MONTANA ADMINISTRATIVE REGISTER

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ISSUE NO. 6

The Montana Administrative Register (MAR), a bi-weekly 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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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 PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA

In the matter of the repeal of ARM 2.43.431 regarding the purchase of military service in the Sheriffs' Retirement System.	NOTICE OF PROPOSED REPEAL OF AN OUTDATED RULE REGARD-THE PURCHASE OF MILITARY SERVICE IN THE SHERIFFS' RETIREMENT SYSTEM NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On April 30, 1992, the Public Employees' Retirement Board proposes to repeal ARM 2.43.431 which has been superseded by the adoption of ARM 2.43.436 effective November 15, 1991.

2. The board is proposing to repeal 2.43.431 which sets the actuarial cost for purchasing military service in the Sheriffs' Retirement System and which can be found on page 2-3143 of the ARM.

3. The rule is proposed to be repealed since it has been superseded by the adoption of 2.43.436 (which can be found on page 2-3145 of the ARM) and which became effective November 15, 1991. 2.43.431 should have been repealed effective that same date; however, due to administrative oversight, the repeal of 2.43.431 was not noticed at the same time.

Since 19-7-301, MCA states that Military Service purchased by members of the Sheriffs' Retirement System (SRS) may not be included in the service required for initial eligibility for retirement, the actuarial cost of purchasing military service in the SRS is only 65% of the cost of purchasing other types of service which would be counted toward retirement eligibility. ARM 2.43.436 was adopted by the Board in November, 1991 to more accurately reflect the actuarial cost of purchasing military service in the SRS. Therefore, ARM 2.43.431 which is less accurate and in conflict with the newer rule must be repealed.

4. Interested parties may submit their data, views or arguments concerning the proposed repeal in writing to Lawrence P. Nachtsheim, Administrator, Public Employees' Retirement Division, 1712 Ninth Avenue, Helena, Montana 59620, no later than April 24, 1992.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Lawrence P. Nachtsheim, Administrator, Public Employees' Retirement Division, 1712 Ninth Avenue, Helena,

Montana 59620, no later than April 24, 1992.

6. If the agency receives requests for a public hearing on the proposed adoption 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 not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 53 persons based upon the number of active members in the SRS covered by these rules as of June 30, 1991.

7. The authority for the rule to be repealed is found in section 19-7-201, MCA, and the rule implements the provisions of 19-7-301, MCA.

Lawrence P. Nachtsheim

Lawrence P. Nachtsheim, Administrator
Public Employees' Retirement Division

Dal Smilie

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Certified to the Secretary of State March 16, 1992.

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

In the matter of the adoption of new rule I concerning a categorical exclusion from EIS requirements for state revolving fund loan assistance for wastewater systems	NOTICE OF PUBLIC HEARING FOR PROPOSED ADOPTION OF NEW RULE I (Water Quality - State Revolving Fund)

To: All Interested Persons

1. On May 22, 1992, at 9:30 a.m., the board will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the adoption of the above-captioned rule, which provides that department actions regarding wastewater system proposals for loan assistance under Title 75, chapter 5, part 11, MCA, may be categorically excluded from certain requirements of the Montana Environmental Policy Act provided several conditions focusing on absence of negative environmental effects are met.

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

3. The rule, as proposed, appears as follows:

RULE I STATE REVOLVING FUND PROJECTS ELIGIBLE FOR CATEGORICAL EXCLUSION FROM EIS REQUIREMENT (1) A department action on an application for loan assistance under Title 75, chapter 5, part 11, and this subchapter may receive a categorical exclusion from the requirements of 75-1-201(1)(b)(iii), MCA, and ARM 16.2.626 through 16.2.641, if the department determines under subsection (2) that its action on the application would not individually, collectively, or cumulatively over time require an environmental assessment (EA) or environmental impact statement (EIS), and under subsection (3) that its action is not precluded from a categorical exclusion:

(2) Actions consistent with any of the following categories are eligible for the categorical exclusion:

(a) actions that are solely directed toward projects involving minor rehabilitation of existing facilities, functional replacement of equipment, or construction of non-mechanical, new ancillary facilities adjacent or appurtenant to existing facilities. These improvements may not decrease the degree of treatment of the existing facility; and

(b) actions for projects in sewered communities of less than 10,000 persons that involve only minor upgrading or minor expansion of existing treatment works and do not change existing unit processes, and that do not directly or indirectly involve the extension of new collection systems.

(3) A categorical exclusion may not be granted if:

(a) The action would authorize facilities that will provide a new discharge or relocate an existing discharge to ground or surface waters;

(b) The action will result in a 30% or greater increase in volume of discharge or loading rate of pollutants from an existing source or from new facilities to receiving waters;

(c) The action would authorize facilities that would provide capacity to serve a population at least 30% greater than the existing population;

(d) The department has received information indicating that public controversy exists over the project's potential effects on the quality of the human environment; or

(e) The proposed project that is the subject of the state action shows some potential for causing a significant effect on the quality of the human environment, based on ARM 16.2.627, or might possibly affect:

(i) sensitive environmental or cultural resource areas; or

(ii) endangered or threatened species and their critical habitats.

(4) The department shall document its decision to issue a categorical exclusion by referencing the application, providing a brief description of the proposed action, and describing how the action meets the criteria for a categorical exclusion without violating criteria for not granting an exclusion.

(5) The department may revoke a categorical exclusion if:

(a) the project is not initiated within the time period specified in the facility plan, or a new or modified application is submitted;

(b) the proposed action no longer meets the requirements for a categorical exclusion because of changes in the proposed action;

(c) new evidence demonstrates that serious local or environmental issues exist; or

(d) state, local, tribal, or federal laws may be violated.

AUTH: 75-5-201, 75-5-1105, MCA; IMP: 75-1-201, 75-5-1105, MCA

4. The board is proposing this rule to meet applicable requirements of the Montana Environmental Policy Act and to parallel federal environmental review under the National Environmental Policy Act of proposals for loan assistance to accomplish wastewater system improvements.

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 Yoli Fitzsimmons, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than May 20, 1992.

6. David W. Simpson, Chairman of the Board, has been

designated to preside over and conduct the hearing.

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

by William J. Spitz
for DENNIS IVERSON, Director

Certified to the Secretary of State March 16, 1992 .

Reviewed by:

Eleanor A. Parker
Eleanor Parker, DHES Attorney

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

In the matter of the amendment of rules 16.20.1303-1304, 16.20.1308, 16.20.1310, 16.20.1313-1314, 16.20.1317-1318, 16.20.1320-1321, 16.20.1323, 16.20.1327-1328, 16.20.1332, 16.20.1402, 16.20.1404-1405, 16.20.1407-1410, 16.20.1412, 16.20.1415-1416, dealing with the Montana pollutant discharge elimination system and pretreatment rules	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES

(Water Quality Bureau)

To: All Interested Persons

1. On May 22, 1992, at 10:30 a.m., the board will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the above-captioned rules.

2. The proposed amendments would incorporate new federal pretreatment standards and regulations into the department's pretreatment and permit regulations. These amendments specify in greater detail application, reporting and sampling requirements for publicly owned treatment works (POTWs); and reporting requirements for industrial users, including a new category termed "significant industrial users". The amendments also clarify and elaborate on the use of general permits under the Montana pollutant discharge elimination system (MPDES).

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

16.20.1303 INCORPORATIONS BY REFERENCE (1)-(3) Remain the same.

(4) All of the incorporations by reference of federal agency regulations listed in the table in (7) below shall refer to federal agency regulations as they have been codified in the July 1, ~~1986~~ 1991, edition of Title 33 and 40 of the Code of Federal Regulations (CFR).

(5)-(6) Remain the same.

(7) The list of incorporations by reference follows:

ARM 16.20....	33 CFR . . .	Description of Regulation
(a) 1305	153.101 et seq.	Control of pollution by oil, and hazardous substances, discharge removal.

ARM 16.20....	40 CFR . . .	Description of Regulation
(b) 1305	Part 300	The National Oil and Hazardous Substances Pollution Contingency Plan.
(c) 1310	125.102	Requirements for best management practices for dischargers who use, manufacture, store, handle, or discharge any hazardous or toxic pollutant.
(d) 1310	Part 136	Guidelines establishing test procedures for the analysis of pollutants.
(e) 1310	Appendix A to Part 122	List of primary industrial categories.
(f) 1310	Tables I, II, and III of Appendix D to Part 122	List of, respectively, testing requirements for organic toxic pollutants by industry category for existing dischargers; organic toxic pollutants in each of 4 fractions in analysis by gas chromatography/mass spectroscopy (GC/MS); and other toxic pollutants (metals and cyanide) and total phenols.
(g) 1310	Tables IV and V of Appendix D to Part 122	List of, respectively, conventional and nonconventional pollutants; and toxic pollutants and hazardous substances required to be identified by existing dischargers if expected to be present.

(h)	1310	Part 125	Criteria and standards for the NPDES, specifically including criteria for extending compliance dates for facilities installing innovative technology (Subpart C), criteria for determining the availability of a variance based on fundamentally different factors (FDF) (Subpart D), and criteria for extending compliance dates for achieving effluent limitations.
(i)	1312	Appendix B of Part 122	Criteria for determining whether a facility or operation merits classification as a concentrated animal feeding operation.
(j)	1313	Appendix C of Part 122	Criteria for determining whether a facility or operation merits classification as a concentrated aquatic animal production facility.
(k)	1313	Part 125, subpart B	Criteria for issuance of permits to aquaculture projects.
(l)	1316	Part 125.3	Technology-based treatment requirements for point source dischargers.
(m)	1317	122.28	Criteria for selecting categories of point sources appropriate for general permitting.
(n)	1317	124.10(d)(1)	Minimum contents of public notices.
(o)	1317	122.26(c)(2)	Criteria for determining when a point source is considered a "significant contributor of pollution".
(p)	1318	Part 136	Guidelines establishing test procedures for the analysis of pollutants.
(q)	1318	122.44(g)	Requirement of 24-hour notice of any violation of maximum daily discharge limits.

(r)	1318	Part 136	Guidelines establishing test procedures for the analysis of pollutants.
(s)	1319	122.44(f)	"Notification levels" for discharges of certain pollutants that may be inserted in a permit upon a petition from the permittee or upon the initiative of the department.
(t)	1320	122.43	Applicable requirements for permit conditions.
(u)	1320	122.44	Additional permit conditions which may be applicable to a point source. Such conditions include technology-based and water-quality-based standards, toxic and pretreatment standards, reopener clause, reporting and monitoring requirements, permit duration and reissuance, test methods, best management practices, conditions concerning sewage sludge, privately owned treatment works, and conditions imposed in EPA grants to POTW's.
(v)	1320	124.56	Requirements for fact sheets.
(w)	1320	124.57	Public notice requirements for draft permits.
(x)	1320	Chapter 1, Subchapter N	Effluent limitations and standards and new source performance standards.
(y)	1320	Part 125	Criteria and standards for the national pollutant discharge elimination system.
(z)	1320	Part 129	Toxic pollutant effluent standards.
(aa)	1320	Part 133	Secondary treatment regulation.
(ab)	1321	122.44(j)(2)	Requirement for the submittal by a publicly owned treatment work (POTW) of a local pretreatment program.

(ac) 1321	122.45(b)(2)(ii)(A)	Availability of alternate permit limitations, standards, or prohibitions based on varying production levels.
(ad) 1321	Part 136	Guidelines for testing procedures for the analysis of pollutants.
(ae) 1321	125.3	Technology-based treatment requirements for point source dischargers.
(af) 1321	Chapter 1, Subchapter N	Effluent guidelines and standards for point source dischargers.
(ag) 1321	122.44(i)	Monitoring requirements for point source dischargers.
(ah) 1325	Part 125, Subpart D	Criteria and standards for determining eligibility for a variance from effluent limitations based on fundamentally different factors (FDF).
(ai) 1327	Part 133	Requirements for the level of effluent quality available through the application of secondary (or equivalent) treatment.
(aj) 1327	125.3(c)	Methods of imposing technology-based treatment requirements in permits.
(ak) 1343	124.64	Procedures for appealing variance determinations.

ARM 16.20....	U.S. Code (U.S.C.)	Description of Fed. Statute
(al) 1317	Sec. 1132	Wilderness area designations.
(am) 1317	Sec. 1274	Wild and scenic river designations.

ARM 16.20....	Clean Water Act	Description of Fed. Statute

(an)	1322	Sec. 301(b)(2)(A), (C), (E), and (F)	Deadlines for achieving effluent limitations and treatment of toxic pollutants.
(ao)	1323	Sec. 301(b)(2)(A), (C), (E), and (F)	Deadlines for achieving effluent limitations and treatment of toxic pollutants.
(ap)	1327	Sec. 301(c), (g), (i), and (k)	Provisions allowing for modifying or extending dates for achieving effluent limitations.
(aq)	1327	Sec. 316(a)	Provision allowing a variance from an applicable effluent limitation based on fundamentally different factors (FDF).
(ar)	1327	Sec. 402(b)(3)	Requirement that states administering the NPDES program notify other states whose waters may be affected by a proposed discharge.
(as)	1343	Sec. 301(c), (i), and (k); and Sec. 316(a)	Provisions for extension of compliance dates with effluent limitations based on, respectively, the economic capability of the permit applicant, delay in completion of POTW's, the use of innovative technology, and specific limits for thermal components of a discharge.
(at)	1343	Sec. 301(g)	Provisions for modifying effluent limitations for ammonia, chlorine, color, iron and total phenols.
(au)	1343	Sec. 302(b)(2)	Provision for modifying effluent limitations based on a "no reasonable relationship to costs" demonstration.

AUTH: 75-5-304, MCA; IMP: 75-5-304, 75-5-401, MCA

16.20.1304 DEFINITIONS In this subchapter, the following terms have the meanings or interpretations indicated below and shall be used in conjunction with and are supplemental to those definitions contained in section 75-5-103, MCA.

(1)-(47) Remain the same.

(48) "Publicly owned treatment works" (POTW) means any

device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a state or municipality. This definition includes:

(a) sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment; and

(b) a city, town, county, district, or other political subdivision created by or under state law, that has jurisdiction over indirect discharges to and the discharges from a treatment works.

(49)-(66) Remain the same.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-401, MCA

16.20.1308 CONTINUATION OF EXPIRING PERMITS (1) The conditions of an expired permit continue in force until the effective date of a new permit if:

(a) the permittee has submitted a timely application under ARM 16.20.~~1309~~ 1310, which is a complete application for a new permit;

(b) Remains the same.

(2)-(3) Remain the same.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-401, MCA

16.20.1310 APPLICATION FOR A PERMIT (1) Remains the same.

(2) When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit.

(3)-(5) Remain the same.

(6)(a)-(i) Remain the same.

(j) The following POTWs shall provide the results of valid whole effluent biological toxicity testing to the department:

(i) All POTWs with design influent flows equal to or greater than one million gallons per day;

(ii) All POTWs with approved pretreatment programs or POTWs required to develop a pretreatment program.

(k) In addition to the POTWs listed in subsection (j) of this section, the department may require other POTWs to submit the results of toxicity tests with their permit applications, based on consideration of the following factors:

(i) The variability of the pollutants or pollutant parameters in the POTW effluent (based on chemical-specific information, the type of treatment facility, and types of industrial contributors);

(ii) The dilution of the effluent in the receiving water (ratio of effluent flow to receiving stream flow);

(iii) Existing controls on point or nonpoint sources, including total maximum daily load calculations for the waterbody segment and the relative contribution of the POTW;

(iv) Receiving stream characteristics, including possible or known water quality impairment, and whether the POTW discharges to a water designated as an outstanding natural resource; and

(v) Other considerations (including but not limited to the history of toxic impact and compliance problems at the POTW) which the department determines could cause or contribute to adverse water quality impacts.

(l) For POTWs required under subsections (j) or (k) of this section to conduct toxicity testing, POTWs shall use EPA's methods or other established protocols which are scientifically defensible and sufficiently sensitive to detect aquatic toxicity. This testing must have been conducted since the last MPDES permit reissuance or per modification under ARM 16.20.1327, whichever occurred later.

(m) All POTWs with approved pretreatment programs shall provide to the department a written technical evaluation of the need to revise local limits, as described in 40 CFR 403.5(c)(1).

(7)-(9) Remain the same.

(10)(a)-(g) Remain the same.

(h) the signature of the certifying official under ARM 16.20.1311.

~~(i) for a request from best practicable control technology currently available (BPT), by the close of the public comment period under ARM 16.20.1334;~~

~~(ii) for a request from best available technology economically achievable (BAT) and/or best conventional pollutant control technology (BCT), by no later than:~~

~~(A) July 3, 1989, for a request based on an effluent limitation guideline promulgated before February 4, 1987, to the extent July 3, 1989 is not later than that provided under previously promulgated regulations; or~~

~~(B) 180 days after the date on which an effluent limitation guideline is published in the federal register for a request based on an effluent limitation guideline promulgated on or after February 4, 1987.~~

~~(iii) the request shall explain how the requirements of the applicable regulatory and/or statutory criteria have been met.~~

(11) A discharger which is not a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under any of the following statutory or regulatory provisions within the times specified below:

(a) A request for a variance based on the presence of "fundamentally different factors" from those on which the effluent limitations guideline was based must explain how the requirements of the applicable regulatory and statutory criteria have been met, and must be filed with the department:~~;~~

(i) by the close of the public comment period under ARM 16.20.1334, if the request is for a variance from best practicable control technology currently available (BPT); or

(ii) by no later than 180 days after the date on which an effluent limitation is published in the federal register, if the request involves a variance from best available technology economically achievable (BAT), best conventional pol-

lutant control technology (BCT), or both of them.

(b)-(c) Remain the same.

(d) An extension under federal Clean Water Act section 301(k) from the statutory deadline of 301(b)(2)(A) for best available technology or 301(b)(2)(E) for best conventional pollutant control technology based on the use of innovative technology, may be requested no later than the close of the public comment period under ARM 16.20.1334 for the discharger's initial permit requiring compliance with section 301(b)(2)(A) or 301(b)(2)(E), as applicable. The request must demonstrate that the requirements of ARM 16.20.1337 and 40 CFR Part 125, subpart C, have been met.

(e)-(f) Remain the same.

(12)-(14) Remain the same.

(15) The board hereby adopts and incorporates herein by reference (see ARM 16.20.1303 for complete information about all materials incorporated by reference):

(a)-(d) Remain the same.

(e) Tables IV and V of Appendix D to 40 CFR Part 122, which are lists appended to a federal agency rule setting forth, respectively, conventional and nonconventional pollutants, and toxic pollutants and hazardous substances required to be identified by existing dischargers if expected to be present; ~~and~~

(f) 40 CFR Part 125, which is a series of federal agency rules setting forth criteria and standards for the national pollutant discharge elimination system (NPDES), specifically including criteria for extending compliance dates for facilities installing innovative technology (Subpart C), criteria for determining the availability of a variance based on fundamentally different factors (FDF) (Subpart D), and criteria for extending compliance dates for achieving effluent limitations~~.~~; and

(g) 40 CFR 403.5(c)(1) (July 1, 1991), which requires POTWs to develop and enforce specific limits to prevent certain discharges.

(h) Copies of the above listed materials are available from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-401, MCA;

16.20.1313 CONCENTRATED AQUATIC ANIMAL PRODUCTION FACILITIES AND AQUACULTURE PROJECTS (1)-(4) Remain the same.

(5) Discharges into aquaculture projects, as defined in ARM 16.20.1304~~(6)~~(5), are subject to the MPDES permit program through ~~section 318 of the federal Clean Water Act~~ 33 U.S.C. 1318, and in accordance with 40 CFR Part 125, subpart B (July 1, 1991).

(a) Remains the same.

(6) Remains the same.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-401, MCA

16.20.1314 STORM WATER DISCHARGES (1)(a)-(b) Remains the same.

~~(c) The administrator shall not require a permit under this section, nor shall the administrator directly or indirectly require any state to require a permit for discharges of storm water runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or do not come into contact with any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.~~

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-401, MCA

16.20.1317 GENERAL PERMITS (1) The department may issue general permits for the following categories of point sources which the board has determined are appropriate for general permitting under the criteria listed in 40 CFR 122.28:

(a)-(h) Remain the same.

(i) sand and gravel mining and processing operations; ~~and~~

(j) ~~groundwater discharges from mobile oil and gas drilling wastewater treatment units.~~ stormwater point sources;

(k) treated water discharged from petroleum cleanup operations;

(l) discharges from public water supply systems, as determined under Title 75, chapter 6, MCA;

(m) discharges to wetlands that do not contain perennial free surface water;

(n) discharges from road salting operations;

(o) asphalt plant discharges;

(p) discharges of hydrostatic testing water;

(q) discharges of noncontact cooling water;

(r) swimming pool discharge; and

(s) septic tank pumper disposal sites.

(2)-(11) Remain the same.

(12) For purposes of this rule, the board hereby adopts and incorporates by reference (see ARM 16.20.1303 for complete information about all materials incorporated by reference):

(a) 40 CFR 122.28 (July 1, 1991) which sets forth criteria for selecting categories of point sources appropriate for general permitting;

(b) 40 CFR 124.10(d)(1) (July 1, 1991) which sets forth minimum contents of public notices;

(c) 40 CFR 122.26(c)(2) (July 1, 1991) which sets forth criteria for determining when a point source is considered a "significant contributor of pollution";

(d)-(e) Remain the same.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-401, MCA

16.20.1318 CONDITIONS APPLICABLE TO ALL PERMITS The following conditions apply to all MPDES permits. Additional conditions applicable to MPDES permits are set forth in ARM 16.20.1320. All conditions applicable to MPDES permits must be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these rules must be given in the permit.

(1)-(11) Remain the same.

(12)(a)-(f) Remain the same.

(g) The permittee shall report all instances of noncompliance not reported under subsections 12 (a), (d), (e) and (f) of this rule, at the time monitoring reports are submitted. The reports must contain the information listed in subsection (12)(f) of this rule.

(h) Remains the same.

(13)(a) The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of subsections (13) (b) and (c) and (d) of this rule.

(b) If the permittee knows in advance of the need for a bypass, it shall submit prior notice to the department, if possible at least ten days before the date of the bypass. The permittee shall submit notice of an unanticipated bypass as required in subsection (12)(f) of this rule (24-hour notice).

(c) Remains the same.

(d) The department may approve an anticipated bypass, after considering its adverse effects, if the department determines that it will meet the three conditions listed above in subsection (13)(d)(c)(i) of this rule.

(14)-(15) Remain the same.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-401, MCA

16.20.1320 ESTABLISHING LIMITATIONS, STANDARDS, AND OTHER PERMIT CONDITIONS (1) In addition to the conditions established under ARM 16.20.1318, 16.20.1319, 16.20.1322, and 16.20.1323, and 16.20.1324, each MPDES permit must include conditions meeting the requirements of stated in 40 CFR 122.43, 122.44, 124.56 and 124.57 (July 1, 1991).

(2) The board hereby adopts and incorporates herein by reference (see ARM 16.20.1303 for complete information about all materials incorporated by reference):

(a) 40 CFR 122.43 (July 1, 1991), which is a federal rule that establishes applicable permit conditions in general;

(a)(b) 40 CFR 122.44 (July 1, 1991), which is a federal agency rule setting forth additional permit conditions which may be applicable to a point source. Such conditions include technology-based and water-quality-based standards, toxic and pretreatment standards, reopener clause, reporting and moni-

toring requirements, permit duration and reissuance, test methods, best management practices, conditions concerning sewage sludge, privately owned treatment works, and conditions imposed in EPA grants to POTW's~~,~~;

(c) 40 CFR 124.56 (July 1, 1991), which describes requirements for fact sheets;

(d) 40 CFR 124.57 (July 1, 1991), which describes the public notice that must be provided for draft permits;

~~(b)~~(e) 40 CFR chapter 1, subchapter N, (July 1, 1991), which sets forth federal effluent limitations and standards and new source performance standards~~,~~;

(f) 40 CFR Part 125 (July 1, 1991), which states standards and criteria for the national point discharge elimination system;

(g) 40 CFR Part 129 (July 1, 1991), which describes toxic effluent pollutant standards; and

(h) 40 CFR Part 133, (July 1, 1991), which sets forth requirements for secondary treatment regulation.

(i) Copies of the above listed materials are available from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-401, MCA

16.20.1321 CALCULATING MPDES PERMIT CONDITIONS (1) All permit effluent limitations, standards, and prohibitions must be established for each outfall or discharge point of the permitted facility, except as otherwise provided under ARM 16.20.1320 (40 CFR 122.44(k)) (BMP's where limitations are infeasible) and ~~section (9)~~ section (10) of this rule (limitations on internal waste streams).

(2)-(4) Remain the same.

(5) All permit effluent limitations, standards, or prohibitions for a metal must be expressed in terms of "~~acid soluble~~ total recoverable metal" as defined in 40 CFR Part 136 unless:

(a)-(c) Remain the same.

(6) Remains the same.

(7)(a)-(c) Remain the same.

(d) prohibition or limitation of specified pollutants by mass, concentration, or other appropriate measure (for example, must not contain at any time more than 0.1 mg/l zinc or more than 250 grams (~~b~~ 1/4 kilogram) of zinc in any discharge).

(8)-(12) Remain the same.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-401, MCA

16.20.1323 SCHEDULES OF COMPLIANCE (1) The permit may, when appropriate, specify a schedule of compliance leading to compliance with the Act and rules adopted thereunder, specifically including any applicable requirements under ARM Title 16, chapter 20, subchapter 9.

(a) Any schedules of compliance under this rule must require compliance as soon as possible, but not later than

the applicable statutory deadline under the Act or under ~~sections 301(b)(2)(A), (C), (D), (E), and (F) of~~ the federal Clean Water Act, as codified at 33 U.S.C. 1311(b)(2)(A), (C), (D), (E), and (F).

(b)-(d) Remain the same.

(2) Remains the same.

(3) The board hereby adopts and incorporates herein by reference ~~sections 301(b)(2)(A), (C), (E), and (F) of~~ the federal Clean Water Act, 33 U.S.C. ~~1251, et seq.~~ section 1311(b)(2)(A), (C), (E), and (F), which set forth deadlines for achieving effluent limitations and treatment of toxic pollutants. See ARM 16.20.1303 for complete information about all materials incorporated by reference. Copies of these materials are available from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-401, MCA

16.20.1327 MODIFICATION OR REVOCATION AND REISSUANCE OF PERMITS (1) When the department receives any information (for example, inspects the facility, receives information submitted by the permittee as required in the permit (see ARM 16.20.1318), receives a request for modification or revocation and reissuance under ARM 16.20.1331, or conducts a review of the permit file) it may determine whether or not one or more of the causes listed in sections ~~(1) and~~ (2) and (3) of this rule for modification or revocation and reissuance or both exist. If cause exists, the department may modify or revoke and reissue the permit accordingly, subject to the limitations of ARM 16.20.1331(c), and may request an updated application if necessary. When a permit is modified, only the conditions subject to modification are reopened. If a permit is revoked and reissued, the entire permit is reopened and subject to revision and the permit is reissued for a new term. See ARM 16.20.1331(4)(b). If cause does not exist under this rule or ARM 16.20.1328, the department may not modify or revoke and reissue the permit. If a permit modification satisfies the criteria in ARM 16.20.1328 for "minor modifications" the permit may be modified without a draft permit or public review. Otherwise, a draft permit must be prepared and other procedures in ARM 16.20.1330 through 16.20.1344 followed.

~~(1)~~(2) The following are causes for modification but not revocation and reissuance of permits except when the permittee requests or agrees:

(a) Remains the same.

(b) The department has received new information. Permits may be modified during their terms for this cause only if the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance. For MPDES general permits (ARM 16.20.1317) this ~~cause~~ subsection includes any information indicating that cumulative effects

on the environment are unacceptable. For new source or new discharger MPDES permits (ARM 16.20.1316), this subsection includes any significant information derived from effluent testing after issuance of the permit.

(c) Remains the same.

(d) The department determines good cause exists for modification of a compliance schedule, such as an act of God, strike, flood, or materials shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy. However, in no case may an MPDES compliance schedule be modified to extend beyond an applicable statutory deadline. See also ARM 16.20.1328~~(3)~~(1)(c) (minor modifications) ~~and subsection (1)(n) of this rule (MPDES innovative technology)~~;

(e)-(g) Remain the same.

(h)(i) Upon request of a permittee who qualifies for effluent limitations on a net basis under ARM 16.20.1321~~(12)~~(10);

(ii) Remains the same.

(i) Remains the same.

(j) Upon failure of ~~an approved state~~ the department to notify, as required by section 402(b)(3) of the federal Clean Water Act, another state whose waters may be affected by a discharge from ~~the approved state~~ Montana;

(k) Remains the same.

(l) To establish a "notification level" as provided in ARM 16.20.1320~~(6)~~;

(m)-(o) Remain the same.

~~(2)~~(3) The following are causes to modify or, alternatively, revoke and reissue a permit:

(a) cause exists for termination under ARM 16.20.~~1327~~ 1329, and the department determines that modification or revocation and reissuance is appropriate;

(b) Remains the same.

~~(3)~~ (4) The board hereby adopts and incorporates herein by reference (see ARM 16.20.1303 for complete information about all materials incorporated by reference):

(a) Remains the same.

(b) Sections 301(c), (g), (i), and (k) of the federal Clean Water Act, codified at 33 U.S.C. section 1311(c), (g), (i), and (k), which are federal statutory provisions allowing for modifying or extending dates for achieving effluent limitations;

(c) Section 316(a) of the federal Clean Water Act, codified at 33 U.S.C. section 1326, which is a federal statutory provision allowing a variance from an applicable effluent limitation based on fundamentally different factors (FDF);

(d) Section 402(b)(3) of the federal Clean Water Act, codified at 33 U.S.C. section 1342(b)(3), which is a federal statutory provision requiring that states administering the NPDES program notify other states whose waters may be affected by a proposed discharge; and

(e) Remains the same.

(f) Copies of the above listed materials are available from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-401, MCA

16.20.1328 MINOR MODIFICATIONS OF PERMITS (1) Upon the consent of the permittee, the department may modify a permit to make the corrections or allowances for changes in the permitted activity listed in this rule~~,~~ without following the procedures of ARM 16.20.1330 through 16.20.1344. Any permit modification not processed as a minor modification under this rule must be made for cause and with a draft permit (ARM 16.20.1332) and public notice as required in ARM 16.20.1330 through 16.20.1344. Minor modifications may only:

(a)-(e) Remain the same.

(f) ~~when the permit becomes final and effective on or after March 9, 1982,~~ conform to ~~changes respecting~~ ARM 16.20.1318~~(5), (12), (13)(c)(ii), (14)(b)(i), and ARM~~ and 16.20.1319(1);

(g) Remains the same.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-401, MCA

16.20.1332 DRAFT PERMITS (1)-(2) Remain the same.

(3) If the department decides to prepare a draft permit, it shall prepare a draft permit that contains the following information:

(a)-(c) Remain the same.

(d) effluent limitations, standards, prohibitions and conditions under ARM 16.20.1318, ~~and~~ 16.20.1319, and 16.20.1320.

(4)-(5) Remain the same.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-401, MCA

16.20.1402 DEFINITIONS The definitions contained in ARM Title 16, chapter 20, subchapter 13 are hereby incorporated by reference in this subchapter. The following definitions pertain to indirect dischargers and POTW's subject to pretreatment standards and the MPDES program:

(1)-(4) Remain the same.

(5) "National pretreatment standard" or "pretreatment standard" means any regulation containing pollutant discharge limits promulgated by the EPA in accordance with section 307(b) and (c) of the CWA, which applies to industrial users. This includes prohibitive discharge limits established pursuant to ~~section (4) of this rule~~ ARM 16.20.1404(4).

(6)-(10) Remain the same.

(11)(a) "Significant industrial user", except as provided in this section, means:

(i) All industrial users subject to categorical pretreatment standards under 40 CFR 403.6 and 40 CFR chapter I, subchapter N; and

(ii) Any other industrial user that discharges an average of 25,000 gallons per day or more of process wastewater

to the POTW (excluding sanitary noncontact cooling and boiler blowdown wastewater); contributes a process wastestream which makes up 5 percent or more of the average dry weather hydraulic or organic capacity of the POTW treatment plant; or is designated as such by the control authority as defined in ARM 16.20.1410(1) on the basis that the industrial user has a reasonable potential for adversely affecting the POTW's operation or for violating any pretreatment standard or requirement (in accordance with ARM 16.20.1407(7)).

(b) Upon finding that an industrial user meeting the criteria in paragraph (b) above has no reasonable potential for adversely affecting the POTW's operation or for violating any pretreatment standard or requirement, the control authority (as defined in ARM 16.20.1410(1) may on its own initiative or in response to a petition received from an industrial user or POTW, and in accordance with ARM 16.20.1407(7), determine that the industrial user is not a significant industrial user.

(c) The board hereby adopts and incorporates by reference 40 CFR 403.5 (national pretreatment standards: categorical standards) (July 1, 1991), and 40 CFR chapter I, subchapter N (effluent guidelines and standards) (July 1, 1991). Copies of these materials are available from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

(11) Remains the same but is renumbered (12).

AUTH: 75-5-201, 75-5-304, MCA; IMP: 75-5-304, MCA

16.20.1404 NATIONAL PRETREATMENT STANDARDS: PROHIBITED DISCHARGES (1) Remains the same.

(2) In addition, the following pollutants may not be introduced into a POTW:

(a) pollutants which create a fire or explosion hazard in the POTW, including wastestreams with a closed cup flashpoint of less than 140°F or 60°C using the test methods specified in 40 CFR 261.21;

(b)-(e) Remain the same.

(f) petroleum oil, nonbiodegradable cutting oil, or products of mineral oil origin in amounts that will cause interference or pass through;

(g) pollutants which result in the presence of toxic gases, vapors, or fumes within the POTW in a quantity that may cause acute worker health and safety problems; and

(h) any trucked or hauled pollutants, except at discharge points designated by the POTW.

(3) A user has an affirmative defense in any action brought against it alleging a violation of the general prohibitions established in subsection (1)(a) of this rule and the specific prohibitions in subsections (2)(c) through (2)(g) of this rule if the user demonstrates that:

(a) it did not know or have reason to know that its discharge, alone or in conjunction with a discharge or discharges from other sources, would cause pass through or interference; and

(b)(i) a local limit designed to prevent pass through or interference or both of them was developed in accordance with section (4) for each pollutant in the user's discharge that caused pass through or interference, and the user was in compliance with each local limit directly prior to and during the pass through or interference; or

(ii) if a local limit designed to prevent pass through or interference or both of them has not been developed in accordance with section (4) for the pollutant or pollutants that caused the pass through or interference, the user's discharge directly prior to and during the pass through or interference did not change substantially in nature or constituents from the user's prior discharge activity when the POTW was regularly in compliance with the POTW's MPDES permit requirements and, in the case of interference, applicable requirements for sewage sludge use or disposal.

~~(3)~~ (4)(a) POTW's developing POTW pretreatment programs must develop and enforce specific limits to implement the prohibitions listed in sections (1) and (2) of this rule~~.~~. Each POTW with an approved pretreatment program shall continue to develop these limits as necessary and effectively enforce these limits.

(b)-(c) Remain the same.

(4)-(5) Remain the same but are renumbered (5)-(6).

(7) The board hereby adopts and incorporates by reference 40 CFR 261.21 (characteristics of ignitability) (July 1, 1991). Copies of these materials are available from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTH: 75-5-201, 75-5-304, MCA; IMP: 75-5-304, MCA

16.20.1405 NATIONAL PRETREATMENT STANDARDS: CATEGORICAL STANDARDS (1) Pretreatment standards specifying quantities or concentrations of pollutants or pollutant properties that may be discharged to a POTW by existing or new industrial users in specific industrial subcategories may be established as separate regulations under ARM Title 16, chapter 20. These standards, unless specifically noted otherwise, are in addition to all applicable pretreatment standards and requirements set forth in this subchapter.

(1)-(3) Remain the ~~same~~ but are renumbered (2)-(4).

~~(4)~~(5) The ~~department~~ board hereby incorporates by reference herein 40 CFR Chapter ~~I~~ I, Subchapter N (Effluent Guidelines and Standards) (July 1, 1991)~~, and~~ 40 CFR 403.6 (National Pretreatment Standards: Categorical Standards) (July 1, 1991); ~~revised as of July 1, 1985~~ and 40 CFR Part 136 (Guidelines Establishing Test Procedures for Analysis of Pollutants) (July 1, 1991). Copies of these materials are available from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTH: 75-5-201, 75-5-304, MCA; IMP: 75-5-304, MCA

16.20.1407 PRETREATMENT PROGRAMS: DEVELOPMENT BY POTW

(1) Any POTW~~,~~ or combination of POTW's operated by the same authority~~,~~ with a total design flow greater than 5 million gallons per day (mgd) and receiving from industrial users pollutants which pass through or interfere with the operation of the POTW or are otherwise subject to pretreatment standards, ~~are~~ is required to establish a POTW pretreatment program. The department may require that a POTW with a design flow of 5 mgd or less develop a POTW pretreatment program if it is found that the nature or volume of the industrial influent, treatment process upsets, violations of POTW effluent limitations, contamination of municipal sludge, or other circumstances so warrant in order to prevent interference or pass through.

(2) Remains the same.

(3) A POTW may develop an appropriate POTW pretreatment program any time before the time limit set forth in section (2) of this rule. The POTW's MPDES permit will be reissued or modified in accordance with ARM 16.20.1328 to incorporate the approved program conditions as enforceable conditions of the permit.

(4) Remains the same.

(5) The department may modify or revoke and reissue a POTW's permit in order to:

(a) Remains the same.

(b) coordinate the issuance of a CWA section 201 construction grant or loan issued under subchapter 3 of this chapter with the incorporation into a permit of a compliance schedule for POTW pretreatment program;

(c)-(d) Remain the same.

(e) incorporate a modification of the permit approved under sections ~~301(h) or 301(i) of the CWA~~ 75-5-402 and 75-5-403, MCA; or

(f) Remains the same.

(6) A POTW pretreatment program must meet the following ~~requirements~~ legal requirements and include the following procedures. These procedures must at all times be fully and effectively exercised and implemented.

(a) The POTW shall operate pursuant to legal authority enforceable in federal, state, or local courts which authorizes or enables the POTW to apply and to enforce the requirements of this rule, other rules adopted pursuant to section 75-5-304, MCA, and 33 U.S.C. sections 1317 and 1342(b)(8). The authority may be contained in a statute, ordinance, or series of contracts or joint powers agreements which the POTW is authorized to enact, enter into or implement, and which are authorized by state law. At a minimum, this legal authority ~~enables~~ must enable the POTW to:

(i)-(ii) Remains the same.

(iii) control, through permit, order, or similar means, the contribution to the POTW by each industrial user to ensure compliance with applicable pretreatment standards and requirements~~,~~. For industrial users identified under subsection 6(b) of this rule, this control must be achieved through

permits or equivalent control mechanisms issued to each industrial user. The control mechanisms must be enforceable and at minimum contain the following conditions:

(A) a statement of duration (in no case more than five years);

(B) a statement of non-transferability without, at minimum, prior notification to the POTW and provision of a copy of the existing control mechanism to the new owner or operator;

(C) effluent limits based on applicable general pretreatment standards of this sub-chapter, categorical pretreatment standards, local limits, and state and local law;

(D) self-monitoring, sampling, reporting, notification and recordkeeping requirements, including an identification of the pollutants to be monitored, sampling location, sampling frequency, and sample type, based on the applicable general pretreatment standards stated in this subchapter, categorical pretreatment standards, local limits, and state and local law;

(E) a statement of applicable civil and criminal penalties that may be assessed for violation of pretreatment standards and requirements, and any applicable compliance schedule. A compliance schedule may not extend the compliance date beyond applicable federal deadlines;

(iv) require the development of a compliance schedule by each industrial user for the installation of technology required to meet applicable pretreatment standards and requirements; ~~including but not limited to the reports required in ARM 16.20.1410~~;

(v) require the submission of all notices and self-monitoring reports from industrial users as are necessary to assess and assure compliance by industrial users with pretreatment standards and requirements, including the reports required in ARM 16.20.1410;

(vi) carry out all inspection, surveillance, and monitoring procedures necessary to determine, independent of information supplied by industrial users, compliance or noncompliance with applicable pretreatment standards and requirements by industrial users. Representatives of the POTW shall be authorized to enter any premises of any industrial user in which a discharge source or treatment system is located or in which records are required to be kept under ARM 16.20.1410 to assure compliance with pretreatment standards. Such authority must be at least as extensive as the authority provided under ~~CWA section 308~~ 33 U.S.C. section 1318;

(vii) obtain remedies for noncompliance by industrial users with any pretreatment standard and requirement. A POTW shall be able to seek injunctive relief for noncompliance by industrial users with pretreatment standards and requirements. A POTW shall seek and assess civil and criminal penalties ~~as authorized by law~~ under authority which provides for a penalty of at least $1,000 per violation, and shall consider each day in which an industrial user violates a pretreatment standard or regulation to be a separate violation;

(viii) pretreatment requirements enforced through the remedies set forth in subsection (6)(a)(vii) of this rule include, but are not limited to, the duty to allow or carry out inspection, entry or monitoring activities; any rules, regulations or orders issued by the POTW; or any reporting requirements imposed by the POTW or this subchapter. The POTW shall have authority and procedures to immediately and effectively halt or prevent any discharge of pollutants to the POTW which reasonably appears to present an imminent danger to the health or welfare of persons. The POTW shall also have authority and procedures (which shall include notice to the affected industrial users and an opportunity to respond) to halt or prevent any discharge to the POTW which presents or may present danger to environment or which threatens to interfere with the operation of the POTW. The department ~~has authority to~~ may seek ~~enforcement~~ judicial relief for noncompliance by industrial users when the POTW has acted to seek such relief but has sought a remedy or penalty which the department finds to be insufficient. The procedures for notice to dischargers where the POTW is seeking ex parte temporary judicial injunctive relief are governed by applicable state or federal law and not by this provision, and must comply with the confidentiality requirements set forth in ARM 16.20.1411.

(b) The POTW shall develop and implement procedures to ensure compliance with the requirements of a pretreatment program. At a minimum, these procedures must enable the POTW to:

(i) Remains the same.

(ii) identify the character and volume of pollutants contributed to the POTW by the industrial user or users identified under section ~~(1)~~ (i) of this rule. This information must be made available to the department upon request;

(iii) notify industrial users identified under section (1) of this rule of applicable pretreatment standards and any other applicable requirements under sections 204(b) and 405 of the CWA and subtitles C and D of the Resource Conservation and Recovery Act (RCRA);

(iv) within 30 days of approval of a list of significant industrial users pursuant to subsection (i) of this subsection, notify each industrial user of its status as an industrial user and of all requirements applicable to it as a result of its industrial user status;

(iv) Remains the same but is renumbered (v).

~~(v)~~(vi) randomly sample and analyze the effluent from industrial users and conduct surveillance ~~and inspection~~ activities in order to identify, independent of information supplied by industrial users, occasional and continuing noncompliance with pretreatment standards~~.~~; inspect and sample the effluent from each significant industrial user at least once a year; and evaluate, at least once every two years, whether each significant industrial user needs a plan to control slug discharges. For purposes of this subsection, a slug discharge is a discharge of a non-routine, episodic

nature, including an accidental spill or a non-customary batch discharge. The results of these activities must be made available to the department upon request~~.~~ If the POTW decides that a slug control plan is needed, the plan must contain, at a minimum, the following elements:

(A) description of discharge practices, included non-routine batch discharges;

(B) description of stored chemicals;

(C) procedures for immediately notifying the POTW of slug discharges, including any discharge that would violate a prohibition under ARM 16.20.1404(2), with procedures for follow-up written notification within five days; and

(D) if necessary, procedures to prevent adverse impact from accidental spills, including inspection and maintenance of storage areas, handling and transfer of materials, loading and unloading operations, control of plant site run-off, worker training, building of containment structures or equipment, measures for containing toxic organic pollutants (including solvents), or measures and equipment for emergency response;

(vi) Remains the same but is renumbered (vii).

~~(vii)~~ (viii) comply with all applicable public participation requirements of 40 CFR 25 in the enforcement of state pretreatment standards. These procedures ~~include provision for~~ must ensure that at least annually ~~providing~~ the public is ~~notification,~~ notified in the largest daily newspaper published in the municipality in which the POTW is located~~,~~ of industrial users which, during the previous 12 months, were significantly violating applicable pretreatment standards or other pretreatment requirements. For the purposes of this provision, a ~~significant violation is a violation which remains uncorrected 45 days after notification of noncompliance, or which resulted in the POTW exercising its emergency authority; and~~ an industrial user is in significant noncompliance if it:

(A) has chronic violations of wastewater discharge limits, defined here as those in which 66 percent or more of all of the measurements taken during a six-month period exceed (by any magnitude) the daily maximum limit or the average limit for the same pollutant parameter;

(B) experiences technical review criteria (TRC) violations, defined here as those in which 33 percent or more of all of the measurements for each pollutant parameter taken during a six-month period equal or exceed the product of the daily maximum limit or the average limit multiplied by the applicable TRC (TRC=1.4 for BOD, TSS, fats, oil, and grease, and 1.2 for all other pollutants except pH;)

(C) otherwise violates a pretreatment effluent limit (daily maximum or longer term average) that the control authority determines has caused, alone or in combination with other discharges, interference or pass through (including endangering the health of POTW personnel or the general public);

(D) discharges a pollutant that has caused imminent

endangerment to human health, welfare or to the environment or has resulted in the POTW's exercise of its emergency authority under subsection (a)(vii) of this section to halt or prevent such a discharge;

(E) fails to meet, within 90 days after the schedule date, a compliance schedule milestone contained in a local control mechanism or enforcement order for starting construction, completing construction, or attaining final compliance;

(F) fails to provide, within 30 days after the due date, required reports such as baseline monitoring reports, 90-day compliance reports, periodic self-monitoring reports, and reports on compliance with compliance schedules;

(G) fails to accurately report noncompliance; or

(H) otherwise causes violations, or a group of violations that the control authority determines will adversely affect the operation or implementation of the local pretreatment program.

(c) Remains the same.

~~(7)~~(d) POTWs shall develop local limits as required in ARM 16.20.1404(3)(a), or demonstrate that they are not necessary.

(e) The POTW shall develop and implement an enforcement response plan. This plan must contain detailed procedures indicating how a POTW will investigate and respond to instances of industrial user noncompliance. The plan must, at a minimum:

(i) Describe how the POTW will investigate instances of noncompliance;

(ii) Describe the types of escalating enforcement responses the POTW will take in response to all anticipated types of industrial user violations and the time periods within which responses will take place;

(iii) Identify by title the official or officials responsible for each type of response;

(iv) Adequately reflect the POTW's primary responsibility to enforce all applicable pretreatment requirements and standards, as detailed in subsections (a) and (b) of this section.

(7) The POTW shall prepare a list of its industrial users meeting the criteria in ARM 16.20.1402(11)(b). The list shall identify the criteria in ARM 16.20.1402(11)(b) applicable to each industrial user and, for industrial users meeting the criteria in ARM 16.20.1402(11)(b)(i), shall also indicate whether the POTW has made a determination pursuant to ARM 16.20.1402(11)(b)(i). Discretionary designations or redesignations by the department are deemed to be approved by the department 90 days after submission of the list or modifications to the list, unless the department determines that a modification is in fact a substantial modification.

(8) The board hereby adopts and incorporates by reference 33 U.S.C. section 1317 (toxic and pretreatment effluent standards); 33 U.S.C. section 1318 (inspections, monitoring and entry); 33 U.S.C. 1342(b)(8) (notice of variation of pollutants into POTWs); and 40 CFR part 25 (public participa-

tion in programs) (July 1, 1991). Copies of these materials are available from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.
AUTH: 75-5-201, 75-5-304, MCA; IMP: 75-5-304, MCA

16.20.1408 POTW PRETREATMENT PROGRAMS AND AUTHORIZATION TO REVISE PRETREATMENT STANDARDS: SUBMISSION FOR APPROVAL
(1) Remains the same.
(2)(a) The program submission must contain a statement from the city attorney or a city official acting in comparable capacity, or the attorney for those POTW's which have independent legal counsel, that the POTW has authority adequate to carry out the programs described in ARM 16.20.1407. This statement must:
(i) identify ~~the provision of~~ the legal authority under ARM 16.20.1407(6)(a) which provides the basis for each procedure under ARM 16.20.1407(6)(b);
(ii)-(iii) Remain the same.
(b)-(d) Remain the same.
(3)-(7) Remain the same.
AUTH: 75-5-201, 75-5-304, MCA; IMP: 75-5-304, MCA

16.20.1409 APPROVAL PROCEDURES FOR POTW PRETREATMENT PROGRAMS AND POTW GRANTING OF REMOVAL CREDITS The following procedure is adopted in approving or denying requests for approval of POTW pretreatment programs and applications for removal credit authorization.
(1) The department has 90 days from the date of public notice of a submission complying with the requirements of ARM 16.20.1408(2), and where removal credit authorization is sought with the requirements of ARM 16.20.1406 and 16.20.1408(4), to review the submission. The department shall review the submission to determine compliance with the requirements of ARM 16.20.1407(2) and (6), and where removal credit is sought, with ARM 16.20.1406. The department may have up to an additional 90 days to complete the evaluation of the submission if the public comment period provided for in section (2) of this rule is extended beyond 30 days or if a public hearing is held as provided for in subsection (2)~~(a)(ii)~~ (b) of this rule. In no event, however, may the time for evaluation of the submission exceed a total of 180 days from the date of public notice of a submission.
(2)-(6) Remain the same.
AUTH: 75-5-201, 75-5-304, MCA; IMP: 75-5-304, MCA

16.20.1410 REPORTING REQUIREMENTS FOR POTW'S AND INDUSTRIAL USERS (1) Remains the same.
(2)(a)-(b) Remain the same.
(c) submit a brief description of the nature, average rate of production, and standard industrial classification of the operation carried out by the industrial user. This description should include a schematic processes diagram which

indicates points of discharge to the POTW from the regulated process;

(d) Remains the same.

(e)(i)-(iii) Remain the same.

(iv) ~~the user shall~~ take a minimum of one representative sample to compile that data necessary to comply with the requirements of this section;

(v) Remains the same.

(vi) perform sampling and analysis in accordance with the techniques prescribed in 40 CFR 136 and amendments thereto. When 40 CFR 136 does not contain sampling or analytical techniques for the pollutant in question, or when the ~~department~~ EPA determines that the 40 CFR sampling and analytical techniques are inappropriate for the pollutant in question, sampling and analysis must be performed by using validated analytical methods or any other applicable sampling and analytical procedures, including procedures suggested by the POTW or other parties, approved by the department;

(vii) ~~if the department allows it, submit a baseline report which utilizes only historical data so long as the data provides information sufficient to determine the need for industrial pretreatment measures. The~~ submit a baseline report ~~must indicate~~ that indicates the time, date, and place of sampling, and methods of analysis, and ~~must certify~~ that certifies such sampling and analysis is representative of normal work cycles and expected pollutant discharges to the POTW;

(viii) if the department allows it, the baseline report may utilize only historical data so long as the data provides information sufficient to determine the need for industrial pretreatment measures.

(f) Remains the same.

(g) if additional pretreatment and/or operation and maintenance are required to meet the pretreatment standards, submit the shortest schedule by which the industrial user will provide such additional pretreatment and/or operation and maintenance. The completion date in this schedule must not be later than the compliance date established for the applicable pretreatment standard.

(i) Remains the same.

(ii) If the categorical pretreatment standard is modified by a removal allowance under ARM 16.20.1406, by use of a combined wastestream formula, or by a fundamentally different factor or variance, after the user submits the report required by section (2) of this rule, any necessary amendments to the information requested by subsections (2)(f) and (g) of this rule must be submitted by the user to the control authority within 60 days after the modified limit is approved.

(3) The following conditions apply to the schedule required by subsection (2)(g) of this rule:

(a) Remains the same.

(b) No increment referred to in subsection (a) of this ~~rule~~ section may exceed 9 months;

(c) Remains the same.

(4) Remains the same.

(5)(a)-(b) Remains the same.

(c) For industrial users subject to equivalent mass or concentration limits established by the control authority in accordance with the procedures in 40 CFR § 403.6(c), the report required by ~~section~~ subsection (5)(a) shall contain a reasonable measure of the user's long term production rate. For all other industrial users subject to categorical pretreatment standards expressed only in terms of allowable pollutant discharge per unit of production (or other measure of operation), the report required by ~~section~~ subsection (5)(a) shall include the user's actual average production rate for the reporting period.

(6)-(10) Remains the same.

(11) The control authority shall require appropriate reporting from those industrial users with discharges that are not subject to categorical pretreatment standards. Significant noncategorical industrial users shall submit to the control authority at least once every six months (on dates specified by the control authority) a description of the nature, concentration, and flow of the pollutants required to be reported by the control authority. These reports must be based on sampling and analysis performed in the period covered by the report, and performed in accordance with the techniques described in 40 CFR part 136, (July 1, 1991). Where 40 CFR part 136 does not contain sampling or analytical techniques for the pollutant in question, or where the EPA determines that the part 136 sampling and analytical techniques are inappropriate for the pollutant in question, sampling and analysis must be performed by using validated analytical methods or any other applicable sampling and analytical procedures, including procedures suggested by the POTW or other persons, approved by the EPA. This sampling and analysis may be performed by the control authority in lieu of the significant noncategorical industrial user. Where the POTW itself collects all the information required for the report, the noncategorical significant industrial user will not be required to submit the report.

(12) POTWs with approved pretreatment programs shall provide the ~~approval authority~~ department with a report that briefly describes the POTW's program activities, including activities of all participating agencies, if more than one jurisdiction is involved in the local program. The report required by this section shall be submitted no later than one year after approval of the POTW's pretreatment program, and at least annually thereafter, and shall include, at a minimum, the following:

(a)-(d) Remains the same.

(13) ~~Notification of changed discharge.~~ All industrial users shall promptly notify the POTW in advance of any substantial change in the volume or character of pollutants in their discharge, including the listed or characteristic hazardous wastes for which the industrial user has submitted initial notification under 40 CFR 403.12(p).

(14) The following conditions and reporting requirements apply to the compliance schedule for development of an approvable POTW pretreatment program required by ARM 16.20.1407.

(a) The schedule shall contain increments of progress in the form of dates for the commencement and completion of major events leading to the development and implementation of a POTW pretreatment program (e.g., acquiring required authorities, developing funding mechanisms, acquiring equipment);

(b) No increment referred to in subsection (a) shall exceed nine months;

(c) Not later than 14 days following each date in the schedule and the final date for compliance, the POTW shall submit a progress report to the approval authority including, as a minimum, whether or not it complied with the increment of progress to be met on such date and, if not, the date on which it expects to comply with this increment of progress, the reason for delay, and the steps taken by the POTW to return to the schedule established. In no event shall more than nine months elapse between such progress reports to the approval authority.

~~(14)~~(15) The reports required by sections (2), (4), and (5) of this rule shall include the certification statement as set forth in 40 CFR § 403.6(a)(2)(ii), and shall be signed as follows:

(a)-(d) Remains the same.

(16) Reports submitted to the department by the POTW in accordance with section (13) of this rule must be signed by a principal executive officer, ranking elected official, or other duly authorized employee if the employee is responsible for overall operation of the POTW.

(17) The reports and other documents required to be submitted or maintained under this section are subject to state law relating to fraud and false statements.

(15) Remains the same but is renumbered (18).

~~(16)~~(19)(a) Any industrial user and POTW subject to the reporting requirements established in this rule shall maintain records of all information resulting from any monitoring activities required by this subchapter. Such records must include for all samples:

(i)-(iii) Remain the same.

(iv) the analytical techniques or methods ~~use~~ used; and

(v) Remains the same.

(b) Any industrial user or POTW subject to these reporting requirements established shall retain for a minimum of 3 years any records of monitoring activities and results, whether or not such monitoring activities are required by this subchapter, and shall make such records available for inspection and copying by the department, the United States environmental protection agency, and ~~by~~ the POTW in the case of an industrial user. This period of retention is extended during the course of any unresolved litigation regarding the industrial user or POTW or when requested by the department.

(c) A POTW to which reports are submitted by an indus-

trial user pursuant to sections (2), (4), and (5) of this rule shall retain such reports for a minimum of 3 years and shall make such reports available for inspection and copying by the department or the United States environmental protection agency. This period of retention is extended during the course of any unresolved litigation regarding the discharge of pollutants by the industrial user or the operation of the POTW pretreatment program or when requested by the department.

(20)(a) The industrial user shall notify the POTW, the department, and the EPA regional waste management division director, in writing, of any discharge into the POTW of a substance, which, if otherwise disposed of, would be a hazardous waste under ARM Title 16, chapter 44, subchapter 3. The notification must include the name of the hazardous waste as set forth in 40 CFR part 261, the EPA hazardous waste number, and the type of discharge (continuous, batch, or other). If the industrial user discharges more than 100 kilograms of the hazardous waste per calendar month to the POTW, the notification must also contain the following information to the extent the information is known and readily available to the industrial user: An identification of the hazardous constituents contained in the wastes, an estimate of the mass and concentration of the constituents in the wastestream discharged during that calendar month, and an estimate of the mass of constituents in the wastestream expected to be discharged during the following twelve months. All notifications must take place within 180 days of the effective date of this rule. Industrial users who commence discharging after the effective date of this rule shall provide the notification no later than 180 days after the discharge of the listed or characteristic hazardous waste. Any notification under this paragraph must be submitted only once for each hazardous waste discharged. However, notifications of changed discharges must be submitted under subsection (13) of this rule. The notification requirement in this section does not apply to pollutants already reported under the self-monitoring requirements of sections (2), (4), and (5) of this rule.

(b) Dischargers are exempt from the requirements of subsection (a) of this section during a calendar month in which they discharge no more than 15 kilograms of hazardous wastes, unless the wastes are acute hazardous wastes as specified in 40 CFR 261.30(d) and ARM 16.44.333(1)(e). Discharge of more than 15 kilograms of non-acute hazardous wastes in a calendar month, or of any quantity of hazardous wastes as specified in 40 CFR 261.30(d) and ARM 16.44.333(1)(e), requires a one-time notification. Subsequent months during which the industrial user discharges more than such quantities of any hazardous waste do not require additional notification.

(c) If any new regulations promulgated under section 3001 of the federal Resource Conservation and Recovery Act (RCRA) identify additional characteristics of hazardous waste

or list any additional substance as a hazardous waste, the industrial user must notify the POTW and the department of the discharge of such substance within 90 days of the effective date of such regulations.

(d) If any notification is made under this subsection (18), the industrial user shall certify that it has a program in place to reduce the volume and toxicity of hazardous wastes generated to the degree it has determined to be economically practical.

(21) The board hereby adopts and incorporates by reference 40 CFR part 136 (guidelines establishing test procedures for the analysis of pollutants) (July 1, 1991), and 40 CFR part 261 (identification and listing of hazardous waste) (July 1, 1991). Copies of these materials may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTH: 75-5-201, 75-5-304, MCA; IMP: 75-5-304, MCA

16.20.1412 NET/GROSS CALCULATION (1) Categorical pretreatment standards may be adjusted to reflect the presence of pollutants in an industrial user's intake water in accordance with 40 CFR 403.15~~, revised as of July 1, 1985~~ (July 1, 1991). The department hereby incorporates herein 40 CFR 403.15, which is a federal regulation relating to net/gross calculation. A copy of 40 CFR 403.15 may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTH: 75-5-201, 75-5-304, MCA; IMP: 75-5-304, MCA

16.20.1415 BYPASS (1)-(3) Remain the same.

(4)~~(a)~~ Bypass is prohibited, and the control authority may take enforcement action against an industrial user for a bypass, unless:

~~(i)~~ (a) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

~~(ii)~~ (b) There ~~was~~ were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventative maintenance; and

~~(iii)~~ (c) The industrial user submitted notices as required under section ~~(c)~~ (3) of this rule.

(5) Remains the same.

AUTH: 75-5-201, 75-5-304, MCA; IMP: 75-5-304, MCA

16.20.1416 MODIFICATION OF POTW PRETREATMENT PROGRAMS (1) Either the ~~approval authority~~ department or a POTW with an approved POTW pretreatment program may initiate program modification at any time to reflect changing condi-

tions at the POTW. Program modification is necessary whenever there is a significant change in the operation of a POTW pretreatment program that differs from the information in the POTW's submission, as approved under ARM 16.20.1409.

(2) POTW pretreatment program modifications ~~shall~~ must be accomplished as follows:

(a) For substantial modifications, as defined in section (3) of this rule:

(i) The POTW shall submit to the ~~approval authority~~ department a statement of the basis for the desired modification, a modified program description (see ARM 16.20.1408(2)), or such other documents the ~~approval authority~~ department determines to be necessary under the circumstances.

(ii) The ~~approval authority~~ department shall approve or disapprove the modification based on the requirements of ARM 16.20.1407(6) following the procedures in ARM 16.20.1409(2)-(6).

(iii) The modification shall be incorporated into the POTW's NPDES permit after approval. The permit will be modified to incorporate the approved modification in accordance with ARM ~~16.20.1327(7)~~ 16.20.1328.

(iv) The modification shall become effective upon approval by the ~~approval authority~~ department. Notice of approval shall be published in the same newspaper as the notice of the original request for approval of the modification under ARM 16.20.1409(2)(a)(i).

(b) The POTW shall notify the ~~approval authority~~ department of any other (i.e., non-substantial) modifications to its pretreatment program at least 30 days prior to when they are to be implemented by the POTW, in a statement similar to that provided for in section (2)(a)(i) of this rule. Such non-substantial program modifications shall be deemed to be approved by the approval authority, unless the ~~approval authority~~ department determines that a modification submitted is in fact a substantial modification, 90 days after the submission of the POTW's statement. Following such "approval" by the ~~approval authority~~ department, such modifications shall be incorporated into the POTW's permit in accordance with ARM 16.20.~~1327(7)~~1328. If the ~~approval authority~~ department determines that a modification reported by a POTW in its statement is in fact a substantial modification, the ~~approval authority~~ department shall notify the POTW and initiate the procedures in ~~section (4)(a)~~ subsection (2)(a) of this rule.

(3) Substantial modifications.

(a) Remains the same.

(b) The ~~approval authority~~ department may designate other specific modifications, in addition to those listed in section (3)(a) of this rule, as substantial modifications.

(c) Remains the same.

AUTH: 75-5-201, 75-5-304, MCA; IMP: 75-5-304, MCA

4. The board is proposing these amendments to its pretreatment and permitting rules in order to protect public

health and the environment as well as meet minimum national pretreatment requirements. These requirements must be met to ensure state primacy in water quality regulatory arena. Some minor changes are made to correct inaccurate citations that resulted from earlier changes to these rules. Finally, the categories eligible general permits under the MPDES system are specified in detail to provide the public clear guidance as to when such permits are available, thereby ensuring opportunity for participation and due process.

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 Yolanda Fitzsimmons, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than May 20, 1992.

6. David Simpson, Chairman of the Board of Health and Environmental Sciences, has been designated to preside over and conduct this hearing.

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

/s/ William J. Spitz
DENNIS IVERSON, Director

Certified to the Secretary of State March 16, 1992.

Reviewed by:

/s/ Eleanor Parker
Eleanor Parker, DHES Attorney

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

In the matter of the amendment of rules 16.20.602-603, 16.20.634, 16.20.701-705 concerning surface water quality standards and the nondegradation policy	))))	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES (Water Quality Bureau)

To: All Interested Persons

1. On May 22, 1992 at 11:30 a.m., the board will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the above-captioned rules.

2. The proposed amendments to ARM 16.20.603, 16.20.634 and 16.20.701-702 are technical changes to the surface water quality standards and the nondegradation rules that are necessary to meet federal requirements. The amendments to ARM 16.20.704 clarify that a petition for an exemption to the nondegradation policy may be brought before the board without a permit being issued by the department and that the procedures apply to those responsible for either point or nonpoint sources of pollution. The proposed amendment of ARM 16.20.602 will ensure that surface water quality standards apply to groundwater discharges that may affect adjacent surface water. The amendments to ARM 16.20.703 and 705 correct citations to sections of the rules regarding procedures for public participation.

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

16.20.602 APPLICATION AND COMPOSITION OF SURFACE WATER QUALITY STANDARDS (1)-(3) Remain the same.

(4) The standards under this subchapter apply to discharges to groundwater that may affect adjacent surface waters.

AUTH: 75-5-201, 75-5-301, MCA; IMP: 75-5-301, MCA

16.20.603 DEFINITIONS In this subchapter the following terms have the meanings indicated below and are supplemental to the definitions given in 75-5-103, MCA:

~~(1) "Acute toxicity" means that death of exposed organisms occurs or can be expected to occur in 96 hours or less.~~

(1) "Acute lethality" means conditions that could result in increased mortality of aquatic life after short term exposure, as defined for the "Criteria Maximum Concentration" in the EPA document 440/5-86-001 (the "Gold Book").

(2)-(11) Remain the same.

(12) "Mixing zone" means the area of a water body con-

tiguous to an effluent with characteristics qualitatively or quantitatively different from those of the receiving water. The mixing zone is a place where effluent and receiving water mix and not a place where effluents are treated. Certain water ~~Water~~ quality standards ~~do~~ may not apply in the mixing zone for those parameters regulated by a MPDES or NPDES permit. An effluent, in its mixing zone, may not ~~cause acute toxicity~~ block passage of aquatic organisms nor may it cause acute lethality, except that ammonia, chlorine, and dissolved oxygen may be present at ~~acutely toxic~~ acute lethality concentrations ~~provided that such acute toxicity does not block passage of aquatic organisms~~ in no more than 10% of the mixing zone. The area in which these exceedences may be allowed shall be as small as practicable.

(13)-(28) Remain the same.

AUTH: 75-5-201, 75-5-301, MCA; IMP: 75-5-301, MCA

16.20.634 MIXING ZONE (1) Discharges to surface waters may be ~~entitled~~ granted a mixing zone ~~which will have a minimum impact on surface water quality, as determined~~ on a case by case basis by the department in accordance with its written implementation policy.

(2) In granting a mixing zone, the department shall ensure:

(a) that chronic toxicity does not result outside of the mixing zone;

(b) the extent of the mixing zone is minimized to the extent practicable;

(c) the granting of a mixing zone does not affect existing uses outside of the mixing zone.

AUTH: 75-5-201, 75-5-301, MCA; IMP: 75-5-301

16.20.701 DEFINITIONS In this subchapter, the following terms have the meanings indicated below and are supplemental to the definitions set forth in section 75-5-103, MCA:

(1)(a) Except as provided in paragraph (b) of this subsection, "degradation" means that as a result of the activities of man:

(i) Remains the same.

(ii) ~~an applicable water quality standard for~~ the hydrogen ion concentration (pH), turbidity, temperature, color, suspended solids or oils ~~has been violated in surface water~~ where quality which is higher than ~~the~~ established water quality standards has become worse than naturally occurring conditions;

(iii) the concentration~~,~~ in groundwater, outside of applicable mixing zones, of a pollutant for which maximum contaminant levels are established in section (4) of ARM 16.20.1003 has become worse; or

(iv)-(vi) Remains the same.

(b)(i)-(ii) Remains the same.

(iii) Changes in surface water quality which occur within a "mixing zone" as defined by ARM 16.20.603~~(8)~~(12) are not considered degradation.

(2)-(3) Remains the same.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-303, 75-5-401, MCA;

16.20.702 APPLICABILITY AND LIMITATION OF STATE WATER NONDEGRADATION -- GENERAL (1) Remains the same.

(2) If the board determines, based on ~~necessary~~ important economic or social development, that degradation may be allowed, in no event may degradation of state waters interfere with or become harmful, detrimental or injurious to public health, recreation, safety, welfare, livestock, wild birds, fish and other wildlife or any other ~~beneficial~~ uses which existed or could have existed on or after November 28, 1975. In allowing such degradation or lower water quality, the board shall assure that within the basin upstream of the proposed degradation there shall be achieved the highest statutory and regulatory requirements for all point and nonpoint sources.

(3) Remains the same.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-303, MCA

16.20.703 PERMIT CONDITIONS TO ENSURE NON-DEGRADATION (1)-(5) Remain the same.

(6) Whenever after a permit has been issued continued monitoring reveals new or more accurate information about the natural quality and fluctuations of the receiving waters, and if such new information would justify the amendment of monitoring or discharge limitation provisions in the permit, the department may approve such a modification. The department shall follow the notice and hearing procedures set forth in ARM ~~16.20.905(4) through (10)~~ 16.20.1334(4)-(8), 16.20.1335, and 16.20.1336 for MPDES permits, and ARM 16.20.1014(4)-(9) for MGWPCS permits.

(a) The board hereby adopts and incorporates by reference ARM ~~16.20.905(4)-(10)~~ 16.20.1334(4)-(8), 16.20.1335, and 16.20.1336 which set forth procedures for public notice and public hearings on MPDES permit applications. Copies of ARM ~~16.20.905(4)-(10)~~ 16.20.1334(4)-(8), 16.20.1335, and 16.20.1336 may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

(b) Remains the same.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-303, 75-5-401, MCA

16.20.704 PROCEDURE FOR PETITIONING FOR ~~AMENDMENTS~~ NON-DEGRADATION REVIEW (1) A person may petition the board to allow a lowering of the quality of high quality waters pursuant to 75-5-301, MCA, either prior to or after obtaining a permit under this chapter. A permit issued by the department is not a pre-requisite to petition the board under this subchapter.

(1)-(4) Remain the same but are renumbered (2)-(5).

(6) The procedures of this rule shall apply to owners and operators of both point and nonpoint sources of pollution.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-303, 75-5-401, MCA

16.20.705 DEPARTMENT AND BOARD PROCEDURES FOLLOWING RECEIPT OF COMPLETED PETITION (1)-(4) Remain the same.

(5)(a) Remains the same.

(b) At least 30 days prior to that hearing, the department shall comply with the following:

(i) the ~~"Public Notice Procedures"~~ public notice procedures set forth in ARM ~~16.20.912~~ 16.20.1334; and

(ii) the "Distribution of Information" procedures set forth in ARM ~~16.20.913 and ARM~~ 16.20.1021.

(c) The board hereby adopts and incorporates by reference ARM ~~16.20.912~~ 16.20.1334, which sets forth procedures for issuing public notices of MPDES permit applications and hearings, and ARM ~~16.20.913 and ARM~~ 16.20.1021 which set forth requirements for distribution and copying of public notices and permit applications. Copies of ARM ~~16.20.912, 16.20.913~~ 16.20.1334 and 16.20.1021 may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

(6) Remains the same.

AUTH: 75-5-201, 75-5-401, MCA; IMP: 75-5-303, 75-5-401, MCA

4. The board is proposing these amendments to the rules in order to meet EPA requirements for state anti-degradation policies. The rules are also necessary to clarify the procedures for obtaining a nondegradation exemption from the Board and to ensure the protection of surface water from groundwater discharges.

5. Interested persons may submit their data, views, or arguments concerning the proposed amendment, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Yolanda Fitzsimmons, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than May 20, 1992.

6. David W. Simpson, chairman of the Board, has been designated to preside over and conduct the hearing.

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

for William J. Gute
DENNIS IVERSON, Director

Certified to the Secretary of State March 16, 1992.

Reviewed by:

Eleanor Parker
Eleanor Parker, DHES Attorney

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

In the matter of the amendment of rules 16.20.401 and 16.20.402 and adoption of new Rules I and II dealing with plan and specification review for small water and sewer systems and review fees, and repeal of 16.20.405, concerning drilling of water wells	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES, ADOPTION OF NEW RULES, AND REPEAL OF 16.20.405 (Water Quality Bureau)

To: All Interested Persons

1. On May 22, 1992, at 10:30 a.m., the board will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of rules 16.20.401 and 16.20.402, the adoption of new rules I and II, and the repeal of rule 16.20.405.

2. The proposed amendments and new rule I would allow local governments to review plans and specifications for small public water supply and public sewage systems. This review would occur upon department approval of the local agency's competency and qualifications. The amendments also modify and update minimum requirements for public water and sewage systems. Proposed new Rule II describes fee schedules to be used in calculating fees to be paid to the Department of Health and Environmental Sciences for review of plans and specifications for public water supply and public sewage systems.

3. The rule to be repealed (16.20.405) is located at page 16-924 of the Administrative Rules of Montana.

4. The rules, as proposed to be amended and adopted, appear as follows (in the amended rules, new material is underlined; material to be deleted is interlined):

16.20.401 PLANS FOR PUBLIC WATER SUPPLY OR WASTEWATER SYSTEM (1) For purposes of this rule, "delegated division of local government" means a local government that has been delegated authority pursuant to Rule I and 75-6-121, MCA, to review and approve plans and specifications for public water supply or waste water systems, as designated in the written delegation.

~~(1)~~(2) The purpose of this rule is to assure the protection of public health and the quality of state waters by requiring ~~department~~ review and approval, by either the department or a delegated division of local government, of plans and specifications for siting, construction and modification of public water supply and waste water systems prior to the ~~be~~ginning of construction.

(2) Remains the same but is renumbered (3).

~~(3)~~(4) Before commencing the construction, alteration or

extension of a public water supply system or wastewater system, the applicant shall submit a design report along with the necessary plans and specifications for the system to the department or a delegated division of local government for its review and written approval. Two sets of plans and specifications are needed for final approval. Approval by the department or a delegated division of local government is contingent upon construction and operation of the public water supply or wastewater system consistent with the approved design report, plans, and specifications. Failure of the system to operate according to the approved plans and specifications or the department's conditions of approval is an alteration that requires resubmittal of a design report, plans, and specifications for department approval.

(a) The design report, plans and specifications for a community water system ~~shall~~ must be prepared and designed by a professional engineer in accordance with the format and criteria set forth in ~~the Great Lakes-Upper Mississippi River Board of State Sanitary Engineers Recommended Standards for Water Works, also known as the Ten State Standards, 1982 edition, published by the Health Education Service, Inc., P. O. Box 7283, Albany, New York, 12224~~ Circular WQB-1, "Montana Department of Health and Environmental Sciences Standards for Water Works", 1992 edition.

(b) The design report, plans and specifications for non-community water systems ~~shall~~ must be prepared in accordance with the format and criteria set forth in Circular WQB-3, "Montana Department of Health and Environmental Sciences ~~Circular No. 84-11, "Minimum Design~~ Standards for Small Water Systems", ~~July 1984~~ 1992 edition. The department or a delegated division of local government may require the plans and specifications for such a system to be prepared by a professional engineer when the complexity of the proposed system warrants such engineering (e.g., systems using gravity storage, pressure booster/reduction stations, or disinfection facilities).

(c) The design report, plans and specifications for all wastewater systems, except non-community sewage systems and other public subsurface sewage treatment systems, ~~shall~~ must be prepared and designed by a professional engineer in accordance with the format and criteria set forth in the Great Lakes-Upper Mississippi River Board of State Sanitary Engineers Recommended Standards for Sewage Works, also known as the Ten State Standards, ~~1978~~ 1988 edition, published by the Health Education Service, Inc., P. O. Box 7126, Albany, New York, 12224. The design report, plans and specifications for a wastewater system ~~shall~~ must also be designed to ~~ensure the safety of the~~ protect public health and ensure compliance with the Montana Water Quality Act, Title 75, Chapter 5, MCA, and rules adopted ~~there~~under the act, including ARM Title 16, chapter 20, subchapter 7.

(d) The design report, plans and specifications for non-community sewage systems or other public subsurface sewage treatment systems ~~shall~~ must be prepared in accordance with the

format and criteria set forth in Circular WQB-4, "Montana Department of Health and Environmental Sciences ~~Circular No. 84-10, "Sewers and Sewage Treatment for Multi-Family and Non-Residential Buildings", July, 1984~~ Standards for Multi-Family and Public Subsurface Sewage Treatment Systems", 1992 edition. The department or a delegated division of local government may require the plans and specifications for ~~such~~ any of these systems to be prepared by a professional engineer when the complexity of the proposed system warrants such engineering (e.g., systems that are experimental, pressure dosed, or use more than 500 linear feet of drainfield; systems which require pumping or which use lagoons or other non-subsurface facilities).

(e) If the design report, plans, and specifications require use of an alternative on-site sewage treatment system, the submittal must meet the requirements of Circular WQB-5, "Montana Department of Health and Environmental Sciences Standards for Alternative On-site Sewage Treatment Systems", 1992 edition.

~~(e)~~(f) The department may grant a deviation from the standards referenced in subsections (3)(a)~~, (b), (c), and (d)~~ through (e) of this rule when the applicant has demonstrated to the satisfaction of the department that strict adherence to the standards of this rule is not necessary to protect public health and the quality of state waters. Deviations from the standards may only be granted by the department.

~~(f)~~(g) The applicant must identify to the ~~department's~~ satisfaction of the department or a delegated division of local government that a legal entity exists which is responsible for the ownership, maintenance, operation and perpetuation of the public water supply system or wastewater system.

~~(4)~~(5) The department or a delegated division of local government shall issue a written approval for a public water supply system or wastewater system if it determines that the design report, plans and specifications are complete and the applicant has complied with all provisions of this rule.

(a)-(b) Remain the same.

~~(5)~~(6) Unless the applicant has commenced the construction, alteration, or extension of a public water supply or wastewater system within 2 years after the department or a delegated unit of local government has issued its written approval, the approval ~~shall be~~ is deemed void and a design report, plans and specifications ~~shall~~ must be resubmitted as required by section (3) of this rule.

(6) Remains the same but is renumbered (7).

~~(7)~~(8) Within 90 days after construction is completed upon a public water supply system or wastewater system, or upon an extension of or addition to such a system, the applicant shall certify to the department or a delegated division of local government that the construction, alteration, or extension was completed in accordance with the plans and specifications approved by the department. In cases where the system was designed by a professional engineer, the applicant shall submit a professional engineer's certification that the

construction, alteration or extension was completed in accordance with the plans and specifications approved by the department. This certification shall be accompanied by a complete set of "as built" drawings signed by the applicant or, in cases where the system is designed by an engineer, the professional engineer, and an operation and maintenance manual if applicable.

~~(8)~~(9) The department or a delegated division of local government may require that chemical analyses, microbiological examinations, flow tests, pressure tests, treatment plant performance records or other measures of performance for a public water supply or wastewater system be conducted by the applicant to substantiate that the system complies with the criteria set forth in the design report, plans and specifications.

(9) Remains the same but is renumbered (10).

~~(10)~~(11)(a) The department hereby adopts and incorporates by reference the following publications:

~~(a)~~(i) ~~The Great Lakes-Upper Mississippi River Board of State Sanitary Engineers, Recommended Standards for Waterworks, 1982 edition, also known as the "Ten States Standards", published by the Health Education Service, Inc., P. O. Box 7283, Albany, New York, 12224~~ Department of Health and Environmental Sciences' Circular WQB-1, 1992 edition, which sets forth the requirements for the design and preparation of plans and specifications for public water supply systems. ~~A copy of 1982 "Ten States Standards" may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Helena, Montana 59620.~~

~~(b)~~(ii) The Great Lakes-Upper Mississippi River Board of State Sanitary Engineers, Recommended Standards for Sewage Works, ~~1970~~ 1988 edition, also known as the "Ten States Standards", published by the Health Education Service, Inc., P. O. Box 7283, Albany, New York, 12224, which sets forth the requirements for the design and preparation of plans and specifications for sewage works. ~~A copy of 1978 "Ten States Standards" may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Helena, Montana 59620.~~

~~(c)~~(iii) Department of Health and Environmental Sciences' ~~Circular 84-11, July 1984~~ Circular WQB-3, 1992 edition, which sets forth minimum design standards for small water systems. ~~A copy of Circular 84-11, July 1984 edition, may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Helena, Montana 59620.~~

~~(d)~~(iv) Department of Health and Environmental Sciences' ~~Circular 84-10, July 1984~~ Circular WQB-4, 1992 edition, which sets forth minimum design standards for sewage treatment and disposal facilities serving multi-family and non-residential buildings. ~~A copy of Circular 84-10, July 1984 edition, may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Helena, Montana 59620.~~

(v) Department of Health and Environmental Sciences Circular WQB-5, "Standards for Alternative On-site Sewage

Treatment Systems", 1992 edition, which sets forth minimum design standards for alternative on-site sewage treatment systems.

(b) A copy of any of the documents adopted under subsection (a) may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Capitol Station, Helena, Montana 59620.

AUTH: 75-6-103, MCA; IMP: 75-6-103, 75-6-112, 75-6-121, MCA

16.20.402 CROSS CONNECTIONS (1) A cross connection is ~~herewith~~ defined as a physical arrangement whereby a public water supply system is connected with another water supply system, either public or private, or with any wastewater or sewer line or other potential source of contamination, in such a manner that a flow of water or contamination into the public water supply system from ~~such~~ the other source of water, waste, contamination, or sewage is possible.

(2)-(5) Remains the same.

AUTH: 75-6-103, MCA; IMP: 75-6-103, MCA

RULE I DELEGATION OF REVIEW OF SMALL PUBLIC WATER AND SEWER SYSTEM PLANS AND SPECIFICATIONS (1) The department may delegate to divisions of local government the review of plans and specifications for:

(a) small public water supply systems and small public sewer systems; and

(b) extensions or alterations of existing public water and public sewer systems that involve 50 or fewer connections.

(2) Delegation may occur only if:

(a) a division of local government submits a written application to the department that includes the following:

(i) a statement of intent that affirms the local government's intent to ensure that systems which it reviews comply with the minimum standards established in ARM 16.20.401;

(ii) names and qualifications of those employees who will be providing the review for the local unit of government; and

(iii) a request that the department provide training for public water and sewer system review.

(b) the department finds that the local government's review will protect public health and the quality of state waters.

AUTH: 75-6-103, 75-6-121, MCA; IMP: 75-6-121, MCA

RULE II FEES (1) The purpose of this rule is to establish fee schedules to be used to calculate fees to be paid to the department for review of plans and specifications for public water supply and public sewage systems, as required under Title 75, chapter 6, part 1, MCA, and ARM 16.20.401.

(2) Fees for review of plans and specifications are based on subsections (a)-(f) and section (3). The total fee for the review of a set of plans and specifications is the sum of the fees for the applicable parts or sub-parts listed in these citations. Review will not commence until fees calculated under this rule have been received.

(a) The fee schedule for designs requiring review for compliance with department Circular WQB-1, 1992 edition, is set forth in Schedule I, as follows:

SCHEDULE I

Part 3.1 Surface water quality and quantity	$ 100
structures	$ 50
Part 3.2 Groundwater	$ 275
Part 4.1 Clarification standard clarification	$ 250
solid contact units	$ 500
Part 4.2 Filtration rapid rate	$ 625
pressure filtration	$ 475
diatomaceous earth	$ 475
slow sand	$ 475
Part 4.3 Disinfection	$ 100
Part 4.4 Cation exchange softening	$ 150
Part 4.5 Aeration natural draft	$ 100
forced draft	$ 100
Part 4.6 Iron and manganese control-sequestering	$ 100
Part 4.8 Stabilization CO_2 addition	$ 150
Part 4.9 Taste and odor control powdered activated carbon	$ 100
Part 4.11 Waste disposal alum sludge	$ 125
lime softening sludge	$ 125
red water waste	$ 125
Part 5.0 Chemical application	$ 250
Part 6.0 Pumping facilities	$ 300
Part 7.1 Plant storage	$ 175
Part 7.2 Hydropneumatic tanks	$ 50
Part 7.3 Distribution storage	$ 175
Part 8.0 Distribution system < 1320 lineal feet with standard specs	$ 100
< 1320 lineal feet without standard specs	$ 225
> 1320 lineal feet with standard specs	$ 150
> 1320 Lineal feet without standard specs	$ 275
Main extension certified checklist	$ 25

(b) The fee schedule for designs requiring review for compliance with Recommended Standards for Sewage Works, 1988 edition, is set forth in Schedule II, as follows:

SCHEDULE II

Part 20 Sewer collection system < 1320 lineal feet with standard spec	$ 100
< 1320 lineal feet without standard spec	$ 225
> 1320 lineal feet with standard spec	$ 150
> 1320 lineal feet without standard spec	$ 275

Sewer extension certified checklist.....$ 25
Part 30 Sewage pumping station
100 gpm or less.....$ 450
greater than 100 gpm.....$ 625
Part 50 Screening grit removal.....$ 500
Part 60 Settling.....$ 400
Part 70 Sludge handling.....$ 800
Part 80 Biological treatment.....$1200
Part 90 Disinfection.....$ 250
Part 100 Wastewater treatment ponds (lagoons)
non-aerated.....$ 400
aerated.....$ 700

(c) The fee schedule for designs requiring review for compliance with department Circular WQB-4, 1992 edition, is to be determined under Schedule III, as follows:

SCHEDULE III

Part 20 Sewers.....$ 50
Part 50 Septic tank.....$ 100
Part 30,40 & 60 Subsurface treatment
gravity.....$ 200
dosed.....$ 250

(d) The fee schedule for designs requiring review for compliance with department Circular WQB-3, 1992 edition, is to be determined under Schedule IV, as follows:

SCHEDULE IV

Part 3.2 Groundwater..... $ 250
Part 6.0 Pump facilities.....$ 100
Part 8.0 Distribution system.....$ 100

(e) The fee for all alternative on-site sewage treatment design requiring review for compliance with department circular WQB-5, 1992 edition, is $350 per design.

(f) The fee schedule for the review of plans and specifications not covered by a specific department design standard but within one of the following categories is to be determined under Schedule V as follows:

SCHEDULE V

Hypochlorinators.....$ 50
Ozonators up to 10 gpm..... $ 150
CT evaluations.....$ 100
Reverse osmosis up to 10 gpm.....$ 100
Spring box and collection lateral.....$ 100
Cartridge/bag filters.....$ 150

(3) Fees for review of plans and specifications not covered under section (2), are established by the department based on a charge of $26 per hour multiplied by the time required to review the plans and specifications. The review time applied to each set of plans and specifications will be

determined by the review engineer and documented with time sheets. The maximum fee for the review of plans and specifications specified under this section is $500.

(4) Fee payment must be in the form of a check or money order made payable to the state of Montana, department of health and environmental sciences.

(5) When a resubmitted set of plans and specifications contains substantial changes in the design that require the plans and specifications to be reviewed again, the department may require an additional review fee. The additional fee will be calculated in the same manner as the original fee and based on those parts of the standard that must be reviewed again due to the change in design.

AUTH: 75-6-108, MCA; IMP: 75-6-108, MCA

5. The board is proposing these amendments to the rules in order to implement various requirements of Title 75, chapter 6, MCA. Specifically, (1) the amendments to rule ARM 16.20.401 are needed to ensure that local governments apply the same requirements as the Department of Health and Environmental Sciences in reviewing small public water supply and public sewage systems; (2) the amendment to ARM 16.20.402 is necessary to ensure adequate review of cross connections; (3) Rule I implements legislation allowing delegation of review of certain public water supply and public sewage systems (see 75-6-121, MCA); and (4) the fee system is developed to fulfill mandatory rulemaking requirements imposed by Section 75-6-108, MCA. ARM 16.20.405 is repealed because sufficient regulation is provided under the regulations for water well drillers as administered by the state Board of Water Well Contractors (see ARM Title 36, chapter 21).

6. Interested persons may submit their data, views, or arguments concerning the proposed changes, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Yolanda Fitzsimmons, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than May 20, 1992.

7. David W. Simpson, chairman of the Board, has been designated to preside over and conduct the hearing.

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

Reviewed by:

Eleanor Parker, DHES Attorney

by DENNIS IVERSON, Director

Certified to the Secretary of State March 16, 1992.

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

In the matter of the adoption of rules I through VI dealing with minimum standards for on-site subsurface wastewater treatment	))))	NOTICE OF PUBLIC HEARING FOR PROPOSED ADOPTION OF RULES I THROUGH VI (Water Quality Bureau)

To: All Interested Persons

1. On May 22, 1992, at 9:30 a.m., the board will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the adoption of the above-captioned rules which relate to minimum requirements for on-site wastewater treatment systems.

2. The proposed rules provide minimum design and construction requirements for on-site subsurface wastewater treatment systems (septic tanks and drainfields, etc.). Regulations no less stringent than these requirements must be adopted by local boards of health. These rules also incorporate a procedure for appeal of local variance decisions to the Department of Health and Environmental Sciences, and update existing design requirements by adoption of department circulars.

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

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

RULE I SCOPE (1) These rules are intended to protect the public health, safety, and welfare by setting forth minimum standards for the construction, alteration, or extension of on-site wastewater treatment systems within the state.

(2) Under 50-2-116(1)(i), MCA, local boards of health must adopt regulations no less stringent than RULES II through VI for on-site wastewater treatment systems for private and public buildings installed after October 1, 1991.

AUTH: 75-5-201, MCA; IMP: 75-5-305, MCA

RULE II GENERAL REQUIREMENTS (1) It is illegal to construct, alter, extend, or utilize an on-site wastewater treatment or disposal system that may:

(a) contaminate any actual or potential drinking water supply;

(b) cause a public health hazard as a result of access to insects, rodents, or other possible carriers of disease to humans;

(c) cause a public health hazard by being accessible to persons or animals;

(d) violate any law or regulation governing water pollution or wastewater treatment and disposal, including the

rules contained in this subchapter;

(e) pollute or contaminate state waters, in violation of 75-5-605, MCA;

(f) degrade state waters unless authorized pursuant to 75-5-303, MCA; or

(g) cause a nuisance due to odor, unsightly appearance or other aesthetic consideration.

(2) If a department-approved public collection and treatment system is readily available for connection to the source of wastewater and the owner of the system approves the connection, wastewater must be discharged to the system.

(3) The following department circulars are adopted and incorporated by reference for purposes of RULES I-VI:

(a) Department Circular WQB-4 (1992 ed.), which sets forth minimum requirements for site evaluation, septic tank construction, and drainfield design for multiple-family and non-residential building;

(b) Department Circular WQB-5 (1992 ed.), which sets forth minimum specifications for the siting, design, constructions and operation of alternative on-site wastewater treatment systems; and

(c) Department Circular WQB-6 (1992 ed.), which sets forth minimum requirements for site evaluation, septic tank construction, and drainfield design for individual residential buildings.

(d) Copies are available from the department's Water Quality Bureau, Cogswell Building, Capitol Station, Helena, MT 59620.

AUTH: 75-5-201, MCA; IMP: 75-5-305, MCA

RULE III DEFINITIONS (1) "Absorption bed" means an absorption system which consists of excavations greater than 3 feet in width together with distribution piping through which effluent may seep or leach into surrounding soils.

(2) "Bedrock" means material that cannot be excavated by power equipment, is so slowly permeable that it will not transmit effluent, or has open fractures or solution channels.

(3) "Cesspool" means a covered underground receptacle which receives untreated wastewater and permits the wastewater to seep into surrounding soil.

(4) "Department" means the Montana department of health and environmental sciences.

(5) "Experimental alternative system" means a new device on which further testing is required in order to provide sufficient information regarding the ability of the system to adequately treat and dispose of wastewater. These systems are described in department Circular WQB-5 and include: elevated sand mound, evapo-transpiration, aerobic package plant, artificially drained site, subsurface sand filter, nutrient removal, and fill systems.

(6) "Failed system" means an on-site wastewater treatment system which no longer provides the treatment and/or disposal for which it was intended, or violates any of the requirements of RULE II(1).

(7) "High permeability soil" means soil rate with a percolation rate faster than 3 minutes per inch.

(8) "Holding tank" means a watertight receptacle that receives wastewater for retention and does not as part of its normal operation dispose or treat the wastewater.

(9) "Impervious layer" means a soil layer with a percolation rate slower than 60 minutes per inch.

(10) "Individual system" means an on-site wastewater treatment system serving no more than two single family residences.

(11) "Innovative alternative system" means a new device, not discussed in department rules or circulars, that provides primary and secondary treatment and ultimate disposal of the wastewater. Innovative alternative systems include corrugated chamber systems, gravel-less corrugated pipe systems, and package plant systems.

(12) "Multiple family system" means an on-site wastewater treatment system serving three to nine residential buildings.

(13) "On-site wastewater treatment system" means a system for sanitary collection, transportation, treatment and disposal of wastewater.

(14) "Replacement system" means an on-site wastewater treatment system proposed to replace a failed, failing, or contaminating system.

(15) "Restrictive layer" means a soil layer that does not allow water entering from above to pass through as rapidly as it accumulates.

(16) "Sealed pit privy" means an enclosed receptacle designed to receive non-water-carried toilet wastes into a lined vault.

(17) "Seasonal high groundwater" means the closest point below the natural ground surface to which water rises at any time of the year.

(18) "Seepage pit" means a covered underground receptacle which receives wastewater after primary treatment and permits the wastewater to seep into surrounding soil.

(19) "Standard alternative system" means an on-site wastewater treatment system that is not considered standard, but available information indicates that adequate treatment and disposal are achieved when designed and constructed properly. Standard alternative systems are described in department Circular WQB-5 and include alternating drainfields, shallow capped drainfields, waste segregation, deep absorption trenches, and sand-lined drainfields.

(20) "Wastewater" means a combination of liquid wastes that may include chemicals, house wastes, wash water, human excreta and animal or vegetable matter in suspension or solution; and solids in suspension or solution.

AUTH: 75-5-201, MCA; IMP: 75-5-305, MCA

RULE IV TECHNICAL REQUIREMENTS (1) On-site wastewater treatment systems must be designed and constructed in accordance with the applicable requirements, as described in RULE II and below:

(a) Individual systems must be designed and installed in accordance with the requirements of Department Circular WQB-6.

(b) Multiple family systems must be designed and installed in accordance with the requirements of Department Circular WQB-4.

(c) Standard alternative systems must be designed and installed in accordance with the requirements of Department Circular WQB-5.

(d) Experimental alternative systems must be designed and installed in accordance with the requirements of Department Circular WQB-5.

(2) Other on-site wastewater treatment systems may only be allowed if site constraints prevent the applicant from constructing a system that meets the requirements of section (1). These systems must be authorized under a variance procedure that ensures that the requirements of section (3) are met, and that the following specific requirements, as applicable, are fulfilled:

(a) Innovative alternative systems must provide primary treatment (removal of settleable solids) and secondary treatment (stabilization of effluent from primary treatment).

(b) Absorption beds may not be constructed in unstabilized fill.

(c) Seepage pits may only be constructed in situations where groundwater is shown to be a minimum of 25 feet below the proposed bottom of the seepage pit, and may not be used in environmentally vulnerable areas or areas of high permeability soils.

(d) Holding tanks systems may be approved only if:

(i) the facility to be served is for seasonal-use only;

(ii) the holding tank system is located at least 50 feet horizontally from any lake, stream, irrigation ditch or surface water body, or the 100-year flood elevation of any watercourse;

(iii) the holding tank system is stabilized against flotation and waterproofed against infiltration or exfiltration; and

(iv) the owner agrees to testing of the holding tank system at least once per year for water tightness, periodic pumping by a licensed septic tank pumper, and disconnection or discontinuation from further use whenever the wastewater collection mains of a public system become available within 500 feet of the property and permission to connect is granted by the entity controlling the system.

(e) Sealed pit privy systems may only be approved if the facility to be served does not have a piped water supply.

(3) An on-site wastewater treatment system may not be constructed if it:

(a) is likely to cause pollution of state waters in violation of 75-5-605, MCA;

(b) would not protect the quality and potability of nearby waters for public water supplies and domestic uses, or the quality of water for other beneficial uses, including those

uses specified in 76-4-101, MCA; or

(c) will adversely affect public health, safety, or welfare.

(4) New construction of cesspools is disallowed.

AUTH: 75-5-201, MCA; IMP: 75-5-305, MCA

RULE V VARIANCE APPEALS TO THE DEPARTMENT (1) Upon receiving an appeal of a local board of health's variance decision under 75-5-305, MCA, the department shall determine within 30 days whether the appeal meets the requirements of section (2) below and notify the appellant in writing of its determination.

(2) The appeal to the department must be in writing and must provide the following information:

(a) the name of the appellant;

(b) the local government entity or entities that made the decision on the application for variance at the local level;

(c) a summary explanation of the project or development for which the variance is requested;

(d) a summary explanation of the variance that is sought;

(e) a statement of the law or ordinance at issue in the matter; and

(f) copies of all applications and supporting materials submitted to the local board of health, and of any written decisions issued by the local board of health.

(3) If the appeal does not fulfill the requirements of section (2) above, the department shall state in its notice to the appellant the deficiencies that must be addressed in a resubmittal. The department shall also notify the appellant in writing when its submittal meets the requirements of section (2).

(4) If the appeal fulfills the requirements of section (2), the department shall conduct a hearing on the appeal.

(5) The hearing must be conducted under the provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 7, MCA. Except as provided in section (7), the department must conduct the hearing within 90 days of the department's written notice to the appellant that the appeal meets the requirements of section (2) above.

(6) The department shall review each application under ARM Title 16, chapter 2 to determine if the department's action may result in significant effects to the quality of the human environment, thereby requiring an environmental impact statement.

(7) If the department's analysis indicates that an environmental impact statement is required, the department shall have 60 days from the date of issuance of the final environmental impact statement to conduct a hearing under this section.

(8) After conducting the hearing, the department may allow up to 14 days for written comments to be submitted concerning the appeal.

(9) The department shall apply the local government variance requirements at issue in the case, provided the

requirements meet the minimum requirements stated in RULE II and RULE VI.

(10) The department shall issue a formal decision, including findings of fact and conclusions of law, within 30 days after the hearing.

AUTH: 75-5-201, MCA; IMP: 75-5-305, MCA

RULE VI LOCAL VARIANCES (1) An applicant may request a variance from the requirements of sections (1) and (2) of [RULE IV] by filing a petition with the local board of health for a variance from that particular requirement. The local board of health may grant a variance from the requirement only of it finds that:

(a) the system that would be allowed by the variance is unlikely to cause pollution of state waters in violation of 75-5-605, MCA;

(b) the granting of the variance will protect the quality and potability of water for public water supplies and domestic uses, and will protect the quality of water for other beneficial uses, including those uses specified in 76-4-101, MCA;

(c) the granting of the variance will not adversely affect public health, safety, and welfare; and

(d) the variance would not conflict with the requirements of [RULE IV(3)].

(2) The local board of health's decision may be appealed to the department.

AUTH: 75-5-201, MCA; IMP: 75-5-305, MCA

5. The board is proposing these rules in order to satisfy the requirements of House Bill 162 (Chapter 479, Montana Laws 1991) passed by the 1991 Legislature. As required by this legislation, the rules specify design and construction standards for on-site wastewater treatment systems, and describe a process for local government variance decisions and for appeals to the department.

6. Interested persons may submit their data, views, or arguments concerning the proposed rules, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Yolanda Fitzsimmons, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than May 20, 1992.

7. David W. Simpson, Chairman of the Board, has been designated to preside over and conduct the hearing.

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

Reviewed by:

Eleanor Parker, DHES Attorney

by DENNIS IVERSON, Director

Certified to the Secretary of State March 16, 1992.

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

In the matter of proposed new rule to reject, modify, or condition permit applications in the Musselshell River and to amend ARM 36.12.1010 Definitions	))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION OF NEW RULE AND AMENDMENT OF ARM 36.12.1010

TO: All Interested Persons:

1. Public Hearings will be held at the following times and locations to consider the adoption of a new rule to reject, modify, or condition permit applications in the Musselshell River and the adoption of a new definition under ARM 36.12.1010:

April 29, 1992, 3:00 PM, Community Center, Harlowton, MT
April 30, 1992, 10:00 AM, Masonic Hall, Roundup, MT

2. The proposed amendment of ARM 36.12.1010 and the new rule read as follows:

"36.12.1010 DEFINITIONS For the purposes of these rules, the following definitions shall apply:

(1) . . .

(6) "Supplemental irrigation" means additional water provided to lands which are already irrigated or to lands which will receive water through another water right.

~~(6)~~(7) . . .

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

RULE I. MUSSELSHELL RIVER CLOSURE (1) The Musselshell River is located in hydrologic basins 40A and 40C, running from the headwaters of the North Fork and South Fork in Meagher County through Wheatland, Golden Valley, and Musselshell counties, and forming the east-west boundary for Petroleum, Garfield, and Rosebud counties. The closure area contains the mainstems of the North and South Fork of the Musselshell River and the Musselshell River down to the mouth of Flatwillow Creek located at a point in the SW¼ Section 33, Township 14 North, Range 30 East, Petroleum County, Montana.

(2) The department shall reject applications for surface water permits within the Musselshell River closure area for any diversions, including infiltration galleries, for consumptive uses of water during the period from July 1 through August 31. Applications for use from September 1 through September 30 shall be rejected, except, applications for supplemental irrigation during this period shall be accepted and processed.

(3) Any permits issued for nonconsumptive uses during the closure period shall be modified or conditioned to provide that there will be no decrease in the source of supply, no disruption in the stream conditions below the point of return, and no adverse effect to prior appropriators within the reach of stream between the point of diversion and the point of return. The applicant for a nonconsumptive use shall prove by

substantial credible evidence its ability to meet the conditions imposed by this rule.

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

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

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

AUTH: Sec. 85-2-112, 319, MCA; IMP: Sec. 85-2-319, MCA

3. The definition of "supplemental irrigation" is needed to clarify what applications for use during September will be accepted and processed.

4. The rationale for Rule I is that appropriable water only exists during high stream flow events. On April 23, 1984 a petition was filed according to § 85-2-319, MCA, with the Department. The petition was signed by ten water users of the Musselshell River requesting the Department to close the Musselshell River during the irrigation season to new appropriations of water. The petitioners state that the lower Musselshell is historically short of the users needs and claim that without the stored water in Deadmans Basin being released into the lower Musselshell far fewer acres of farmland could be regularly irrigated. Deadmans Basin does not have enough storage to allow additional water use from it. In response to the petition the Department conducted a water availability study. The study showed a water shortage during the period of July 1 through September 30. This rule is intended to assist in preserving existing stream flows and flows released from Deadmans Basin for senior appropriators. This rule sets out the period for closure, the class of applications affected and the type of appropriations that are exempt from the rule.

5. Interested parties may present their data, views or arguments in writing or orally at the hearing. Written data, comments or arguments in support of or in opposition to the adoption must be submitted to the Department of Natural Resources and Conservation, 1520 E. 6th Avenue, Helena, MT, 59620 no later than May 1, 1992.

6. Questions concerning the proposed adoption or requests for a copy of the Musselshell River water availability analysis should be directed to the Department of Natural Resources and Conservation at the above Helena address, or call 444-6610. In Lewistown, Montana call the Water Resources Regional Office at 538-7459.

7. Vivian Lighthizer has been designated to preside over and conduct the hearing.

Donald D. MacIntyre
Chief Legal Counsel
Rules Reviewer

Karen Barclay Fagg, Director
Department of Natural Resources
and Conservation

Certified to the Secretary of State, March 16, 1992

BEFORE THE BOARD OF OIL
AND GAS CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION OF NEW RULES FOR THE IMPLEMENTATION OF THE UNDERGROUND INJECTION CONTROL PROGRAM FOR CLASS II INJECTION WELLS UNDER THE FEDERAL SAFE DRINKING WATER ACT (SDWA).	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION OF NEW RULES I THROUGH XVII.

TO: All Interested Persons:

1. On May 7, 1992, at 9:00 a.m., a public hearing will be held in the Frontier Room of the Radisson Northern Hotel, Broadway and 1st Avenue North, Billings, Montana, to consider new rules to implement the Underground Injection Control Program for Class II injection wells under the Federal Safe Drinking Water Act (SDWA), and under Sections 82-11-111(5), 82-11-123(8), 82-11-127(2), and 82-11-137, MCA.

2. The proposed new rules provide as follows:

RULE I DEFINITIONS For the purposes of this sub-chapter the following are defined:

(1) "Area of review" means the area surrounding an injection well to a fixed radius of one quarter (1/4) mile, or for an area project, the project area plus a circumscribing area the width of which is one quarter (1/4) mile.

(2) "Confining zone" means the geological formation or formations, or the portion of a formation that is capable of limiting fluid movement out of the injection zone.

(3) "Corrective action" means the reworking, repair, re-plugging or other activity taken for the purposes of preventing migration of injected fluids into underground sources of drinking water through any existing wellbore that penetrates the injection zone within the area of review.

(4) "Class II injection well" means a well that:

(a) injects fluids brought to the surface in conjunction with conventional oil and gas production;

(b) is used to inject fluids for the enhanced recovery of oil or gas; or,

(c) is used to inject fluids for storage of hydrocarbons that are liquid under standard conditions of temperature and pressure.

(5) "Class III well" means a well that injects for the extraction of minerals other than oil or gas including:

(a) mining of sulfur;

(b) in situ production of uranium or other metals other than by solution mining of conventional mines;

(c) solution mining of salts or potash.

(6) "EPA" means the United States Environmental Protection Agency.

(7) "Injection well, new" means a class II well that began injecting after the effective date of the UIC program delegation

by the EPA.

(8) "Injection well, existing" means an injection well other than a new injection well.

(9) "Injection zone" means the geological formation, group of formations, or portion of a formation that receives the injected fluids through a well.

(10) "Injected fluids" means any material or substance which flows or moves and is emplaced in an injection zone through a class II injection well.

(11) "Mechanical integrity" means that:

(a) there is no significant leak in the casing, tubing, or packer of the injection well; and

(b) there is no significant fluid movement into an underground source of drinking water (USDW) from the injection zone or from a non-USDW geologic stratum or zone of rock overlying the injection zone, or flow between adjacent USDW's through channels adjacent to the injection well bore.

(12) "Program director" means that employee of the Montana board of oil and gas conservation (board) designated by the board as the principal administrator of the Montana underground injection control program delegated by EPA.

(13) "Produced water" means that fluid injected into an injection zone through a class II injection well, and includes liquids recovered from drilling pits, waste water from gas plants which are an integral part of production operations, (unless those waters are classified as hazardous waste by EPA at the time of disposal), and recovered workover fluids.

(14) "UIC" means underground injection control.

(15) "Underground Source of Drinking Water (USDW)" means an aquifer or portion thereof which supplies drinking water for human consumption, or an aquifer which contains fewer than 10,000 mg/l total dissolved solids and is not an exempt aquifer under RULE XIV.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE II UNDERGROUND INJECTION (1) No person shall commence a new injection project or construct or operate a new class II injection well, or convert an existing well to injection, whether for the purpose of disposal, or as part of an enhanced recovery project, or for the storage of liquid hydrocarbons, without a permit from the board.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE III APPLICATION CONTENTS AND REQUIREMENTS (1) The application for water injection or disposal of produced water must be filed with the board showing:

(a) the location of the input well or wells;

(b) the location and mechanical condition, of all oil and gas wells including abandoned and drilling wells, dry holes, and any other wells which penetrate the injection zone within the area of review;

(c) the location and mechanical condition, of all

pipelines which will be used to transport fluids to the input well for storage and injection;

(d) the formations from which wells are producing or have produced, the formations, depth, and estimated water quality of any potential underground sources of drinking water, and the location and depth of any water wells in the area of review;

(e) the name, description, and depth of the injection zone(s) including a water analysis, estimated formation pressure, and reservoir characteristics of the zone, and the name, lithologic characteristics, depth, and estimated fracture gradient of the confining zone;

(f) the elevation of the top of the oil or gas bearing formation in the input well or wells and in the wells producing from the same formation within the area of review of the project;

(g) the electric log of the input well or wells or other log or lithological information not already on file with the board;

(h) a description of the input well or wells casing and cementing program (all new wells must be cased and cemented so that migration of fluids into or between USDW's is prevented);

(i) a description and analysis of the injected fluids stating the kind, source, and the estimated amount to be injected daily, and the average and maximum anticipated injection pressure;

(j) the names and addresses of the pool operators in an enhanced recovery project;

(k) the names and addresses of the leasehold owners, including unleased mineral owners, and the surface owners within the area of review of the input well(s);

(l) such other information, including proposed contingency plans for well failure, as the board may require to determine whether the injection project may be made safely and legally.

(2) One application may be made for multiple class II injection wells in a geographic area if all wells within that geographic area have substantially the same mechanical and geologic characteristics. Where appropriate, an application for underground injection of fluids on an area basis may include the information required in subsection (1) of this rule for a typical class II injection well in lieu of submitting such information on all class II injection wells in the application provided such class II injection wells have substantially the same characteristics.

(3) If injected fluids will be collected and retained in pits, ponds, or other open receptacles prior to injection, the applicant must submit an application on form 23 for a permit to construct or operate a pit or pond when the application for water injection or disposal is filed with the board. All earthen reservoirs, pits, ponds, and open receptacles must comply with ARM 36.22.1207, 36.22.1226, and 36.22.1227.
AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE IV CORRECTIVE ACTION (1) It is the obligation of

the applicant to demonstrate to the board's satisfaction that the existing wells that penetrate the injection zone within the area of review are in adequate mechanical condition to prevent migration of injected fluid into any USDW. The board will require the applicant to submit a plan for corrective action, including the reworking, repairing or re-plugging of any such well(s) the board considers to be a possible avenue for fluid migration. Injection must not commence until satisfactory completion of the work required in the approved corrective action plan.
AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE V SIGNING THE APPLICATION (1) Applications must be signed (for a corporation) by a principal executive officer of at least the level of vice-president; or, (for a sole proprietorship) by the sole proprietor; or, (for a partnership) by a general partner. If the application is submitted on behalf of a federal, state, or other public agency, or by a municipality, signature must be of a principal executive or a ranking elected official. The application may be signed by a duly authorized representative if the authorization is made in writing by one of the above described persons, and if the authorization either names an individual or specifies a position having responsibility for the operation of the project. The written authorization will be submitted to the board, and must be promptly replaced if the authorization no longer accurately describes the responsible position or person. Application for enhanced recovery projects must be signed by all operators who will participate in the proposed project, or by the unit operator if the request is part of a plan for unitized operation under sections 82-11-201, et seq., MCA. Applications for disposal wells must be signed by the well operator.
AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE VI FINANCIAL RESPONSIBILITY (1) The owner or operator of any injection well must comply with the bonding requirements of ARM 36.22.1308; provided, however, that such bonding requirements must also apply to lands owned or held in trust by the United States.
AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE VII HEARINGS (1) New wells or projects. A petition for hearing of the application for underground injection must be filed in triplicate with the board at its Helena office. Upon receipt of the petition, the board will set a hearing date for the application, and cause notice of the hearing to be published as provided in section 82-11-141, MCA. Notice of hearings will be first published at least thirty (30) days in advance of the hearing date.

(2) Wells in existing projects. Administrative approval may be given for an additional well or recompletion of an

existing well within a previously approved area or enhanced recovery project, provided that the applicant demonstrates through the application that the well requested has substantially the same characteristics and operating parameters previously approved by the board for injection wells in the project.
AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE VIII NOTICE OF APPLICATION (1) New wells or projects. Notice of application for underground injection permit must be given by the applicant by mailing a copy of the application to each operator of drilling or producing wells or of wells which have produced within the area of review and to the lease owners, mineral owners, and surface owners within the area of review of the proposed input well or wells. A copy also must be mailed to EPA, the water quality bureau of Montana department of health and environmental sciences, and to the Montana department of natural resources and conservation. A copy of the application must be mailed to the clerk and recorder of the county in which the project is located. Such notice must be mailed on or before the date the application is mailed to or filed with the board.

(2) New wells in existing projects. Applications for an additional new well or wells, or for recompletion of an existing well or wells to injection service, within an approved area or enhanced recovery project must give notice to the leasehold owners and surface owners within the area of review of the well or wells by mailing a copy of the application to each party on or before the date the application is mailed to the board. The applicant must advise each party that the application is eligible for administrative approval by the program director, unless objections are received within twenty (20) days of receipt of the application by the program director.
AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE IX BOARD AUTHORIZATION (1) No injection program shall be instituted until the same has been authorized by the board.

(2) The board will make such special orders and rules for the individual case as conditions may justify.

(3) If the board determines, or is notified by EPA, that the approval of an application, or a portion of the application, is beyond the scope of delegated authority, or requires the concurrence of EPA, the board will refer the application to EPA, and final disposition of the application will be deferred until EPA concurrence is received.
AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE X NOTICE OF COMMENCEMENT OR DISCONTINUANCE - PLUGGING OF ABANDONED WELLS (1) Within ten (10) days of the commencement of underground injection operations, the applicant

must notify the board of the same and the date of commencement.

(2) Within thirty (30) days after the discontinuance of an enhanced recovery or liquid hydrocarbon storage project, the applicant or the one in charge thereof must notify the board of the date of such discontinuance and the reasons therefor.

(3) Before any class II well shall be abandoned, written notice must be served on the board, and approval of the abandonment plan received from the program director or other authorized representative of the board. The abandonment plan must, at a minimum provide for isolation of the injection zone with a cement, or mechanical plug capped with cement, and for the isolation and protection of each USDW in such a manner as to prevent movement of fluids between USDW's.

(4) Injection wells which fail a mechanical integrity test (MIT) will be immediately removed from service and promptly repaired or plugged for abandonment within 180 days of the failed test unless otherwise ordered by the board; provided, however, that the operator of an injection well that has failed the MIT may apply to the program director, or other authorized representative of the board, to defer repair or plugging. Any deferment granted will be under such conditions of physical isolation of the injection zone, or monitoring and reporting requirements deemed necessary under the circumstances to protect any USDW's penetrated by the wellbore. Up to a two (2) year deferment may be granted administratively from the date of the failed test, but will not be extended without consent of the board.

(5) Injection well operators will report the status of each unplugged injection well in its monthly injection reports on form 5. The operator will notify the board of any well which the operator expects to be shut-in or temporarily abandoned for a period of six (6) months or more. Any injection well which has been shut-in or temporarily abandoned for a period in excess of two (2) years must be properly plugged and abandoned. An operator may apply for a plugging deferment as provided in paragraph (4) above upon a showing of reasonable cause and demonstration of non-endangerment to USDW's.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE XI RECORDS REQUIRED (1) The owner or operator of any class II injection well or wells must keep and retain for at least five (5) years, an accurate record of:

(a) the cumulative amount of fluid injected into such well or wells;

(b) the wellhead pressure or pressures, and the injection rate at the time the pressure is recorded;

(c) the total amount of water produced, and the total amount of oil and gas produced from an enhanced recovery project;

(d) the pressure in the casing - tubing annulus if monitoring of such pressure is required as part of a mechanical integrity test.

(2) The information required in subsection (1) of this

rule must be observed at least weekly and a representative observation recorded at least monthly and filed with the board on board form 5.

(3) The owner or operator of any class II injection well permitted after the effective date of this rule must conduct a chemical analysis of the typical injected fluids on the 360th operational day of injection. For purposes of this rule, an operational day of injection shall mean any day on which fluids are injected for two (2) or more hours. Samples of typical injected fluids must be taken at the injection wellhead. The chemical analysis of the typical injected fluids must include tests for total dissolved solids (TDS), specific conductivity, pH, and percent oil. The results of such analysis must be submitted in writing to the board within thirty (30) days after the sample is taken.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE XII MECHANICAL INTEGRITY (1) From and after the effective date of these regulations, all new wells drilled for, and all existing wells converted to, water injection or disposal must demonstrate mechanical integrity before being placed into service. A mechanical integrity test must be designed to determine whether there is a significant leak in the tubing, casing, or packer of the well, and whether there is a significant movement of injected fluid into any USDW or between any USDW's through vertical channels adjacent to the wellbore.

(2) A mechanical integrity test that demonstrates that there are no significant leaks in the tubing, casing, or packer will include:

(a) a pressure test of the tubing-casing annulus using liquid or gas, or

(b) monitoring of the casing-tubing annulus following a valid initial pressure test, or

(c) a radioactive tracer survey, timed run method, or

(d) any other test or combination of tests considered effective by the board, and approved by the director, office of drinking water, U.S. EPA.

(3) A mechanical integrity test also will include a demonstration that there is no significant movement of injected fluid in vertical channels adjacent to the well bore. Such demonstration must include a cement bond log (with a variable density curve, travel time curve, amplitude curve, and gamma ray curve) and may include the following:

(a) cementing records which demonstrate the presence of cement adequate to prevent fluid migrations adjacent to the well bore:

(b) radioactive tracer surveys:

(c) noise logs:

(d) temperature surveys: or,

(e) any other test or combination of tests considered effective by the board and approved by EPA.

(4) After the effective date of these regulations, all existing injection wells which have not had an initial

mechanical integrity test will be tested for mechanical integrity as directed by the board.

(5) Injection wells will be retested for mechanical integrity no less than once each five (5) years from the date last tested. Wells last tested under supervision of EPA will be retested under supervision of the board no less than five (5) years from the EPA test date.

(6) A pressure test of the casing tubing annulus as provided in (2)(a) must be performed at a minimum surface pressure of 300 pounds per square inch (psi) or 100 psi above the actual injection pressure at the time tested, whichever is greater; provided, however, that the maximum test pressure will not be required to exceed 800 psi surface pressure. The test will be considered successful if the applied pressure can be held for fifteen (15) minutes with no more than a five (5) percent pressure loss.

(7) Wells which fail the mechanical integrity test must be immediately shut-in until either repaired, reworked, or plugged for abandonment in accordance with RULE X. Such wells must be successfully retested for mechanical integrity before being placed in injection service.

(8) Subsequent to any mechanical integrity test, a well operation which causes the injection packer to be unseated or in which the tubing or packer was pulled, repaired or replaced will require that the well be retested for mechanical integrity before being placed in service.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE XIII NOTIFICATION OF TESTS - REPORTING RESULTS (1) To the extent practicable, the board's field representative will schedule routine mechanical integrity tests required under RULE XII. The owner or operator of a class II injection well must give the board at least forty-eight (48) hour advance written notice of any mechanical integrity test not originally scheduled by a board representative. Notification of tests not included in the board's routine test schedule must specify the name and telephone number of the person responsible for scheduling the test, the name and address of the owner or operator of the injection well, the name and location of the well, and the time and date the mechanical integrity test will be performed.

(2) The owner or operator must provide a subsequent report of any mechanical integrity test (MIT) on board form 2 regardless of whether or not the MIT is witnessed by a board representative. Subsequent reports are due within fifteen (15) days of the test unless remedial repairs are required, in which case a subsequent report is due within fifteen (15) days of completion of the remedial work.

(3) Subsequent reports will include the date of the test or the date on which work began, the manner or method of testing, the results of the test and any remedial work done or required to be performed to demonstrate mechanical integrity. The name, address, and telephone number of the company representative, consultant, or contractor that performed the test also must be

provided.

(4) Two (2) copies of any well logs, surveys, fluid analyses or any other reports run or made during the test or as part of any reworking or repair efforts must be submitted with the subsequent report.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE XIV EXEMPT AQUIFERS (1) The board may authorize the exemption of an aquifer from classification as an underground source of drinking water provided the aquifer:

(a) does not currently serve as a source of drinking water; and,

(b) cannot now and will not in the future serve as a source of drinking water because:

(i) the aquifer produces, or is capable of producing, mineral, hydrocarbon, or geothermal energy in commercial quantities, or;

(ii) The aquifer is situated at a depth or location which makes recovery of the water for drinking water purposes economically or technologically impractical, or;

(iii) The aquifer is so contaminated that it would be economically or technologically impractical to render the water fit for human consumption, or;

(iv) The aquifer is located above a class III well mining area subject to subsidence or catastrophic collapse; and,

(c) the total dissolved solids content of the groundwater is more than 3,000 and less than 10,000 milligrams per liter and the aquifer is not reasonably expected to supply a public water system.

(2) Exempt aquifers will include:

(a) any aquifer exempted by EPA prior to the effective date of these regulations;

(b) any aquifer exempted by the board as a part of a public hearing on an application for an enhanced recovery or area injection permit or other class II well;

(c) any aquifer proposed by the board for exemption as part of the UIC primacy delegation or subsequently proposed after notice and hearing, provided such exemption is approved by EPA.

AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE XV TUBINGLESS COMPLETIONS (1) After the effective date of these regulations, tubingless completions or annular injection wells, or wells not equipped to inject through tubing below a packer or other suitable sealing device in the annulus will not be permitted.

(2) Exceptions to this requirement will be granted for existing wells in a board approved enhanced recovery or pressure maintenance project where the applicant can demonstrate that it is practically or economically not feasible to equip such wells with tubing and packer.

(3) Mechanical integrity testing and monitoring requirements will be required more frequently and be more

stringent for wells permitted as an exception to this rule.
AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE XVI PERMIT CONDITIONS (1) Applications for injection wells approved by the board, or administrative approvals issued under the board's authority, are valid for the life of the injection well(s) unless revoked by the board for good cause, after notice and hearing.

(2) If administrative approval is requested, the board, or its authorized representative, may approve, modify, or reject any application submitted, stipulate the operating conditions, determine the appropriate test methods and test frequency, or limit the injection pressure and/or the quantity and quality of the fluids injected.

(3) Any operator or owner of an injection well may request an administrative review by the board, at its next regularly scheduled business meeting, of any modification, stipulation, or restriction placed on a permit by the board's staff. The injection well must be operated in compliance with the original permit conditions until the board's administrative review is complete.
AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

RULE XVII INJECTION FEE - WELL CLASSIFICATION (1) The board will collect an annual injection fee of $200.00 for each injection well existing upon the effective date of these regulations, and for each injection well permitted thereafter.

(2) Wells will be classified as injection wells, under these regulations, if: the well is actively used for injection; has been completed for injection service but is idle or shut-in; has been reported to EPA as an injection well; or has been permitted by the board as an injection well, whether or not actually placed into injection service. A well will no longer be classified as an injection well when: it has been permanently plugged in accordance with the board's rules; it has been re-completed or converted to other approved uses, but not simply idled or shut-in; the injection or disposal zone has been effectively isolated in a manner approved by the board; or the work proposed under an approved permit was not done or could not be accomplished.
AUTH: 82-11-111, MCA IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, and 82-11-137, MCA

3. The reason for the new rules is to implement the underground injection control (UIC) program for Class II injection wells under 42 U.S.C. Section 1425 of the Safe Drinking Water Act, and under Sections 82-11-111(5), 82-11-123(8), 82-11-127(2), and 82-11-137, Montana Code Annotated. The Montana UIC program is presently administered by EPA, through its Region VIII office in Denver, Colorado, and its Montana office in Helena, under the Safe Drinking Water Act and federal regulations found at 40 CFR Parts 124, 144, 146, and 147. The board is in the final stages of making a UIC program

primacy application to EPA for the delegation of authority to administer the UIC program for all existing and future Class II injection wells. The adoption of UIC rules by the Board is necessary under the Safe Drinking Water Act to qualify for state primacy of the UIC program.

4. Interested persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments also may be submitted to Timothy C. Fox, 2535 St. Johns Avenue, Billings, Montana 59102, by no later than 5:00 p.m., on Wednesday, May 6, 1992.

5. Warren H. Ross, Chairman of the Montana Board of Oil and Gas Conservation, has been designated to preside over and conduct the hearing.

Donald D. MacIntyre
Chief Legal Counsel

Dee Rickman, Executive Secretary
Board of Oil and Gas Conservation

Certified to the Secretary of State, March 16, 1992.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of NEW RULE I relating to delinquent tax accounts and non-collection actions	NOTICE OF THE PROPOSED ADOPTION of NEW RULE I relating to delinquent tax accounts and non-collection actions

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

RE-NOTICE This re-notice replaces the rule which was originally published in MAR No. 21 dated November 14, 1991. Due to comments and substantial changes the version published in MAR No. 21 will not be adopted.

1. On May 4, 1992, the Department of Revenue proposes to adopt new Rule I relating to delinquent tax accounts and non-collection actions.

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

RULE I DEPARTMENT DETERMINATION THAT COLLECTION OF DELINQUENT ACCOUNTS IS NOT COST EFFECTIVE AND SUBSEQUENT ACCOUNT WRITE OFF (1) The definitions which apply to the rule are:

(a) "Reasonable time" means within five years or the normal statute of limitation.

(b) "Write off of collection" means removal of an assessment from active department enforcement and monitoring procedures, and does not mean a tax assessment is forgiven.

(2) The department may write off any tax, penalty or interest, when it is determined that it is no longer cost effective to attempt further collection. The reason for such write off must be documented either in the system notes or the hard file. The decision of the department to write-off collection of accounts is based upon the following:

(a) the inability of the department to locate delinquent taxpayers in order to properly provide notification of assessments or their right to a hearing, within a reasonable time;

(b) the inability of the department to properly reduce the assessment to a judgment lien by filing a warrant for distraint within a reasonable time;

(c) the anticipated cost of collection significantly exceeds the projected amount of recovery in accordance with existing department collection policies;

(d) the time period for collection provided by law has expired; or

(e) the taxpayer is deceased and the department is unable to locate either an estate or pending probate, or any property or other assets vested in the taxpayers' name.

(3) Unpaid tax obligations, the collection of which is written off by the department are not forgiven and are still payable, but the department will no longer incur further expense in collecting these obligations. However, the department may resume active collection of an account if:

(a) the time period for collection of the assessment or a filed warrant for distraint has not expired; and

(b) the department received information which significantly changes the original basis for write-off as set forth in (2).

(4) The financial condition of a delinquent taxpayer is not an area of consideration for write-off of collection unless one or more of the elements set forth in (2) is present, or unless a properly completed closing agreement has been authorized.

(5) Upon the final decision of a court, the department shall write-off collection of any tax, penalty or interest upon which further collection has been barred by a decision of a court of proper jurisdiction of a United States Bankruptcy Court. AUTH: 15-1-201 MCA; IMP: 15-1-207 MCA.

3. Rule I is proposed to be adopted because the statement of intent in Senate Bill 110 contemplates rule-making to explicitly state the criteria for which a debt may be written off but not forgiven.

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

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

no later than April 24, 1992.

5. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Cleo Anderson at the above address no later than April 24, 1992.

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

CLEO ANDERSON
Rule Reviewer

DENIS ADAMS
Director of Revenue

Certified to Secretary of State March 16, 1992.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of New Rule I relating to Imposition of Generation-Skipping Transfer Tax	NOTICE OF THE PROPOSED ADOPTION of New Rule I relating to Imposition of Generation-Skipping Transfer Tax

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On May 4, 1992, the Department of Revenue proposes to adopt New Rule I relating to imposition of generation-skipping transfer tax.

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

Rule I IMPOSITION OF GENERATION-SKIPPING TRANSFER TAX

(1) The generation-skipping transfer tax provided by 72-16-1002, MCA, is equal to the maximum federal credit allowed.

(2) If property is held both within and without this state, the federal generation-skipping transfer tax must be prorated according to 72-16-802(2)(a) and (b), and 72-16-1002(2), MCA, to determine Montana's share of the tax.

(3) A duplicate of the federal form 706 must be filed with the department on or before the last day allowed for filing the federal form 706.

(4) Payment of the tax must be made on or before the deadline for filing the federal form 706.

AUTH: 72-16-1007, MCA; IMP: 72-16-1001 through 72-16-1006, MCA

3. New Rule I is proposed to clarify how the generation skipping credit has to be prorated when estate property is held in two or more states. The rule requires the credit to be paid to Montana on the same date as the federal requirement.

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

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

no later than April 24, 1992.

5. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Cleo Anderson at the above address no later than April 24, 1992.

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

CLEO ANDERSON
Rule Reviewer

DENIS ADAMS
Director of Revenue

Certified to Secretary of State March 16, 1992.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of NEW RULE I and RULE II; the AMENDMENT of ARM 42.12.101, 42.12.126, 42.12.128, 42.12.130, 42.12.208, 42.13.107; and REPEAL of ARM 42.11.101, 42.11.102, 42.11.112, 42.11.113, 42.11.114, 42.11.232, 42.11.242, 42.12.113, 42.12.203, 42.12.221, 42.13.104 and 42.13.303 relating to Liquor Licenses	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION of NEW RULE I and RULE II; the AMENDMENT of ARM 42.12.101, 42.12.126, 42.12.128, 42.12.130, 42.12.208, 42.13.107; and REPEAL of ARM 42.11.101, 42.11.102, 42.11.112, 42.11.113, 42.11.114, 42.11.232, 42.11.242, 42.12.113, 42.12.203, 42.12.221, 42.13.104 and 42.13.303 relating to Liquor Licenses

TO: All Interested Persons:

1. On April 16, 1992, at 9:00 a.m., a public hearing will be held in the Fourth Floor Conference Room of the Sam Mitchell Building, at Helena, Montana, to consider the Adoption of New Rule I and New Rule II; the Amendment of ARM 42.12.101, 42.12.126, 42.12.128, 42.12.130, 42.12.208 and 42.13.107; the Repeal of ARM 42.11.101, 42.11.102, 42.11.112, 42.11.113, 42.11.114, 42.11.232, 42.11.242, 42.12.113, 42.12.203, 42.12.221, 42.13.104, and 42.13.303 relating to liquor licenses.

2. The new rule I does not replace or modify any section currently found in the Administrative Rules of Montana. Rule II modifies ARM 42.12.101, 42.12.126, and 42.12.128.

3. Rules I and II as proposed to be adopted provide as follows:

RULE I HEARING PROCEDURE (1) When it is determined that a hearing is necessary the matter will be forwarded to the hearing examiner who will determine the time, date, and place for the hearing. The date and time of the hearing shall be during regular business hours. The place of the hearing shall be:

(a) for an in-person hearing, the hearing will be held in Helena, Montana; and

(b) for a telephonic hearing, the hearing will be initiated from Helena by the hearing examiner through a conference call to the telephone numbers provided by the parties.

(2) Prior to a hearing date, the hearing examiner's office shall issue a written notice of the date, time, and place of the hearing. At that time, a copy of the notice shall be provided to all interested parties.

AUTH: Sec. 16-1-303, MCA; IMP: Sec. 16-4-207, MCA.

RULE II DEFINITIONS As used in this sub-chapter the following definitions apply:

(1) "Parties" means a licensee; applicant; secured party; protestant; or attorney representing the licensee, applicant, secured party, protestor or other interested party.

(2) "Financial interest" means a direct financial sharing in the profits, the losses, or the liabilities incurred through the daily operation of the business conducted under the alcoholic beverage license.

(3) "Bona fide grocery store" means a retail establishment where a variety of articles of staple foodstuffs, including meats, vegetables, fruits, bakery items, dairy products, and household supplies are sold for consumption off the premises.

(4) "Special event" means any occasion including but not limited to picnics, fairs, conventions, receptions, civic or community enterprises, or sporting events lasting one or more consecutive days.

AUTH: Sec. 16-1-303, MCA; IMP: Sec. 16-4-207, MCA.

4. The Department is proposing to adopt Rule I because of an amendment to 16-4-207, MCA which allows for public hearings to be held in other areas besides Helena. The cost of travel by Department staff would become prohibitive in a very short time. Therefore, the Department is proposing this rule which will allow for a telephonic hearing.

The Department is proposing to adopt Rule II to combine the definitions found in various rules throughout this chapter.

5. ARM 42.12.101, 42.12.126, 42.12.128, 42.12.130, 42.12.208 and 42.13.107 are amended as follows:

42.12.101 APPLICATION FOR LICENSE (1) and (2) remain the same.

~~(3) The term "financial interest" means a direct financial sharing in the profits, the losses, or the liabilities incurred through the daily operation of the business conducted under the alcoholic beverage license.~~

AUTH: Sec. 16-1-303 MCA; IMP: 16-4-201 MCA.

42.12.126 OFF-PREMISE SALE OF BEER (1) remains the same.

(2) ~~For the purposes of this rule, a "bona fide grocery store" means a retail establishment where a variety of articles of staple foodstuffs, including meats, vegetables, fruits, bakery items, dairy products, and household supplies are sold for consumption off the premises.~~ A retail inventory of ~~approximately~~ $3,000 ~~divided proportionately among the required groups~~ will be used as a basis for determining whether an establishment qualifies as a "bona fide grocery store". The retail inventory of at least $3,000 must be maintained at all times. The retail inventory must include at least three different types of items in each of the following food groups; meats, vegetables, fruits, bakery items, dairy products and

household supplies. For example, three different types of items in the dairy products group would be a cheese, a milk and a butter but skim milk, chocolate milk and whole milk would not be considered as three different types of items in the dairy products group.

AUTH: Sec. 16-1-303 MCA; IMP: 16-4-105 MCA.

42.12.128 CATERING ENDORSEMENT (1) remains the same.

(2) ~~For purposes of this section, a "special event" means any occasion including but not limited to picnics, fairs, conventions, receptions, civic or community enterprises, or sporting events lasting one or more consecutive days.~~

~~(3)~~ The holder of a catering permit may sell and serve all-alcoholic beverages at retail only at a booth, stand, or other fixed place of business within the exhibition enclosure, confined to specified premises or designated areas described in the application, and approved by the division. A holder of any such permit, or his agents or employees may also sell and serve beer in the grandstand or bleacher.

(4) remains the same but is changed to (3).

AUTH: Sec. 16-1-303 MCA, IMP: 16-3-103 and 16-4-204 MCA.

42.12.130 DETERMINATION OF LICENSE QUOTA AREAS (1) Any applicant applying to the department for a new license or transfer of location of an existing license under the quota limitations provided for under 16-4-105 and 16-4-201, MCA, must submit to the department:

~~(a)~~ a sworn statement or affidavit from the local county or city surveyor, ~~attesting to the distance as measured from official city or county plats, accompanied by a copy of the plat indicating the points between which the measurement was made, and the distance; or~~

~~(b) a certified survey from a licensed land surveyor attesting to the exact distance, accompanied by the plats indicating the points which were measured, and the distance.~~ a private licensed land surveyor or local government official attesting to the location of the proposed premises.

(2) If the location of the ~~premises falls within the incorporated city boundaries or within a distance of 5 straight-line miles from the nearest corporate city boundary, the premise will be subject to that quota established for the "city" quota area.~~ proposed premises is not within the boundaries of an incorporated city, the official must attest to the exact distance from the nearest corporate boundary to the proposed premises as measured from official city or county plats.

(a) The distance must be measured by radial survey method from the nearest corporate city boundary to the nearest entrance of the proposed premises.

(3) ~~If the distance attested to is more than 5 straight-line miles from the nearest corporate city boundaries, the premise is considered under the quota established for the "county" quota area.~~ The sworn statement or affidavit must be

substantially in the following form:

CERTIFIED SURVEY AFFIDAVIT

Legal Description and/or Street Address of Proposed Premises:

I (individual's name), (title) have the knowledge and the authority to attest to the location of the premises known as (trade or business name).

The location of this premises is (within the incorporated boundaries of (name of city) or is (less than) five miles from the (name of city) corporate boundary or is more than five miles from any incorporated city within (name) county.

In the case of a location outside the corporate boundary include the following:

The distance was measured by radial survey method from the nearest corporate city boundary to the nearest entrance of the proposed premises. Plat(s)/map(s) verifying the location that indicate the points between which the measurement was made and the distance can be provided upon request.

In the case of a location inside the corporate boundary include the following:

The location of the premises was determined by examination of corporate plats or other official records.

A signature block, title of the parties, and the document must be dated and notarized.

AUTH: 16-1-303 MCA; IMP, 16-4-105, 16-4-201, 16-4-409, and 16-4-501, MCA.

42.12.208 TEMPORARY AUTHORITY (1) Temporary authority as provided by 16-4-404(6), MCA, may be issued only to an applicant who requests a transfer of ownership ~~and will~~. Temporary operating authority must not be granted on an application for an original license or ~~transfer of location only~~ when there is a proposed change of location for the existing licensed premises.

(2) through (6) remain the same.

AUTH: Sec. 16-1-303 MCA; IMP, Sec. 16-4-404 MCA.

42.13.107 EXTENSION OF TIME FOR NONUSE (1) Any licensee or applicant requesting an extension of time for nonuse of a license in accordance with 16-3-310, MCA, must furnish written evidence~~, certified to be correct~~ of the reasons for his failure to place the license in operation within the time prescribed.

(2) The department may grant up to three extensions of nonuse status in increments not exceeding 90 days. If the license is not put into use within one year, the department ~~may require a licensee~~ must consider the quota limitations when determining whether further extensions of nonuse status may be granted.

(a) If the license quota is not full the license may be granted extensions of nonuse status in excess of one year after the department determines the extensions are justified and the department has no indication that the community needs another license in use or no party has demonstrated an interest in operating an alcoholic beverages business.

(b) If the license quota is full the licensee shall be required to attend an informal conference conducted at the liquor division offices in Helena to afford the licensee or person(s) holding a security interest in the license the opportunity to present evidence establishing justification for any further extension of nonuse status. If the department determines additional nonuse time is justified a letter granting nonuse status will be issued. If the department determines continued nonuse status is not justified the department will issue a notice to lapse the license.

(c) If there are no quota limitations on the type of license issued nonuse status, 90 day extensions may be granted each time a written statement is received from the licensee, his representative or the secured party that includes an explanation of the need for nonuse.

(3) The department may deny requests for extensions of nonuse status if the licensee or those person(s) having a security interest in the license fail to establish any progress towards putting the license into ~~public~~ use.

(4) Requests for extension of nonuse status based on voluntary closure due to adverse economic conditions or repeated requests based on a proposed sale of a license will not constitute sufficient grounds for extending nonuse status. An earnest money receipt signed by the proposed purchaser is needed for proof of a pending sale and is required for justification of nonuse status if the quota is full and the license has been inactive over one year.

(5) remains the same.

AUTH: Sec. 16-1-303 MCA; IMP, Sec. 16-3-310 MCA.

6. The amendments to ARM 42.12.101, 42.12.126 and 42.12.128 are housekeeping amendments. The language being deleted here is being added to new Rule II.

ARM 42.12.130 is being amended to eliminate the requirement to submit to the department a certified survey.

ARM 42.12.208 is being amended because Section 16-4-404(6), MCA was amended to prohibit the issuance of temporary operating authority if there has been a change in location of an existing license.

ARM 42.13.107 is being amended to allow granting of a license nonuse status in excess of one year. The amendments distinguish between "quota" licenses and "nonquota" licenses. As "nonquota" licenses do not affect a new party's ability to apply and obtain a license, the rule allows indefinite nonuse status for nonquota licenses. If the license is located within a quota area, the department has a duty to the public to assure

that issued licenses are being used or are lapsed so other parties may apply and place a license into use in the area. In areas where the number of licenses issued exceed the quota limitations, the department has a responsibility to reduce the number of licenses issued, whenever possible, to reach the limitations set by the Montana Legislature. Section 16-3-310, MCA, provides for the possibility that a license may be inactive for reasons beyond the control of the licensee. Therefore, the Department also has a responsibility to the licensee to allow a reasonable amount of time to resolve the reason for inactivity of a license before determining a license must be lapsed for nonuse. The amendments to the rule provide reasonable conditions and requirements be met for extended nonuse status which allow the department to fulfill its responsibilities.

7. The Department is proposing to repeal the following rules:

42.11.101 BUSINESS HOURS FOR STATE LIQUOR STORES
AUTH: Sec. 16-1-303 MCA; IMP: Sec. 16-2-104 MCA.

42.11.102 LICENSEE'S AGENT FOR LIQUOR PURCHASES
AUTH: Sec. 16-1-303 MCA; IMP: Sec. 16-1-303 MCA.

42.11.112 DIVISION SHIPMENT ORDERS -- EXCEPTIONS
AUTH: Sec. 16-1-303 MCA; IMP: Secs. 16-1-302, 16-1-303, and 16-1-304 MCA.

42.11.113 SHIPPING LABELS
AUTH: Sec. 16-1-303 MCA; IMP: Secs. 16-1-302 and 16-1-303 MCA.

42.11.114 SHIPPING REQUIREMENTS
AUTH: Sec. 16-1-303 MCA; IMP: Secs. 16-1-302 and 16-1-303 MCA.

42.11.232 REPRESENTATIVE IDENTIFICATION CARDS
AUTH: Sec. 16-1-303 MCA; IMP: Sec. 16-3-103 MCA.

42.11.242 INFORMATION ON STATE LIQUOR STORE INVENTORIES
AUTH: Sec. 16-1-303 MCA; IMP: Sec. 16-3-103 MCA.

42.12.113 LICENSE FEES FOR COMBINED POPULATION AREAS
AUTH: Sec. 16-1-303 MCA; IMP: Secs. 16-4-105, 16-4-201, and 16-4-501 MCA.

42.12.203 INTER-QUOTA AREA TRANSFERS
AUTH: Sec. 16-1-303 MCA; IMP: 16-4-201 MCA.

42.12.221 PENALTIES FOR VIOLATION OF RULES OR STATUTES
AUTH: Sec. 16-1-303 MCA; IMP: Secs. 16-3-301, 16-4-406, 16-6-305, and 16-6-314 MCA.

42.13.104 POSTING OF LICENSES
AUTH: Sec. 16-1-303 MCA; IMP: Secs. 16-4-104 and 16-4-204 MCA.

42.13.303 BEER OR TABLE WINE STORAGE FACILITIES
AUTH: Sec. 16-1-303 MCA; IMP: Secs. 16-3-230, 16-4-102, 16-4-103, and 16-6-104 MCA.

8. The Department is proposing to repeal ARM 42.11.101, 42.11.102, 42.11.112, 42.11.242, 42.12.113, 42.12.203, 42.13.104, and 42.13.303 because they are redundant to the code or other rules.

The requirements found in ARM 42.11.113 and 42.11.114 are covered by state purchase orders in which specifications such as shipping labels can be and are conditions of purchase.

ARM 42.11.232 is unnecessary and difficult to administer. Repeal of this rule will eliminate the need for the division to issue identification cards.

ARM 42.12.221 reaches beyond the scope of the law it purports to implement by allowing penalties for violation of laws other than those related to alcoholic beverages. The sections of the code which the rule implements do not call for penalties for violations of laws not related to alcoholic beverages. Repeal of this rule leaves ARM 42.12.101 in effect which appropriately focuses penalties for violations of laws related to alcoholic beverages.

9. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to:

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

no later than May 1, 1992.

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

CLEO ANDERSON
Rule Reviewer

DENIS ADAMS
Director of Revenue

Certified to Secretary of State March 16, 1992.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.12.122 and the REPEAL of ARM 42.13.501 and 42.13.502 relating to Suitability of a Premises for Liquor Licenses	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT of ARM 42.12.122 and the REPEAL of ARM 42.13.501 and 42.13.502 relating to Suitability of a Premises for Liquor Licenses

TO: All Interested Persons:

1. On April 16, 1992, at 1:30 p.m., a public hearing will be held in the Fourth Floor Conference Room of the Sam Mitchell Building, at Helena, Montana, to consider the amendment of ARM 42.12.122 and the repeal of ARM 42.13.501 and 42.13.502 relating to suitability of a premises for liquor licenses.

2. ARM 42.12.122 as proposed to be amended provides as follows:

42.12.122 DETERMINATION OF SUITABILITY OF PREMISES (1) ~~In determining the suitability of the premises for carrying on the retail sale of alcoholic beverages, the department will consider:~~

~~(a) all matters pertaining to said premises and the business conducted therein;~~

~~(b) the general reputation of said place of business;~~

~~(c) the reputation and character (including criminal record, if any) of the employees conducting said business;~~

~~(d) whether or not the applicant personally conducts and supervises said business or whether the applicant entrusts the management and supervision to others;~~

~~(e) the health and sanitary conditions of the premises; and~~

~~(f) other factors required by 16-4-203 and 16-4-401, MCA.~~ A party applying for either a new retail license, the transfer of ownership of an existing retail license, the transfer of location of an existing retail license or approval of an alteration to a premises must provide the department with evidence of the suitability of the premises for the use intended.

(2) ~~In those instances where the applicant or licensee entrusts the day-to-day management and supervision of the business to others, he/she shall file with the liquor division an employment agreement, on a form to be furnished by the division, setting out the salary, the date of employment, and other information as the division deems necessary.~~

The premises must be considered suitable for the retail sale of alcoholic beverages if:

(a) It meets the standards of the department of health and environmental sciences; the department of commerce, building

codes bureau; and the state fire marshall's office in the fire prevention and investigation bureau of the department of justice; or their delegated representatives.

(i) A license issued for off-premises consumption of beer and/or table wine must meet the standards for an establishment operated as a grocery store or a drug store licensed as a pharmacy;

(ii) A license issued for on-premises consumption of beer must meet the standards for an establishment operated as a bar or tavern;

(iii) A license issued for on-premises consumption of beer and wine must meet the standards for an establishment operated as either a restaurant or a prepared food business; and

(iv) A license issued for on-premises consumption of all-alcoholic beverages must meet the requirements for a bar or tavern.

(b) The investigator can easily ascertain the type of alcoholic beverages business that is being conducted on the premises due to indoor and outdoor advertising, signage and the general layout and atmosphere of the premises to be licensed. The two circumstances to be ascertained are:

(i) A beer and/or table wine license issued for off-premises consumption operates at a premises recognizable as a grocery store or a pharmacy; and

(ii) A license issued for on-premises consumption operates at a premises recognizable as a restaurant, bar or tavern having a bar preparation area and sufficient seating, not less than 12 seats at the bar, tables or booths, to encourage patrons to remain on the premises and consume the alcoholic beverages sold by the drink.

(c) A variety of alcoholic beverages are advertised and displayed as being available for purchase.

(d) The premises is open for business on a regular basis so not to be considered a license on nonuse status.

(e) The layout of the premises allows for licensee and/or employee only control over the preparation, sale, service and distribution of alcoholic beverages.

(f) The investigator can verify to the department that the dimensions shown on the floor plan accurately represents the physical layout of the premises.

(g) The applicant has demonstrated adequate safeguards are in place to prevent the sale of alcoholic beverages to minors and intoxicated persons.

(h) The premises to be used for the on-premises consumption of alcoholic beverages, is physically separated by four permanent walls and is without inside access from any other business conducted in the building, except businesses which are directly related to the on-premises consumption of alcoholic beverages, such as a hotel or restaurant.

(i) The premises is not within a fifty foot radius of gasoline pumps.

(j) The provisions of subsection (3) are not violated.

~~(3) Premises shall not be considered suitable for the issuance of either all-beverage or retail beer licenses unless the equipment and facilities of the premises comply with the standards of ARM 16.10.201 through 16.10.251. Premises shall not be considered suitable which, in the opinion of the department, are not sanitary and safe for occupancy and use as an establishment dispensing alcoholic beverages which would constitute a menace to the health and safety of the patrons or of the public.~~ The premises cannot be considered suitable for the retail sale of alcoholic beverages if:

(a) Local government zoning restrictions or ordinances prohibit the sale and/or consumption of alcohol at the location of the premises.

(b) The location is off regular police beats and cannot be properly policed by local authorities.

(c) The service of alcohol is handled by the customer without the direct involvement of the licensee or their employees such as:

(i) alcoholic beverages provided the customer through automatic dispensing or vending machines; or

(ii) self service beer tap.

(d) The on-premises operation is not physically separated from other businesses operated in the same building that are unrelated to the business of retail on-premises alcoholic beverages consumption, such as a grocery store, laundromat, clothing store, hardware store, flower shop, a nursery or preschool.

(e) The on-premises operation is within a fifty foot radius of gasoline pumps;

(f) The operator of the alcoholic beverages business intends to conduct some or all of the sale of alcoholic beverages through the use of a drive-up window.

(4) Premises currently licensed that do not meet the suitability standards would be required to meet the above standards when requesting the department to approve an application for a transfer of ownership, and/or location, or a request to remodel the existing licensed premises. But in no case, may premises that do not meet the suitability standard continue to operate after January 1, 1995.

AUTH: Sec. 16-1-303 MCA; IMP, Sec. 16-4-402 MCA; 16-4-404, 16-4-405, MCA.

3. The department is proposing to amend ARM 42.12.122 because one of the requirements to obtain a gaming license is ownership of an on-premises consumption alcoholic beverages license. Some individuals have no interest in selling alcoholic beverages but must obtain a license to operate a gaming business. Section 16-3-310, MCA, requires a license be used in a "going establishment" or it lapses. Section 16-4-404(5)(a)(iv), MCA, states a premises must be "suited for the retail alcoholic beverages business . . ." The department must determine whether a premises is suitable for carrying on the

type of business for which it is to be licensed. It is the department's position that the license must be used and used for its intended purpose. There are basically two different types of retail licensed businesses, one that sells alcohol for off-premises consumption and one that sells alcohol for on-premises consumption. These types of businesses have different premises requirements that must be evident in order to serve the public in the manner intended by the type of license issued. The proposed rule will clarify the elements that must be present for the department to consider the premises suitable. Amendments to ARM 42.12.122 consider a premises upon which alcoholic beverages are sold through the use of a drive-up window as unsuitable.

4. The department proposes to repeal the following rules:

42.13.501 DRIVEUP WINDOWS, found at page 1351 of the Administrative Rules of Montana.
AUTH: Sec. 16-1-303 MCA, IMP: Sec. 16-3-303 MCA.

42.13.502 OPERATION OF DRIVEUP WINDOWS, found at page 1351 of the Administrative Rules of Montana.
AUTH: Sec. 16-1-303 MCA; IMP: Sec. 16-3-303 MCA.

5. The department is proposing to repeal ARM 42.13.501 and 42.13.502 in order to avoid contradictory language with the amendments made to ARM 42.12.122.

6. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to:

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

no later than May 8, 1992.

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

Cleo Anderson
CLEO ANDERSON
Rule Reviewer

Denis Adams
DENIS ADAMS
Director of Revenue

Certified to Secretary of State March 16, 1992.

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

In the matter of the adoption of rules I through VII and the amendment of rule 46.12.1902 pertaining to targeted case management for children and adolescents	))))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF RULES I THROUGH VII AND THE AMENDMENT OF RULE 46.12.1902 PERTAINING TO TARGETED CASE MANAGEMENT FOR CHILDREN AND ADOLESCENTS

TO: All Interested Persons

1. On April 21, 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 adoption of rules I through VII and the amendment of rule 46.12.1902 pertaining to targeted case management for children and adolescents.

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

[RULE I] CASE MANAGEMENT SERVICES FOR PERSONS UNDER EIGHTEEN YEARS OF AGE WITH SEVERE EMOTIONAL DISTURBANCE, DEFINITIONS (1) "Advocacy" means the act of enhancing parent or surrogate parent involvement in the planning and delivery of services for a client, and of empowering the client to speak or act on behalf of self whenever possible. The case manager speaks or acts on the client's behalf when the client or the parent is unable to carry out this role.

(2) "Assessment" means the act of identifying the resources and services needed to carry out the therapeutic case plan developed with the assistance of the client or the parent or the surrogate parent. Assessment includes identifying the strengths, abilities, potentials, skills and aspirations of the client and the client's family. This is not a psychiatric, medical or other specialized evaluation which is traditionally completed by other qualified professionals. Assessment enables the case manager to determine the nature and extent of brokering, coordination, transportation and advocacy needed.

(3) "Case planning" means the development of a written individualized case management plan for the client which is arrived at by the case manager with participation of the parent or the surrogate parent, the client advocate and the client.

(4) "Crisis assistance and intervention" means the act of assessing the nature and severity of the client's crisis, identifying appropriate resources to provide the support service which will alleviate the crisis, and arranging for

delivery of services in a timely manner. Crisis assistance and intervention does not include direct provision of service to eliminate or stabilize the client or the client's family in crisis.

(5) "Monitoring" means the ongoing act of assessing the impact of services being provided to a client according to the established case plan, identifying services included in the plan but not currently provided, and the reasons for services not being provided, and ensuring that the services are provided. Monitoring includes identifying needed changes and the provision of reports or feedback to the providers, the client and the client's family.

(6) "Record maintenance" means the act of recording essential information promptly in client files to document the provision of case management services. This information must be in a form which can be easily understood by the client and professionals.

(7) "Service coordination" means the act of linking the client, the parent or family members with service providers and facilitating development of service resources.

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

[RULE II] CASE MANAGEMENT SERVICES FOR PERSONS UNDER EIGHTEEN YEARS OF AGE WITH SEVERE EMOTIONAL DISTURBANCE, ELIGIBILITY (1) A person is eligible for case management as a person under eighteen years of age with severe emotional disturbance if the person:

(a) is receiving medicaid;

(b) has not reached 18 years of age, and

(c) has been determined to be a person with severe emotional disturbance.

(2) A person with severe emotional disturbance is a person who:

(a) demonstrates a need for specialized services from two or more human service programs due to emotional disturbance; and

(b) the person meets one of the two following conditions:

(i) the person has a DSM-III-R diagnoses mental disorder included in subsection (3) diagnosed by a certified or licensed mental health professional, and the person consistently and persistently demonstrates one of the following characteristics:

(A) the person has failed to establish or maintain interpersonal relationships appropriate to the person's developmental stage and cultural environment;

(B) the person displays behavior inappropriate to the person's developmental stage and cultural environment;

(C) the person fails to demonstrate a range or appropriateness of emotion or mood appropriate to the person's developmental stage and cultural environment;

(D) the person displays disruptive behavior which leads to isolation in or from school, home, therapeutic or recreation settings; or

(E) the person displays behavior sufficiently intense or severe to be considered seriously detrimental to:

(I) the person's growth, development or welfare; or

(II) the safety or welfare of others.

(ii) the person has no DSM-III-R diagnosis but exhibits severe emotional and/or organic impairment which:

(A) manifests as emotional or behavioral symptoms or disturbance;

(B) the symptoms or disturbance have been present for at least six months or are expected to continue for a period over six months; and

(C) the symptoms or disturbance are consistently and persistently demonstrated by one of the characteristics set forth in subsections (i)(A) through (E).

(3) DSM-III-R diagnoses necessary for categorization as seriously emotionally disturbed include:

(a) childhood schizophrenia (295);

(b) mood disorders (296.2, 296.3, 296.4, 296.5, 296.6, 300.40, 301.1, 301.13);

(c) pervasive developmental disorder not otherwise specified (299.80);

(d) multiple personality disorder (300.14);

(e) personality disorders (301.40, 301.50, 301.81, 301.84);

(f) sexual disorders (302.20, 302.3, 302.84, 302.89)

(g) life threatening anorexia nervosa (307.10) and bulimia nervosa (307.51);

(h) separation anxiety disorder (309.21);

(i) posttraumatic stress disorder (309.89);

(j) kleptomania (312.32);

(k) pyromania (312.33);

(l) impulse control disorder (312.34);

(m) trichotillomania (312.39);

(n) overanxious disorder (313.00);

(o) oppositional defiant disorder (313.81);

(p) identity disorder (313.82);

(q) reactive attachment disorder (313.89); or

(r) severe attention deficit hyperactivity disorder (314.01).

(4) A person with primary problems of developmental disability, substance abuse or chemical dependency does not have severe emotional disturbance unless the person additionally exhibits behavior resulting from emotional disturbance.

(5) A person who is a victim of sexual or physical abuse has severe emotional disturbance when the abuse results in emotional disturbance manifested by the characteristics described in subsection (2). A person with a character and personality disorder including sexual behaviors which is abnormal and prohibited by statute does not have severe emotional disturbance unless the behavior results from emotional disturbance.

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

[RULE III] CASE MANAGEMENT SERVICES FOR PERSONS UNDER EIGHTEEN YEARS OF AGE WITH SEVERE EMOTIONAL DISTURBANCE, SERVICE COVERAGE (1) Reimbursable case management services for persons under 18 years of age with severe emotional disturbance are:

(a) assessment;
(b) case planning;
(c) crisis assistance and intervention;
(d) monitoring;
(e) record maintenance;
(f) care coordination, referral and advocacy; and
(g) resource development.

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

[RULE IV] CASE MANAGEMENT SERVICES FOR PERSONS UNDER EIGHTEEN YEARS OF AGE WITH SEVERE EMOTIONAL DISTURBANCE, CASE MANAGEMENT PLAN (1) A case management plan must:

(a) identify measurable objectives for the client and the client's family;

(b) include an objective to serve the client in the least restrictive and most culturally appropriate therapeutic environment possible for the client which is also directed toward facilitating preservation of the client in the family unit, or preventing out-of-community placement or facilitating the client's return from acute or residential psychiatric care;

(c) specify strategies to achieve defined objectives;

(d) identify the strengths and potentials of the client and the client's family which will be a base upon which coordinated services will be provided;

(e) identify agencies, service providers and contracts which will assist in meeting the objectives and specify how they will assist;

(f) identify natural, family and community supports to be utilized and developed in achieving defined objectives; and

(g) identify the role and duties of the client, the parent or the surrogate parent and all participants in the delivery of a comprehensive and coordinated service to the client and the client's family and specify monitoring procedures and timeframes.

(2) Objectives in a case management plan must have an identified date of review no more than every 90 days after the plan date. Plans must be kept current and revised to reflect changes in client goals and needs, the services provided to the client, and provider changes of responsibility.

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

[RULE V] CASE MANAGEMENT SERVICES FOR PERSONS UNDER EIGHTEEN YEARS OF AGE WITH SEVERE EMOTIONAL DISTURBANCE, PROVIDER REQUIREMENTS (1) These requirements are in addition to those requirements provided in ARM 46.12.301 through 309.

(2) Case management services for persons under 18 years of age with severe emotional disturbance must be provided by a licensed mental health center that is under contract with the Montana department of corrections and human services to provide mental health services, or in cases where the community mental health center is unwilling or unable to provide the required case management services, the service may be provided by a provider designated by and under contract with the department of corrections and human services.

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

[RULE VI] CASE MANAGEMENT SERVICES FOR PERSONS UNDER EIGHTEEN YEARS OF AGE WITH SEVERE EMOTIONAL DISTURBANCE, GEOGRAPHICAL COVERAGE (1) Case management services for persons under 18 years of age with severe emotional disturbance are available only in the geographic areas beginning on the effective dates specified as follows:

(a) Missoula county - May 15, 1992;

(b) Helena and Helena valley of Lewis and Clark county - May 15, 1992;

(c) Great Falls (city) - July 1, 1992;

(d) Havre (city) - July 1, 1992;

(e) Gallatin county - August 1, 1992;

(f) Park county - August 1, 1992; and

(g) Silver Bow county - August 1, 1992.

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

[RULE VII] CASE MANAGEMENT SERVICES FOR PERSONS UNDER EIGHTEEN YEARS OF AGE WITH SEVERE EMOTIONAL DISTURBANCE, REIMBURSEMENT (1) Case management services provided for persons under 18 years of age with severe emotional disturbance and their families are reimbursed based on a cost per service unit. A service unit is a fifteen minute increment.

(2) The department will pay the lower of the following for case management services for persons under 18 years of age with severe emotional disturbance:

(a) the provider's actual submitted charge for services; or

(b) the fee schedule in subsection (3).

(3) The fee schedule for case management services for persons under 18 years of age with severe emotional disturbance is the following:

(a) for individual case management services:

each 15 minute unit $9.54

(b) for group case management services:
each 15 minute unit $3.18

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

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

46.12.1902 CASE MANAGEMENT SERVICES, GENERAL ELIGIBILITY
Subsections (1) and (1)(a) remain the same.
(b) adults with severe and disabling mental illness; ~~and~~
(c) persons age 16 and over with developmental disabilities~~.~~; and
(d) persons under 18 years of age with severe emotional disturbance.

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

4. The proposed rules would implement medicaid case management services for persons under 18 years of age who have severe emotional disturbances. The Consolidated Omnibus Budget Reconciliation Act of 1985 provided that states could within their discretion implement case management services for certain groups under the medicaid program. Case management services are to assist medicaid recipients in gaining access to medical, social and other services necessary to their well-being. The Montana Legislature at 53-6-101(3)(n), MCA has specifically listed case management services as a discretionary service of the medicaid program.

In Montana, medicaid case management services are currently available to high risk pregnant women, adults with severe and disabling mental illness and persons age 16 and older with developmental disabilities. The proposed rules will implement medicaid case management services for persons under 18 years of age with severe emotional disturbances.

The proposed rules are necessary to improve the lives of severely emotionally disturbed youth. The state does not have an established unified comprehensive system of community services for such youth. The implementation of case management services under the proposed rules will establish a system of case managers for such youth. The case managers will identify youth in need of services, locate services for those youth, and coordinate the delivery of services to them. This unified system of case management will bring the disparate services that are available to bear on the problems of such youth in a unified approach without having to restructure the delivery systems.

ARM 46.12.1902 must be amended to add persons under 18 years of age with severe emotional disturbance to the covered groups under the medicaid case management services.

The proposed rules encompass definitions, eligibility, service coverage, case management plan, provider requirements, geographical coverage, and reimbursement. The rules provide definitions, limitations, requirements and features of provider performance and reimbursement that are necessary for the operation of the program.

The eligibility rule, [Rule II], is necessary to define the persons to be served categorically and to detail the conditions that constitute severe emotional disturbance. The service coverage rule, [Rule III], is necessary to specify the services that may be provided under case management. The case management plan rule, [Rule VI], is necessary to provide for the elements of the case plan that are necessary to the conduct of case management. The provider requirements rule, [Rule V], is necessary to specify the type of providers that may deliver the services. The geographical coverage rule, [Rule VI], is necessary to limit the availability of the services in time and place so that the program is operational only within the parameters of its resources. The reimbursement rule, [Rule VII], is necessary to define the unit of reimbursement and to provide for an appropriate rate of reimbursement.

5. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to 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 April 23, 1992.

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

Dawn Sliva
Rule Reviewer

John E. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State March 16, 1992.

BEFORE THE BOARD OF ALTERNATIVE HEALTH CARE
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the adoption of new rules pertaining to alternative health care	)))	NOTICE OF ADOPTION OF NEW RULES PERTAINING TO ALTERNATIVE HEALTH CARE

TO: All Interested Persons:

1. On January 30, 1992, the Board of Alternative Health Care published a notice of public hearing concerning the proposed adoption of new rules pertaining to alternative health care, at page 105, 1992 Montana Administrative Register, issue number 2.

2. The Board has adopted new rules I (8.4.101), II (8.4.201), III (8.4.202), IV (8.4.401), V (8.4.402), VII (8.4.404) and VIII (8.4.301) exactly as proposed. The Board has adopted new rules VI (8.4.403) and IX (8.4.302) as proposed but with the following changes:

"8.4.403 LICENSING BY ENDORSEMENT (1) through (1)(e) will remain the same as proposed.

(f) The candidate holding an inactive or otherwise non-current license must meet the above requirements, plus all other requirements of section 37-26-404(1)(b), MCA, and this chapter, including the APPLICABLE requirements that:

(i) through (iii) will remain the same as proposed."

Auth: Sec. 37-26-201, MCA; IMP, Sec. 37-26-404, MCA

"8.4.302 RENEWALS (1) through (3) will remain the same as proposed.

(4) Any person failing to ~~make restoration of~~ RENEW a license within six months of the expiration date will be considered to have forfeited the license. The licensee ~~will then be required to~~ SHALL reapply to the board in order to be relicensed to practice naturopathic medicine or direct entry midwifery in this state."

Auth: Sec. 37-26-201, 37-27-105, MCA; IMP, Sec. 37-26-201, 37-27-105, MCA

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

COMMENT: Use of the term "physical medicine" in new rule IV (8.4.401) has not been defined so that the scope of this practice could be known to the public.

RESPONSE: The proposed rule lists educational course requirements only, and is not a scope of practice rule. The language was adopted from the accrediting body's standards, and is not intended to define terms, but simply to list the curriculum courses required from a naturopathic medical education.

COMMENT: Fees are too high, especially as compared to other licensing professions in Montana.

RESPONSE: Comparison with other licensing fees, such as acupuncturists, does not give an accurate picture, as the naturopathic license is not subsidized by another board. The board must set fees by determining the number of licensees available to support the board. The fiscal note before the Legislature contemplated a small number of licensees. The fees can be adjusted at a later date if a greater number of licensees exists.

COMMENT: There should be flexibility in the rules for older graduates.

RESPONSE: The Legislature did not allow a grandfather clause for older graduates of various naturopathic colleges. The rules instead set forth a curriculum standard for naturopathic colleges, and any applicant whose naturopathic education meets the standards is eligible to apply for licensure, regardless of age or date of degree.

COMMENT: The minimum naturopathic education standards in the proposed rules are similar to conventional medical education standards, but an interpretive measure should be embodied.

RESPONSE: The definition of a "naturopath" cannot be changed to fit medical degrees of any type and from any country within it. Persons holding a medical M.D. degree or background should work through a M.D. licensing board if licensing is desired. The actual name of the degree awarded does not preclude a naturopathic license if all the application requirements are met.

COMMENT: Proposed board rules do not address pre-existing legitimate practitioners by endorsement rules.

RESPONSE: The naturopathic licensing law does not state that naturopathic medicine is the same as other types of medical practices. Pre-existing practitioners must therefore be evaluated under the naturopathic standards set forth in the rules. All endorsement authority is set forth in the naturopathic law, which may be referred to for requirements.

COMMENT: Proposed rule VI(1)(f) [8.4.403(1)(f)] should change the reference to "this chapter" to narrow the reference or substitute statutory citations.

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

COMMENT: Rule VII (8.4.404) should contain an additional implemented section citation.

RESPONSE: The board concurs with the comment and will amend the rule to include the additional citation to 37-26-201, MCA.

COMMENT: The 50% late renewal fee should comply with the requirement that fees must be commensurate with costs.

RESPONSE: Costs associated with late renewals include cost of staff time to design and implement computer programs to track late renewals; staff time and materials to generate

late renewal notices and lists; postage costs for certified mailing of late renewal notices; staff time to track late renewal licensees, handle phone calls, and additional correspondence; board member time for dealing with unrenewed or late licenses; staff investigator or attorney time for investigation of licensees practicing without a current license. The fee is therefore commensurate with costs of late renewals.

COMMENT: Rule IX (8.4.302) should use the word "renewal" in place of "make restoration of," for clarity.
RESPONSE: The board concurs with the comment and will amend the rule as shown above.

COMMENT: Rule IX (8.4.302) should substitute "shall" for "will then be required to," to make the reapplication requirement more self-implementing.
RESPONSE: The board concurs with the comment and will amend the rule as shown above.

COMMENT: The statement of reasonable necessity for the rules should provide more details of the reason particular rules are being proposed.
RESPONSE: The board concurs with the comment and will amend the statement of reasonable necessity as follows:

"These rules are being proposed to implement Chapter 26 and Chapter 27 of Title 37 mandated by the 1991 Montana Legislature. ARM 8.4.401 sets forth naturopathic medical education standards for evaluation of diverse degrees and curricula.
ARM 8.4.402 sets forth the application requirements for licensing by examination.
ARM 8.4.403 sets forth the requirements for licensing by endorsement.
ARM 8.4.404 sets forth requirements for certificate of specialty practice of naturopathic childbirth attendance.
ARM 8.4.301 sets forth fees for original licensure and renewal.
ARM 8.4.302 sets forth procedures for renewal and penalties for late renewal of licenses."

BOARD OF ALTERNATIVE HEALTH CARE
DR. MICHAEL BERGKAMP, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, March 16, 1992.

BEFORE THE BOARD OF PSYCHOLOGISTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the adoption of new rules pertaining to continuing education requirements	))))	NOTICE OF ADOPTION OF NEW RULES PERTAINING TO THE PRACTICE OF PSYCHOLOGY

TO: All Interested Persons:

1. On December 26, 1991, the Board of Psychologists published a notice of public hearing to consider the adoption of new rules pertaining to continuing education at page 2541, 1991 Montana Administrative Register, issue number 24. The public hearing was held on January 21, 1992, at 9:00 a.m. in the Social and Rehabilitation Services Auditorium in Helena, Montana.

2. The Board has adopted new rules I (8.52.701), II (8.52.702) and III (8.52.703) as proposed but with the following changes:

"8.52.701 CONTINUING EDUCATION REQUIREMENTS (1) through (3)(b) will remain the same as proposed.

(c) All approved formal continuing education courses must issue a program ~~and~~ OR certificate of completion containing the following information:

(i) through (d) will remain the same as proposed."

Auth: Sec. 37-17-202, MCA; IMP, Sec. 37-17-202, MCA

"8.52.702 CONTINUING EDUCATION PROGRAM OPTIONS

(1) Acceptable continuing education may be chosen from subsections (a), (b) or (c) below. ~~Up to~~ NO MORE THAN twenty of the total continuing education units required can be met by subsection (b) and up to 15 continuing education units can be met by subsection (c).

(a)(i) and (ii) will remain the same as proposed.

(iii) Any other specific activities, i.e. audio tapes or conference/workshops, meeting requirements of ARM 8.52.701(3)(a) through (c) above WILL QUALIFY FOR CONTINUING EDUCATION CREDIT.

(b)(i) Documentation of successful completion of the ABPP examination may be submitted in fulfillment of NO MORE THAN 20 continuing education units.

(ii) through (iii) will remain the same as proposed.

(iv) The following professional activities that meet criteria specified in ARM 8.52.701(3)(a) and (b) above may be submitted in fulfillment of NO MORE THAN 10 continuing education units:

(A) through (D) will remain the same as proposed.

(c) ~~For a maximum of~~ NO MORE THAN 15 continuing education units personal growth activities that meet the following criteria:

(i) will remain the same as proposed.

(A) through (D) will remain the same as proposed.

(ii) will remain the same as proposed.

(A) through (D) will remain the same as proposed.

(iii) SPECIFIC SUPERVISION THAT:
(A) IS OBTAINED IN A FORMAL SETTING.
(B) IS CONDUCTED BY A CERTIFIED OR LICENSED PROFESSIONAL.
(C) HAS A FEE CHARGED FOR SERVICES RENDERED.
(D) IS DOCUMENTED BY STATING THE NUMBER OF CONTACT HOURS ON THE PROFESSIONAL'S LETTERHEAD."
Auth: Sec. 37-17-202, MCA; IMP, Sec. 37-17-202, MCA

"8.52.703 CONTINUING EDUCATION IMPLEMENTATION
(1) through (2)(b) will remain the same.
(c) No continuing education is required for licensees licensed less than one full calendar year on their first reporting date. Licensees licensed less than two full calendar years~~,~~ on the first reporting date shall submit 20 hours of continuing education.
(d) All licensed psychologists must submit to the board on the appropriate year's license renewal~~,~~ a report summarizing their continuing education activities. The board will review these reports prior to April 30 of the subsequent year and, IF APPROPRIATE, notify the licensee regarding his/her noncompliance. Licensees found to be in noncompliance with the requirement will be asked to submit to the board for approval~~,~~ a plan to complete the continuing education requirements for licensure. Prior to the next consecutive year's license renewal deadline, those licensees who were found to be in noncompliance will be formally reviewed to determine their eligibility for license renewal. Licensees, who at this time have not complied with continuing education requirements, will not be granted license renewal until they have fulfilled the board-approved plan to complete the requirements. Those not receiving notice from the board regarding their continuing education should assume satisfactory compliance. Notices will be considered properly mailed when addressed to the last known address on file in the board office. No continuing education used to complete delinquent continuing education plan requirements for licensure can be used to meet the continuing education requirements for the next continuing education reporting period.
(e) and (f) will remain the same as proposed."
Auth: Sec. 37-17-202, MCA; IMP, Sec. 37-17-202, MCA

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

COMMENT: The granting of continuing education credit for performing, presenting or publishing research; for presenting workshops in the field of psychology; and for individual and group psychotherapy does not directly bear on the practice of psychology as defined by Montana law.

RESPONSE: The activities noted are essential elements of the practice of psychology.

COMMENT: Information on qualifications of the presenter and presentation format are rarely provided in a continuing education program.

RESPONSE: The Board expects that such information will be provided to meet the requirements of the rules.

COMMENT: The submission of continuing education credit records with license renewals will put an unnecessary burden on licensees and the Board. A few audits per year should be enough to insure compliance.

RESPONSE: The Board will require the submission of continuing education information on simple forms which impose a minimal burden on licensees and the Board.

COMMENT: A specified number of credits should be allowed for one to one supervision which focuses on a particular case or type of case and follows the same over a period of time.

RESPONSE: The Board agrees and will amend the rule to allow credit for case supervision.

COMMENT: Personal growth is the key to being a good therapist. The maximum number of credits for personal growth activities should be increased.

RESPONSE: The Board has allowed a reasonable number of credits for personal growth activities. It is important that a licensee participate in a variety of other continuing education programs.

COMMENT: Personal growth activities should be expanded to include an approved format similar to that described for study groups.

RESPONSE: The rule already provides some guidance for participation in personal growth activities for continuing education. Further criteria are not necessary at this time.

COMMENT: Staff of the Administrative Code Committee commented on ARM 8.52.701(2). The comment stated that courses should be preapproved so licensees can have assurance that their registration fees would be paid for a course counting toward their continuing education requirement.

RESPONSE: The Board has developed a process for implementation of continuing education within budgetary constraints. The rules are specific enough to give notice to licensees of continuing education requirements. The Board will not deny approval of continuing education activities which conform according to the plain meaning of the rules.

The Board will randomly audit 5 percent of the continuing education reports submitted each year to assure compliance.

COMMENT: Staff of the Administrative Code Committee made a comment in reference to 8.52.703 stating that subsection (2)(d) should be clarified as to whether there can be a carryover of courses or credits to subsequent reporting periods. If carryover is allowed, a maximum number should be set for carryover credits.

RESPONSE: ARM 8.52.703 requires submission of 40 hours of continuing education credit for each two-year reporting period. The Board intends that there shall not be any carryover of courses or credits to subsequent reporting periods.

COMMENT: Notices of deficiencies in continuing education credits should be sent by registered mail with return receipt or with a reply form for the psychologist to acknowledge receipt of the notice.

RESPONSE: It is not necessary to specify in the rule that notices of deficiencies will be sent by registered mail or with a reply form but use of registered mail is standard procedure for the Board staff.

COMMENT: Language and grammar corrections were suggested.

RESPONSE: Most of the language and grammar corrections suggested are agreed to by the Board and the rules will be so amended. The Board would like to note that names of boards and associations are not capitalized within the text of rules.

COMMENT: One comment was received regarding ARM 8.52.702 stating more specific requirements for personal growth activities should be set forth such as 6-12 sessions in duration, self-motivated and not motivated by a work or legal requirement, and not crisis oriented or supportive in nature.

RESPONSE: It is not appropriate for the Board to inquire into the substance of therapy of licensees. The rule provides sufficient safeguards that such personal growth activities will be substantive and serious.

COMMENT: An alternative program category should be allowed for a psychologist to demonstrate that an unspecified activity contributes to their professional competence.

RESPONSE: The language of ARM 8.52.701 is sufficiently broad to allow a psychologist to submit a variety of activities for credit. For guidance the Board has provided a list of activities which "typically do not qualify for continuing education credit." Licensees may submit specific activities for credit upon consideration of the requirements of the rules.

COMMENT: A certificate of completion should not be required in ARM 8.52.701(3)(c) as it is sometimes unavailable; for example, in paper sessions.

RESPONSE: The Board expects that certificates of completion will become available to meet the needs of licensees as the continuing education requirement is implemented.

COMMENT: Credit should be given for completing examinations of other organizations than ABPP.

RESPONSE: The Board is authorizing credit for completion of the ABPP examination since its validity and professional value is already well established. The Board will consider the inclusion of other professional examinations in future rule amendments.

COMMENT: Continuing education programs may be unavailable outside of the major population centers of Montana.

RESPONSE: Although the availability of continuing education programs may be limited in rural areas, they will be available at numerous locations around the state. The rules provide for a variety of options which will not require travel, such as use of tapes or other resources. Substantial benefit is gained by the interaction of rural practitioners with psychologists in other areas.

BOARD OF PSYCHOLOGISTS
BARBARA ANN LOOBY, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, March 16, 1992.

**BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA**

In the matter of proposed amendments of Rule 8.86.301 as it relates to class I wholesale prices; and Rules 8.86.501, 8.86.503 and 8.86.504 as they relate to the quota rules	)))))	**NOTICE OF AMENDMENTS OF RULES 8.86.301-PRICING RULES RULE 8.86.501, 8.86.503 AND 8.86.504-QUOTA RULES** **DOCKET #11-91**

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

1. On January 16, 1992, the Board of Milk Control published notice of proposed adoption of rule 8.86.301(6)(h)(i),(ii),(iii),(v) and (15) as it relates to the class I wholesale price; and rules 8.86.501(1)(i), 8.86.503 and 8.6.504(1)(j) as they relate to the statewide pool and quota plan. Notice was published at page 3 of the 1992 Administrative Register, issue No. 1, as MAR NOTICE 8-86-44.

2. A hearing was held on February 19, 1992, at 9:00 a.m. in the Department of Transportation auditorium, 2701 Prospect Avenue, Helena, Montana. Seven persons appeared at the hearing to offer data, views or arguments, and all seven spoke in favor of various parts of the proposed amendments. Three persons were in opposition to various parts of the proposed amendments. The Bureau received pre-filed testimony from Country Classic Dairies which opposed all aspects of the proposed amendments to ARM 8.86.301, except that pertaining to changing the volume requirement in subsection (6)(h)(iii) and (v) from 500 gallons and 750 gallons respectively to 1,000 gallons.

3. Country Classic Dairies Inc. withdrew their petition prior to the hearing. [paragraph 5 of notice] Meadow Gold Dairies Inc. withdrew a portion of their petition prior to the hearing. [paragraph 7 of notice, 8.86.301(1)(h)(iii), last sentence, "Delivery to a retail store means delivery to a structure in one location or street address."] Clover Leaf Dairy Inc. and the Board of Milk Control voluntarily withdrew their proposals at the hearing because both were defective. [paragraphs 3 and 11 of notice]

4. After thoroughly considering all of the testimony and comments, the board is adopting ARM 8.86.501 exactly as proposed and adopting ARM 8.86.503 with the following change: (new matter underlined, deleted matter interlined)

"8.86.503 NEW PRODUCERS -- PERCENTAGE OF MILK SALES ASSIGNED TO QUOTA MILK

(1)-(2) same as proposed.

(3) The percentage of milk sales assigned to quota price under this rule to any one new eligible producer may not exceed 35% of the CURRENT PRODUCER MONTHLY average ~~monthly~~ production ~~of producers in Montana for the current month~~. (TOTAL QUOTA PRODUCTION FOR THE MONTH, DIVIDED BY THE NUMBER OF PRODUCERS IN PRODUCTION, TIMES 35%)"

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

5. Principal reasons given for adoption of the rules were as follows:

a. Previous rules did not solve all the problems and it was discovered there was need for further clarification.

b. There was a need to eliminate speculative aspects from the rule to avoid the abuse and restore the integrity to the plan.

c. There wasn't any opposition to the proposal.

6. After thoroughly considering all of the testimony and comments, the board is adopting ARM 8.86.504 exactly as proposed.

7. The authority for the rule is section 81-23-302, MCA, and the rule implements section 81-23-302, MCA.

8. Principal reasons given for adoption of the rule were as follows:

a. The rule is discriminatory as it provides two sets of rules for the same group of people.

b. The change would not affect the status quo on current revenue allocation amongst producers.

c. The Carnation producers have suffered a lot of economic hardship in the past and unless that restriction is lifted it will endanger Clover Leaf's future milk supply.

d. There was no opposition to the proposed change.

9. After thoroughly considering all of the testimony and comments, the board is adopting the Meadow Gold request to ARM 8.86.301 exactly as proposed except for the following language change: (new matter underlined, deleted matter interlined)

"8.86.301 PRICING RULES

(1)-(6)(h)(ii) remains the same.

(iii) The minimum wholesale price for fluid milk purchased by retail grocery stores at the distributor's dock will be calculated by multiplying the minimum retail price by a factor of seventy-eight percent (78%). All fluid milk purchased by retail grocery stores at the distributor's dock must be paid for within fifteen (15) days after invoicing.

Delivery of such fluid milk shall be FOB the distributor's dock. The retail grocery store can pick up milk at the distributor's dock with its own equipment or by a contract hauler retained by and paid by the retail grocery store or can have the milk delivered by the distributor. If the distributor delivers the milk to the retail grocery store a delivery charge based upon the cost of delivery, which shall be a minimum of three and one-half percent (3.5%) of the retail grocery store's invoice. The distributor shall not provide any service of any type to retail grocery stores purchasing milk pursuant to this subsection (iii). In order for a retail store to be eligible to purchase fluid milk products from a distributor at this pricing level, the retail grocery store must purchase a minimum of one thousand (1000) gallons of fluid milk products per week. ~~Delivery to a retail store means delivery to a structure in one location or street address.~~

(iv) remains the same.

(v) same as proposed.

(i)-(14)(b) remains the same."

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

10. Principal reasons given for adoption of the rule were as follows:

a. There was no testimony in opposition.

b. The change better enables processors to comply with the rule provisions when those rule provisions provide the flexibility to deal with weather related problems.

11. After thoroughly considering all of the testimony and comments, the board rejects the proposal requested by the Montana Jobber's Association for the following reasons:

a. Adoption of the language at the plant dock would create a definite advantage for one distributor and create a substantial disadvantage for other distributors.

b. Adoption of the language --"delivery to a retail store means delivery to a structure in one specific location or street address"-- would prohibit small retailers from banding together and obtaining efficiencies in volume in purchasing milk in order to obtain a lower price.

c. Adoption of the words --"separate wholesale grocery distribution center facility", and "single retail store facility"-- would prohibit retail stores from buying through purchasing agents or in groups to combine the size of their order for better buying power.

d. The adoption of b. and c. would prevent small stores from competing with large stores which would promote inefficiency, unfairness and chaos in the marketplace.

e. The objection to the 1,000 gallons/week as it appeared in both the drop price and the dock price of the Jobber's proposal was because it would cause the jobber's milk to be less competitive because dumps would be lower.

12. The following principal reasons urged for its adoption comes from the testimony of two individual jobbers and the counsel for the Jobber's Association:

a. The jobbers are at a distinct disadvantage under the recent system and they are just trying to improve their position.

b. Changes are an attempt to cleanup the ambiguity in the current regulations in order to make their intent clearer.

13. The principal reasons for the board's rejecting the reasons given for the adoption is as follows:

a. The board rejected the jobbers contention that the changes would cleanup the ambiguity in the rules. They felt it would cause more uncertainty.

b. The board agreed that the jobbers are at a certain disadvantage because of economics of scale, but they did not see any justification for amending the rule in a manner whereby the rule would be responsible for inflicting the iniquity.

MONTANA BOARD OF MILK CONTROL
MILTON J OLSEN, CHAIRMAN

BY: _____
Andy J. Poble, Deputy Director

BY: _____
Annie M. Bartos, Chief Legal Counsel

Certified to the Secretary of State March 16, 1992.

BEFORE THE BOARD OF CRIME CONTROL
DEPARTMENT OF JUSTICE
STATE OF MONTANA

In the Matter of the Amendment of Rules 23.14.101, 23.14.201 through 23.14.206 and 23.14.301 through 23.14.306 relating to Montana Board of Crime Control Grant Procedures	))))))	NOTICE OF THE AMENDMENT OF RULES 23.14.101, 23.14.201 THROUGH 23.14.206 AND 23.14.301 THROUGH 23.14.306

TO: All Interested Persons:

1. On January 16, 1992, the Board of Crime Control published notice of a proposed amendment to the following rules concerning grant procedures at page 16 of the 1992 Montana Administrative Register, issue number 1.

2. The agency has amended Rules 23.14.101, 23.14.202 through 23.14.206 and 23.14.301 through 23.14.306 MCA as proposed.

3. The agency has amended Rule 23.14.201 MCA with the following change which the staff of the legislative council recommended:

23.14.201 INCORPORATION OF MODEL RULES (1) The board ~~of crime control~~ adopts the attorney general's model procedural rules one (1) through ~~thirty-eight (38)~~ twenty-eight (28) ~~and all subsequent amendments to the model procedural rules,~~ and incorporates herein those rules by reference.

AUTH: 44-4-301 MCA. IMP: 44-4-301 MCA.

BOARD OF CRIME CONTROL
EDWIN L. HALL, Administrator

By: Edwin L. Hall
EDWIN L. HALL, Administrator
BOARD OF CRIME CONTROL
DEPARTMENT OF JUSTICE

Certified to the Secretary of State, 3-10-92

Rule Reviewer

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

In the matter of the adoption of New Rules I through XIV implementing a recreational access program for state lands and amendment of ARM 26.3.156 pertaining to weeds, pests, and fire protection on state lands	NOTICE OF ADOPTION OF RECREATIONAL ACCESS RULES AND AMENDMENT OF ARM 26.3.156 RELATING TO WEEDS, PESTS, AND FIRE PROTECTION

TO: All Interested Persons:

1. On October 31, 1991, the Board of Land Commissioners and Department of State Lands published notice of proposed adoption of rules concerning recreational use of the state lands and proposed amendment of ARM 26.3.156 concerning weeds, pests, and fire protection at page 1986 of the 1991 Montana Administrative Register, Issue Number 20.

2. The agency has amended ARM 26.3.156 as proposed and has adopted the new rules with the following changes:

RULE I. (ARM 26.3.180) OVERVIEW OF RECREATIONAL USE RULES (1) Rules IV through XIV regulate the recreational use of state lands administered by the department of state lands. These lands are commonly referred to as "trust lands" and appear in light blue on most land status maps.

(2) Recreational use is divided into ~~two~~ three categories as follows:

(a) General recreational use - This use is generally defined as licensed hunting, ~~and~~ hunting related activities, and fishing. ~~and~~ This is more specifically defined in Rule III~~(10)~~ (11). It requires purchase of a recreational use license. Detailed procedures and restrictions are contained in Rules IV through XIII.

(b) Special recreational use - This use is defined in Rule III~~(19)~~ (21) and requires a special recreational use license. These kinds of uses include commercial or concentrated use as defined in 77-1-101(5), MCA. Detailed provisions are contained in Rule XIV.

(c) Other recreational use - Types of recreational use not within the definitions of general recreational use or special recreational use, such as hiking, do not require a recreational use or special recreational use license from the department. On leased state land, however, permission must be secured in accordance with ARM 26.3.157. (AUTH: Secs. 77-1-209, 77-1-804, 77-1-806, MCA; IMP, Secs. 77-1-801 through 77-1-810, MCA.)

RULE II. (ARM 26.3.181) ADMINISTRATION OF RECREATION ON STATE LANDS ADMINISTERED BY THE DEPARTMENT OF STATE LANDS (1) Under Article X, Section 4 of the Montana Constitution,

the board of land commissioners has the duty and authority to manage state trust lands under regulations provided in law. Under 77-1-301, MCA, the department of state lands manages state lands under the direction of the board. Section 77-1-203(3), MCA, opens state lands administered by the board to general recreational use subject to legal access and to closures and restrictions.

(2) Lands owned by the state that are not subject to [these rules] are:

(a) lands owned by the department of fish, wildlife and parks, including:

(i) those portions of game ranges and ~~game~~ wildlife management areas that are owned by the department of fish, wildlife and parks;

(ii) state parks;

(iii) fishing access sites; and

(iv) lands leased by the department of fish, wildlife and parks to private individuals as cabinsites;

(b) lands subject to lease, license, or easement from the department to the department of fish, wildlife and parks or a city, county, or consolidated city-county government for the following purposes:

(i) ~~state~~ public parks, and

(ii) fishing access sites;

(c) the surface, beds and banks of rivers, streams, and lakes that are ~~navigable~~ open to the general public for recreational purposes under the stream access law;

(d) highways and highway rights-of-way;

(e) lands administered by the department of corrections and human services [formerly the department of institutions];

(f) campus grounds, experiment station grounds, and other lands owned by the university system;

(g) department of state lands administrative sites;

(h) lands in which the department of state lands does not own the surface, including lands where the department owns the mineral estate only and private lands over which the department has acquired an easement; and

(i) other lands owned by any other state agency.

(3) The main office of the department of state lands is located in Helena. To administer its field functions, the department has divided the state into six geographic "areas," each administered by an "area land office," the head of which is the "area manager." Areas are further divided into units, each administered by a "unit office." A listing of those offices is:

Area	Office Location
Central Area	
Central Land Office	Helena
Helena Unit Office	Helena
Bozeman Unit Office	Bozeman
Conrad Unit Office	Conrad
Dillon Unit Office	Dillon

Eastern Area	
Eastern Land Office	Miles City
Northeastern Area	
Northeastern Land Office	Lewistown
Glasgow Unit Office	Glasgow
Lewistown Unit Office	Lewistown
Northwestern Area	
Northwestern Land Office	Kalispell
Kalispell Unit Office	Kalispell
Libby Unit Office	Libby
Plains Unit Office	Plains
Stillwater Unit Office	Olney
Swan River Unit Office	Swan Lake
Southern Area	
Southern Land Office	Billings
Southwestern Area	
Southwestern Land Office	Missoula
Missoula Unit Office	Missoula
Hamilton Unit Office	Hamilton
Clearwater Unit Office	Greenough
Anaconda Unit Office	Anaconda

(4) Whenever in [these rules], the submission of a document, such as a petition, is required to be filed at an area or unit office, the document must be submitted to the area or unit office listed above that administers the state land to which the document pertains. Persons may contact any department office to determine the appropriate office for any tract of land.

(5) Whenever in [these rules], a formal or informal hearing is required to be held in an "area," the term "area" refers to the department area in which the land to which the hearing pertains is located. The hearing may be held, at the department's discretion, at any location within that area. (AUTH: Secs. 77-1-209, 77-1-804, 77-1-806, MCA; IMP, Secs. 77-1-801 through 77-1-810, MCA.)

RULE III. (ARM 26.3.182) DEFINITIONS

Wherever used in [these rules], unless a different meaning clearly appears from the context:

(1) "Affidavit" means a signed statement, the truth of which has been sworn to or affirmed before a notary public, as evidenced by the signature and seal of the notary public.

(2) "Board" means the board of land commissioners provided for in Article X, section 4 of the Montana Constitution.

(3) "Closure" means prohibition of all general recreational use.

(4) "Commissioner" means the commissioner of state lands, provided for in 2-15-3202, MCA. The commissioner is

the chief administrative officer of the department of state lands.

(5) "Customary access point" means, with regard to state land, each outer gate and each normal point of access to the land, including both sides of a water body crossing the property wherever the water body intersects an outer boundary line.

~~(5)~~ (6) "Dedicated county road" means a county road that has been created by means of donation of a landowner and acceptance by a county under statutory or common law dedication procedures.

~~(6)~~ (7) "Dedicated public road" means a road useable by the public under state or federal law. The term includes dedicated county roads.

~~(7)~~ (8) "Department" means the department of state lands provided for in Title 2, Chapter 15, part 32, MCA.

~~(8)~~ (9) "Drop box" means a receptacle in which a person making general recreational use of state lands may leave notice required pursuant to Rule IX(3) and (4).

~~(9)~~ (10) "Emergency" means, for the purposes of Rules VII and VIII, a situation that:

(a) creates an imminent threat to personal safety or of significant property damage or significant environmental harm;

(b) would be substantially lessened or alleviated by closure to general recreational access of a state tract; and

(c) requires closure more expeditiously than could be implemented through the normal closure procedure.

~~(10)~~ (11) "General recreational use" means ~~hunting and~~ fishing and hunting for game for which a hunting license is required by the department of fish, wildlife and parks. It also includes accompanying a person who is hunting or fishing for the purpose of assisting that person. Day horseback use in conjunction with hunting and fishing is included as general recreational use. ~~Hunting for non-game species, such as rodents and coyotes, is general recreational use. Scouting for game that can be legally hunted only during a certain season is hunting if conducted no more than 30 days before the beginning of the season.~~ General recreational use includes scouting for big game on leased land if conducted during the weekend and the day before the beginning of any hunting season during which the recreationist intends to hunt.

~~(11)~~ (12) "Growing crop" means a crop, as defined below, between the time of planting and harvest~~, except that winter wheat is not considered to be a growing crop between November 1 and February 28~~. "Crop" means such products of the soil as are planted and intended for harvest, including but not limited to cereals~~,~~ and vegetables~~,~~ and including grass~~,~~ ~~including~~ and alfalfa that is intended for harvest for hay or seed production. The term does not include grass used for pasturage or trees.

(13) "Lease" means a lease or land use license, other than a recreational use or special recreational use license, issued by the department for use of the surface of the land.

The term does not include a mineral lease unless it is preceded by the word "mineral."

~~(12)~~ (14) "Lessee" means a person who holds a lease ~~or land use license, other than a general or special recreational use license issued pursuant to [these rules], issued by the department for use of the surface of the land. The term does not include mineral lessee unless it is preceded by the word "mineral."~~ as that term is defined in (13).

~~(13)~~ (15) "Legally accessible state lands" means state lands that can be accessed by dedicated public road, public right-of-way, or public easement; by public waters such as lakes, rivers and streams that are recreationally navigable under 23-2-302, MCA; by adjacent federal, state, county or municipal land if the land is open to public use; or by adjacent private land if permission to cross the land has been secured from the landowner. Accessibility by aircraft does not render lands legally accessible under this definition. The granting of permission by a private landowner to cross private property in a particular instance does not subject the state land that is accessed to general recreational use by members of the public other than those granted permission.

~~(14)~~ (16) "Livestock" means cattle, sheep, swine, goats, privately owned bison and elk, horses, llamas, mules ~~and~~, donkeys and other animals used for the protection of these animals.

~~(15)~~ (17) "Motorized vehicle" means a vehicle propelled by motor power, including, but not limited to, an automobile, truck, motorcycle, moped, and an all terrain vehicle ~~and~~ but excluding a snowmobile.

~~(16)~~ (18) "Recreational use account" means the account established by 77-1-808, MCA, in which revenues generated from general recreational use of state lands are deposited and from which expenses of the general recreational use program are paid.

~~(17)~~ (19) "Recreational use license" means the license issued pursuant to Rule IV that authorizes a person to engage in general recreational use as defined in ~~(10)~~ (11) above.

~~(18)~~ (20) "Restriction" means a limitation on the manner in which recreational use may be conducted.

~~(19)~~ (21) "Special recreational use" means:

(a) commercial recreational activities, such as outfitting, in which a private person, corporation, group or other entity charges a fee or obtains other consideration;

(b) non-commercial recreational activities conducted by an organization, such as a lodge, business, church, union, or club;

~~(c) family reunions;~~ and

~~(d)~~ (c) camping on leased lands by one or more persons at other than designated campgrounds. (AUTH: Secs. 77-1-209, 77-1-804, 77-1-806, MCA; IMP, Secs. 77-1-801 through 77-1-806, MCA.)

RULE IV. (ARM 26.3.183) GENERAL RECREATIONAL USE OF STATE LANDS: LICENSE REQUIREMENT (1) Subject to

restrictions imposed pursuant to Rule V and closures imposed pursuant to Rules VI, VII, and VIII, state lands administered by the department, except those lands described in Rule II(2)(b), (g) and (h), are open to general recreational use to a person under the age of 12 years or a person 12 years old ~~and~~ or older who obtains a recreational use license, signs that license, and has a valid signed license in his or her possession. Under 77-1-801, MCA, general recreational use without a license is a misdemeanor.

(2) A general recreational use license is issued for a 12-month period beginning on March 1 of each year and expiring on the last day of February of the next year. The license is personal and non-transferable. It may be purchased at any ~~outlet that sells conservation licenses issued by~~ authorized license agent of the department of fish, wildlife and parks. Any person may purchase a recreational use license for ~~another person~~ a spouse, parent, child, brother or sister, but the license is not valid until signed by the person in whose name it is issued.

(3) A person who uses state lands for general recreational use shall abide by the restrictions imposed pursuant to Rule V and may not use for general recreational purposes state lands that have been closed pursuant to Rule VI, VII or VIII. Violation of this provision subjects the violator to civil penalties pursuant to Rule X.

(4) No lessee or other person may interfere with a person who is making ~~or attempting to make~~ lawful general recreational use of state lands in accordance with this rule. Violation of this provision subjects the violator to civil penalties pursuant to Rule X ~~or loss of lease pursuant to 77-6-210(1)(e), MCA.~~ The lessee may, without such interference, make inquiry concerning the status of those using state lands.

(5) Under 77-1-801(2) and (3), MCA, a person must, upon request of a fish and game warden, present for inspection his or her recreational use license. Failure to present the license is a misdemeanor.

(6) A person who is engaging in general recreational use on state land shall, upon request of a department employee, present his or her recreational use license for inspection. Failure to present the license subjects the recreationist to a civil penalty pursuant to Rule X.

(7) A person who is engaging in general recreational use on private land that has been opened pursuant to an exchange under Rule VII(10) or VIII(13) shall, upon request of a department employee or a fish and game warden, present his or her recreational use license for inspection. Failure to present the license subjects the recreationist to a civil penalty pursuant to Rule X. (AUTH: Secs. 77-1-209, 77-1-804, MCA; IMP, 77-1-801, 77-1-802, 77-1-804, 77-6-210, MCA.)

RULE V. (ARM 26.3.186) GENERAL RECREATIONAL USE OF STATE LANDS; RESTRICTIONS (1) ~~Following~~ The following restrictions apply to persons engaging in general recreational use of state lands:

(a) (i) Except as provided in (ii) and (iii), motorized ~~Motorised~~ vehicle use on state lands by recreationists is restricted to federal roads, state roads, dedicated county roads ~~and~~, other county roads that are regularly maintained by the county and those roads on state lands that are designated by the department as open for motor vehicle use.

(ii) A person who has in his or her possession a "permit to hunt from vehicle" issued by the department of fish, wildlife and parks is authorized to drive on any road except a road that is closed by the department by sign or barrier.

(iii) A recreationist may park on state land within 50 feet of a customary access point: on federal roads and highways, state highways, and county roads in accordance with applicable traffic laws and regulations; and within 50 feet of any other road designated by the department for public access across the state land. The recreationist may not park so as to block vehicle access to the tract. Parking of vehicles must be accomplished in a manner that does not produce injury to the land or the lessee's improvements.

(b) Snowmobile use on the roads referenced in (1)(a)(i) is allowed only if permitted by applicable traffic laws and regulations. Snowmobile use on leased land is restricted to those department roads that have been designated as open to motorized vehicle use. Snowmobile use on unleased land is allowed except in areas where it is prohibited by the department.

~~(b)~~(c) A recreationist shall use firearms in a careful and prudent manner. A recreationist may not negligently, as defined in 45-2-101(37), MCA, discharge a firearm on state lands or discharge a firearm within one-quarter mile of an inhabited dwelling or of an outbuilding in close proximity to an inhabited dwelling without permission of an inhabitant. Temporary absences of inhabitants do not render a dwelling uninhabited.

~~(c)~~ (d) Camping and open fires on leased or licensed land ~~is~~ are restricted to campgrounds designated by the department for public camping. ~~No person may camp in a campground for more than~~ Camping on all state land is limited to 14 consecutive days.

~~(d) Open fires are prohibited except in designated campgrounds.~~

(e) Recreationists may not interfere with legitimate activities of the lessees or their agents conducted pursuant to the lease ~~or license~~. For example, the discharge of firearms that would interfere with the authorized use of ~~the~~ a tract for livestock operations is prohibited.

(f) For state lands included within a ~~game~~ wildlife management or block management area administered by the department of fish, wildlife and parks, recreational access and activities must be conducted in accordance with rules, regulations, and procedures specific to that management area.

(g) Littering on state lands is prohibited. Recreationists shall pack out their litter.

(2) The department may, after notice to the lessee, impose additional site specific restrictions on general recreational use to protect public safety, property or the environment. (AUTH: Secs. 77-1-209, 77-1-804, MCA; IMP, Secs. 77-1-804, MCA.)

RULE VI. (ARM 26.3.187) GENERAL RECREATIONAL USE OF STATE LANDS: CATEGORICAL CLOSURES (1) Except as provided in (2), the following state lands are closed to general recreational use by the public:

(a) all lands leased ~~or licensed~~ for cabinsites or homesites;

(b) all lands on which growing crops, as defined in Rule III~~(11)~~(12), are located;

(c) military leases while military activities are taking place;

(d) active commercial leases; and

(e) lands on which the department has declared the threat of wildfire to be extreme.

(2)(a) Any person, corporation, organization or agency of local, state, or federal government may petition to exclude a specific tract from a categorical closure imposed pursuant to (1) above.

(b) The petition must be submitted in writing to the area or unit office, must be signed by the petitioner, and must contain the following information:

(i) name, mailing address, and telephone number of petitioner;

(ii) description of lands to which the petition applies by legal description, lease ~~or license~~ number, or description of the location;

(iii) the reason that the categorical closure should be terminated for that tract and supporting documentation; and

(iv) duration of period for which termination is sought.

(c) The department may summarily dismiss a petition with a brief statement of the reasons for dismissal whenever:

(i) the petition is unsupported by specific substantial factual allegations, data, or documentation; or

(ii) a petition requesting substantially the same exclusion has been denied within the preceding 365 days.

(d) To be considered during a particular calendar year, the petition must be submitted by ~~January 31~~ April 1 of that year. Upon receipt of a valid petition, the department shall notify the lessee that a petition has been filed and he or she may submit an objection or have an informal hearing, or both, on the petition at the area or unit office on or before ~~March~~ May 1. The petitioner may also request an informal hearing.

(e) If an informal hearing is requested, the department shall notify the petitioner and the lessee of the informal hearing and ~~the petitioner~~ they may attend and participate. The informal hearing must be conducted by the area manager or his designee.

(f) The area manager or designee may conduct further investigation and shall, on or before ~~April~~ July 1, make a

written decision whether to grant the petition. The written decision must contain the reason for granting or denying the petition. Copies of the decision must be mailed to the petitioner and the lessee.

(g) The lessee or petitioner may appeal the decision to the commissioner or his designee by filing a written notice of appeal with the area office within 15 days of receipt of the decision. The area office shall immediately forward the appeal to the department's main office in Helena. The appeal shall, in the discretion of the commissioner, proceed by written argument, oral argument, or both at the main office of the department in Helena or other location designated by the commissioner. The opposing party is entitled to notice of the appeal and the opportunity to respond, including the right to appear at any appellate hearing. Neither party may submit evidence or information that was not submitted at the informal hearing. The commissioner or his designee shall issue a written decision affirming, reversing or modifying the decision on or before ~~June 15~~ September 1.

(3) Except for closure for fire danger pursuant to (1)(e), the lessee shall post categorically closed lands at all customary access points with signs purchased from the department at cost or meeting design and content specifications prescribed by the department. (AUTH: Secs. 77-1-209, 77-1-804, MCA; IMP, Sec. 77-1-804, MCA.)

RULE VII. (ARM 26.3.188) GENERAL RECREATIONAL USE OF STATE LANDS: PROCEDURE FOR SITE SPECIFIC CLOSURES PRIOR TO SEPTEMBER 2, 1992 (1) The department may close specific tracts of state land pursuant to this rule prior to September 2, 1992, for any of the following reasons:

(a) damage attributable to recreational use diminishes the income generating potential of the state lands;

(b) damage to surface improvements of the lessee or mineral lessee;

(c) the presence of threatened, endangered, or sensitive species or plant communities;

(d) the presence of unique or special natural or cultural features;

(e) wildlife protection;

(f) noxious weed control;

(g) the presence of buildings, structures, or facilities;

(h) protection of public safety;

(i) prevention of significant environmental impact; ~~or~~

(j) disruption of calving, lambing, or shipping activities or substantial disruption of livestock use ~~management on the tract, such as calving, lambing, or shipping activities.~~;

(k) an imminent threat, caused by potential substantial public use, of immediate, irreparable property damage or bodily injury on the leasehold tract or adjacent land; or

(l) comparable general recreational use has been made available pursuant to (10).

(2) Closures made pursuant to this rule may be of a seasonal, temporary or permanent nature.

(3)(a) Any person, corporation, organization or agency of local, state, or federal government may petition to close a specific tract of land for any reason listed in (1).

(b) The petition must be submitted to the area or unit office in which the state land is located and must be in writing. To be considered during a the 1992 calendar year, the petition must be submitted by May 1, 1992, be signed by the petitioner, and must contain the following information:

(i) name, mailing address, and telephone number of petitioner;

(ii) description of lands to which the petition applies by legal description, lease ~~or license~~ number, or other description of the location;

(iii) the reason that the land should be closed and supporting documentation; and

(iv) period for which closure is sought.

(c) The department may summarily dismiss a petition with a brief statement of the reasons for the dismissal if:

(i) the petition is not based on a ~~grounds~~ reason for closure listed in (1); or

(ii) the petition is not supported by specific factual allegations, data, or documentation~~; or~~

~~(iii) a petition requesting essentially the same closure has been rejected in the past 365 days~~.

(d) The department may also initiate a closure proceeding by preparing on or before May 1, 1992, a written statement containing the information described in (b)(ii), (iii), and (iv). The department shall follow the procedures contained in (4) through ~~(9)~~ (6) below.

(4) The department shall by May 15, 1992, post public notice of the petition or statement at the county courthouse and the area and unit offices and by making a list of all petitions filed statewide available at the department's main office in Helena.

(5) Any person may object to the closure. Written objections must be submitted to the office in the area or unit in which the land is located by June 15, 1992. The objection must contain the reasons why the petition should not be granted and supporting documentation. The objection may not be considered if it does not. In addition, the department shall hold, in the area in which the state land is located, a public hearing on each petition for which an objection has been filed. At the hearing, the petitioner and any objector may submit testimony, orally or in writing. The public notice required in (4) must provide notice of the right to object in writing and the public hearing.

(6) The department may conduct further investigation. On or before September 1, 1992, the commissioner shall grant, grant with modifications, or deny the petition and shall prepare a written document stating his reasons for the decision. He shall immediately send a copy of the decision to the petitioner and any person who filed an objection.

(7) If the petition is granted, the lessee shall post the closed lands at all customary access points with signs purchased from the department at cost or meeting design and content specifications prescribed by the department. For temporary closures, the lessee shall remove closure signs at the end of the closure period.

(8) In an emergency, as defined in Rule III~~(9)~~ (10), any person or entity that is qualified to file a petition pursuant to (3)(a) may request an emergency closure by filing a written request with the area office or by making a telephone call and filing a written request within 24 hours. When possible, the area manager or his designee shall notify and consult with the lessee. The area manager or his designee shall grant or deny the petition as soon as possible, but in no case in more than five days. If the petition is granted, the closure must be for a specific period of time and may be extended for ~~a period not exceeding the initial term~~ additional periods. The area manager or his designee shall terminate the closure as soon as the emergency ceases. Upon request of any person, the commissioner or his designee shall review any emergency closure in effect for more than 5 days and shall approve, modify, or terminate the closure in writing.

(9) The department may also, on its own initiative, after consulting or attempting to consult with the lessee, close a tract of state land in an emergency.

(10) (a) The department may, after hearing pursuant to (5) and any appeal pursuant to (6), enter into an agreement with a landowner whereby a tract of state land is closed under the procedures in (3) through (7) in exchange for the landowner's agreement to open private land to general recreational use if the private land:

(i) is in the same general area;

(ii) is of equal or greater recreational value to the state tract;

(iii) has equal or greater public access as the state tract, and

(iv) is not generally available for general recreational use upon request by the public.

(b) Before a state tract is closed pursuant to this section, the private landowner shall enter into an agreement with the department whereby the landowner agrees to:

(i) allow general recreational use on the tract under restrictions no more stringent than those contained in Rules V and IX;

(ii) post signs meeting design and content specifications of the department at customary access points on the state tract. These signs must notify the public of the closure and give directions to the private tract;

(iii) post signs on the private tract at customary access points advising the public that the tract is open for general recreational use by the public subject to the recreational use license requirement;

(iv) mark or otherwise inform the recreationist of the boundaries of the area;

(v) allow employees of the department and department of fish, wildlife and parks access to the private property at all times during hunting and fishing seasons;

(vi) not claim funds pursuant to Rules XI or XII;

(vii) hold and save the department and the state of Montana harmless from all claims for property damage or personal injury resulting from the acts or omissions of the landowner; and

(viii) other requirements deemed necessary by the department.

(c) An agreement made pursuant to (b) must be cancelable by either party upon 60-day written notice. (AUTH: Secs. 77-1-209, 77-1-804, MCA; IMP, Sec. 77-1-804, MCA.)

RULE VIII. (ARM 26.3.189) GENERAL RECREATIONAL USE OF STATE LANDS: PROCEDURE FOR SITE SPECIFIC CLOSURES AFTER SEPTEMBER 1, 1992

(1) The department may close specific tracts of state land pursuant to this rule after September 1, 1992, for any of the following reasons:

(a) damage attributable to recreational use diminishes the income generating potential of the state lands;

(b) damage to surface improvements of the lessee or mineral lessee;

(c) the presence of threatened, endangered, or sensitive species or plant communities;

(d) the presence of unique or special natural or cultural features;

(e) wildlife protection;

(f) noxious weed control;

(g) the presence of buildings, structures, or facilities;

(h) protection of public safety;

(i) prevention of significant environmental impact; ~~or~~

(j) disruption of calving, lambing, or shipping activities or substantial disruption of livestock use ~~management on the tract, such as calving, lambing, or shipping activities.~~;

(k) an imminent threat, caused by potential substantial public use, of immediate, irreparable property damage or bodily injury on the state tract or adjacent land; or

(l) comparable public general recreational use has been made available pursuant to (13).

(2) Closures made pursuant to (1) may be of a seasonal, temporary or permanent nature.

(3)(a) Any person, corporation, organization or agency of local, state, or federal government may petition to close a specific tract of land for any reason listed in (1).

(b) The petition must be submitted to the area or unit office in which the state land is located and must be in writing. To be considered during a calendar year, the petition must be submitted by ~~January 31~~ April 1 of that year, be signed by the petitioner, and must contain the following information:

(i) name, mailing address, and telephone number of petitioner;

(ii) description of lands to which the petition applies by legal description, lease ~~or license~~ number, or other description of the location;

(iii) the reason that the land should be closed and supporting documentation; and

(iv) period for which closure is sought.

(c) The department may summarily dismiss a petition with a brief statement of the reasons for the dismissal if:

(i) the petition is not based on a ~~grounds~~ reason for closure listed in (1);

(ii) the petition is not supported by specific factual allegations, data, or documentation; or

(iii) a petition requesting essentially the same closure has been rejected in the past 365 days unless changed conditions are alleged and documented.

(d) The department may also initiate a closure proceeding by preparing on or before ~~January 31~~ April 1, a written statement containing the information described in (b)(ii), (iii), and (iv). The department shall follow the procedures contained in (4) through (9) below.

(4) The department shall by ~~March~~ May 1 post public notice of the petition or statement at the county courthouse and the area and unit offices and by making a list of all petitions and statements filed statewide available at the department's main office in Helena.

(5) The public notice must give the public an opportunity to object to the ~~closure~~ petition or statement and the objector and the petitioner an opportunity to request, on or before ~~April 1~~ May 20, a public hearing on the closure. The objection must be submitted to the office in the area or unit in which the land is located. The objection must contain the reasons why the petition should not be granted and supporting documentation. The objection may not be considered if it does not. If a hearing is requested, the department shall hold the hearing in the area of the proposed closure.

(6) Notice of hearing must be sent to the petitioner and the lessee. In addition, public notice must be given ~~by publication in a newspaper of general circulation in the area of the proposed closure~~ on or before ~~May 1~~ June 5 in the same manner as provided in (4). The notice must contain the name of the petitioner, location of the land, reason for proposed closure and reasons that the hearing has been requested.

(7) The hearing must be held in the area of the proposed closure and be an open public hearing at which any interested party may give comments and submit information. The hearing must be held before June ~~1~~ 20.

(8) The department may conduct further investigation and shall prepare a written decision to grant, grant with modifications, or deny the petition, stating its reasons for the decision. On or before July 1, it shall send a copy of the decision to the petitioner and any person who filed objections pursuant to (5) above.

(9) The objector or petitioner may appeal the decision to the commissioner or his designee by filing a written appeal with the area office within 15 days of receipt of the decision. The department shall give the opposing party notice of the appeal and the opportunity to respond, including the right to appeal at any appellate hearing. The appeal shall, in the discretion of the commissioner, proceed by written argument, oral argument, or both, at the main office of the department in Helena or other location designated by the commissioner. No party may submit evidence or information that was not submitted at the hearing. The commissioner or his designee shall issue a written decision affirming, reversing, or modifying the decision on or before September 1.

(10) If the petition is granted, the lessee shall post the closed lands at all customary access points with signs purchased from the department at cost or meeting design and content specifications prescribed by the department. For temporary closures, the lessee shall remove closure signs at the end of the closure period.

(11) In an emergency, as defined in Rule III~~(9)~~(10), any person or entity that is qualified to file a petition pursuant to (3)(a) may request an emergency closure by filing a written request with the area office or by making a telephone call and filing a written request within 24 hours. When possible, the area manager or his designee shall notify and consult with the lessee. The area manager or his designee shall grant or deny the petition as soon as possible, but in no case in more than five days. If the petition is granted, the closure must be for a specific period of time and may be extended for ~~a period not exceeding the initial term~~ additional periods. The area manager or his designee shall terminate the closure as soon as the emergency ceases. Upon request of any person, the commissioner or his designee shall review any emergency closure in effect for more than 5 days and shall approve, modify, or terminate the closure in writing.

(12) The department may also, on its own initiative, after consulting or attempting to consult with the lessee, close a tract of state land in an emergency.

(13)(a) The department may, after notice pursuant to (5) and opportunity for hearing and appeal pursuant to (5), (7), or (9), enter into an agreement with a landowner whereby a tract of state land is closed under the procedures in (3) through (9) in exchange for the landowner's agreement to open private land to general recreational use if the private land:

(i) is in the same general area;

(ii) is of equal or greater recreational value to the state tract;

(iii) has equal or greater public access as the state tract; and

(iv) is not generally available for general recreational use upon request by the public.

(b) Before a state tract is closed pursuant to this section, the private landowner shall enter into an agreement with the department whereby the landowner agrees to:

(i) allow general recreational use on the tract under restrictions no more stringent than those contained in Rules V and IX;

(ii) post signs meeting design and content specifications of the department at customary access points on the state tract. These signs must notify the public of the closure and give directions to the private tract;

(iii) post signs on the private tract at customary access points advising the public that the tract is open for general recreational use by the public subject to the recreational use license requirement;

(iv) mark or otherwise inform the recreationist of the boundaries of the area;

(v) allow employees of the department and department of fish, wildlife and parks access to the private property at all times during hunting and fishing seasons;

(vi) not claim funds pursuant to Rules XI or XII;

(vii) hold and save the department and the state of Montana harmless from all claims for property damage or personal injury resulting from the acts or omissions of the landowner; and

(viii) other requirements deemed necessary by the department.

(c) An agreement made pursuant to (b) must be cancelable by either party upon 60-day written notice.

(14) The department shall periodically review each closure made pursuant to Rule VII or this rule to determine whether the closure is still necessary. This review must occur at least at ~~lease~~ expiration or renewal of the lease for leased tracts and at least every ten years for unleased tracts. After public notice, notice to the lessee, and an opportunity for public comment and hearing, the department may terminate a closure it determines to no longer be necessary. (AUTH: Secs. 77-1-209, 77-1-804, MCA; IMP, 77-1-804, MCA.)

RULE IX. (26.3.192) GENERAL RECREATIONAL USE OF STATE LANDS; NOTICE TO LESSEES (1) If a lessee wishes to be notified prior to anyone entering upon the leasehold for general recreational purposes, the lessee shall post, at all customary access points, signs purchased from the department at cost or constructed, in accordance with design and content specifications developed by the department. The lessee must include on the sign the following information:

(a) name of the lessee or lessee's agent who must be notified;

(b) telephone number of lessee or lessee's agent;

(c) clear directions to the location at which lessee or the lessee's agent may be contacted; and

(d) clear directions to the location of the closest drop box.

If the lessee does not wish to be notified in person or by telephone, the sign must so indicate and need not contain the information required in (b) and (c). The information must be legible and legibility must be maintained.

(2) A lessee who posts land pursuant to (1) shall provide a clearly identified drop box for each single tract at a customary access point to the tract, except that a lessee of 2 or more contiguous tracts may provide one drop box for those tracts to which the access point provides convenient access. In cases in which a customary access point cannot be easily identified or a question of the convenience of an access point is raised by the public, the area manager shall make a determination and the lessee shall install drop boxes in accordance with that determination.

(3) If the lessee or agent wishes to be notified in person or by telephone, the lessee or his or her agent shall be available to receive notice from recreational users by telephone or in person from the hours of ~~6:00~~ 7:00 A.M. until ~~10:00~~ 9:00 P.M. A person wishing to make general recreational use of state lands posted pursuant to (1) shall attempt to contact the lessee or lessee's agent in person or by telephone during those hours if the recreationist's access point to the state land is five miles or less by the shortest road from the nearest public telephone or the location at which the lessee or lessee's agent is available. The recreationist may determine which method of contact to employ. If the recreationist contacts the lessee or agent in person or by telephone, the recreationist shall, upon request, provide his or her name, address, and recreational use license number, the name and recreational use license numbers of all recreationists in his or her party and the dates of ~~the~~ use. Notice is considered to have occurred if the recreationist is answered by a telephone answering machine and the recreationist leaves his or her name, address, and recreation use license number and the same information for each member of his or her party. Notice authorizes the recreationist to engage in general recreational use for three consecutive days, or any longer period specified by the lessee, without further notice. In addition, no further notice is required as long as the recreationist is engaged in continuous general recreational use that includes the state land and that makes further notice impossible or extremely impractical, such as a back country hunting or fishing trip. If the recreationist attempts to contact the lessee by telephone or in person but the lessee or agent is not available, or if the shortest road distance from the recreationist's access point to the nearest public telephone or the location at which the lessee or lessee's agent is available is greater than five miles, the recreationist shall leave a notice in the drop box provided pursuant to (2). Notice by drop box is effective for three consecutive days or until the end of any continuous general recreational use that includes the state land and that makes additional notice impossible or extremely impractical.

(4) If the lessee wishes to be notified by drop box only, the recreationist shall leave notice in the drop box provided pursuant to (2). The notice must provide the recreationist's name, address, and recreational use license number and the names, addresses, and recreational use license

numbers of each person in his or her party, and the dates of use. The recreationist is responsible for providing paper and pencil or pen to prepare the notice. Notice by drop box is effective for three consecutive days or until the end of any continuous general recreational use that includes the state land and that makes additional notice impossible or extremely impractical, such as a back country hunting or fishing trip.

(5) The department shall, after notice and opportunity for informal hearing at the main office of the department in Helena, revoke the general recreational use license of any person who violates (3) or (4) above. In addition, the department may prohibit the person from obtaining a recreational use license for a period not exceeding 2 years from the effective date of the revoked license. (AUTH: 77-1-209, 77-1-806, MCA; IMP, 77-1-806, MCA.)

RULE X. (ARM 26.3.193) GENERAL RECREATIONAL USE OF STATE LANDS: CIVIL PENALTIES (1) Pursuant to 77-1-804(8), MCA, the department may assess against a recreationist, lessee or other person a civil penalty of up to $1,000 for each day of violation of Rules IV(3), ~~or~~ (4), (5), (6), or (7), V, VI, VII, or VIII. The department may waive the civil penalty for minor or technical violations and shall waive the civil penalty if a criminal penalty has been assessed for the violation.

(2) In determining the amount of civil penalty, the department shall consider the following factors:

(a) number of previous violations;

(b) severity of the infraction; and

(c) whether the violation was intentional or unintentional.

(3) A person against whom the department proposes to assess a civil penalty is entitled to a contested case hearing in accordance with the Montana Administrative ~~Procedures~~ Procedure Act, Title 2, Chapter 4, part 6, MCA, on the questions of whether a violation was committed and the amount of the penalty. The hearing must be conducted by a hearing officer appointed by the commissioner. The department shall notify the individual of the violation, setting forth in the notice the specific facts which the department alleges to constitute the violation. The notice shall be served by certified mail or in person by a department employee, sheriff or deputy, fish and game warden, or registered process server. The notice must give the person at least 15 days to respond to the violation notice. Upon receipt of the response or expiration of the period allotted for response, the department shall either withdraw the notice of violation or provide its rationale for pursuing the violation and a proposed penalty. Service of the response and proposed penalty must be made in the same manner as the notice of violation. The person is entitled to a hearing on the existence of the violation, the amount of proposed penalty, or both, if he or she requests a hearing within 30 days of receipt of the department's response and proposed penalty. The request for hearing must set forth

statement of the reasons that the person is contesting assessment of the penalty.

(4) Upon conclusion of the hearing, the department shall, within 60 days, issue its findings of fact and conclusions of law and order dismissing the violation or assessing a penalty. If a civil penalty is assessed, the person shall pay the penalty within 30 days of receipt of the order or such additional time as is granted by the department.

(5) The assessment of the civil penalty is appealable to district court pursuant to Title 2, Chapter 4, part 7, MCA. (AUTH: 77-1-209, 77-1-804, MCA; IMP, 77-1-804, MCA.)

RULE XI. (ARM 26.3.194) GENERAL RECREATIONAL USE OF STATE LANDS: DAMAGE REIMBURSEMENT (1) As provided in 77-1-809, MCA, a lessee or a mineral lessee may apply to the department for reimbursement of costs resulting from repair to or replacement of the lessee's improvements, growing crops, or livestock on state lands damaged by recreationists.

(2) The application must be submitted to the area or unit office within 30 days of the time that the lessee discovers the damage, must be in affidavit form, and must contain:

(a) the date of discovery of the damage;

(b) the nature of the damage;

(c) reasonable proof that the loss was caused by a recreationist;

(d) documentation of repair or replacement costs; and

(e) whether the claimant has submitted a claim to his private insurance carrier and, if so, the status of the claim.

(3) No reimbursement may be paid to the extent the lessee's costs have been reimbursed by the lessee's insurance carrier.

(4) Upon review of the application and, if necessary, additional investigation, the department shall grant the claim in whole or in part or deny the claim. The department shall issue its decision within 60 days of receipt of the application.

(5) Whenever the lessee has submitted an insurance claim, the department shall delay payment of the claim until the action on the claim is completed.

(6) The department shall, on or before July 1 of each fiscal year, designate a portion of the recreational use account for damage reimbursement. Claims that are granted may be paid only to the extent that funds are available for damage reimbursement in the recreational use account and must be paid in the order they have been filed with the department. (AUTH: 77-1-209, 77-1-804, MCA; IMP, 77-1-809, MCA.)

RULE XII. (ARM 26.3.195) GENERAL RECREATIONAL USE OF STATE LANDS: WEED CONTROL MANAGEMENT (1) The lessee is responsible for weed control on leased state land. However, weed control cost share funds designated pursuant to (2) are available to lessees from the recreational use account for control of noxious weed infestations caused by general

recreational use after February 29, 1992. "Noxious weeds" are those weeds designated as noxious weeds by the Montana department of agriculture.

(2) The department shall, on or before July 1 of each fiscal year, designate a portion of the general recreational use account for weed control.

(3) A lessee may apply in writing for weed control funds, equipment, assistance or supplies to treat a weed infestation caused by general recreational use. The application must:

(a) describe the location and size of the infestation and type of weed;

(b) demonstrate that the infestation was caused by general recreational use of the tract; and

(c) contain a weed management plan, including the cost of carrying out the plan. The plan may propose any combination of recognized weed management techniques which will deal effectively with the weed problem.

(4) The area land office shall process applications in the order received and shall approve an application if it finds that the application reasonably proves that the infestation was caused by general recreational use of state lands, that the plan provides an effective method of control, and that the cost of the plan is ~~cost effective~~ reasonable. In its approval, the area office shall designate the amount of funding approved. That amount may be less than the amount applied for. Before providing funding, supplies, assistance or materials, the department shall enter into a written agreement with the lessee specifying how the funding, supplies, assistance or materials must be used. The assistance may be provided through the county weed board.

(5) Projects remain eligible for funding for the fiscal year in which the approval was granted and for two additional fiscal years. At the end of this period, the department may terminate the approval if it determines that the project no longer meets the criteria in (4). (AUTH: Secs. 77-1-209, 77-1-810, MCA; IMP, 77-1-810, MCA.)

RULE XIII. (ARM 26.3.197) GENERAL RECREATIONAL USE OF STATE LANDS: OTHER PROVISIONS (1) Nothing in [these rules] authorizes a recreationist to enter private land to reach state lands or to enter private land from state lands. A recreationist may not enter private land from adjacent state lands, regardless of the absence of fencing or failure of the owner to provide notice, without permission of the landowner or his agent.

(2) Under ~~section~~ 77-1-806(2), MCA, entry onto private land from state land by a recreationist without permission of the landowner is a misdemeanor, whether or not the recreationist knows he or she is on private land.

(3) Recreationists are responsible for determining whether state lands are legally accessible. The recreationist

is encouraged to contact landowners to determine boundaries and to use accurate maps.

(4) Before ~~designating~~ the department designates roads on state lands as open for public access pursuant to Rule V(1)(a), ~~the department~~ it shall mail notice of the proposed designation to the lessee.

(5) Any person may petition the board to include within the definition of general recreational use any type of recreation other than hunting and fishing. The petition must be in writing, be signed, and include a statement of the reasons why the use petitioned for should be included subject to the general recreational use license. It must be filed with the commissioner, who shall bring the petition before the board. (AUTH: 77-1-209, 77-1-804; IMP, 77-1-804, 77-1-806, MCA.)

RULE XIV. (26.3.198) SPECIAL RECREATIONAL USE OF STATE LANDS

(1) No special recreational use of state lands may occur without first obtaining a special recreational use license from the department. This requirement applies whether or not any or all of the persons involved in the special recreational use have obtained general recreational use ~~license~~ licenses pursuant to Rule IV.

(2) To obtain a special recreational use license, a person must be at least 18 years of age or the head of a family and apply to the area or unit office on a form prescribed by the department. The applicant shall provide a description of or a map showing the area intended for use.

(3) Before granting a special recreational use license, the department shall make a bona fide attempt to notify the lessee of the application.

(4) To obtain a special recreational use license, a person must pay to the department the amount that the department determines to be the full market value of that use. A license granted pursuant to this rule may be subject to competitive bidding.

~~(4)~~ (5) A license granted pursuant to this rule may be exclusive, except the department shall reserve the right to grant other licenses for different uses on the same land. Issuance of an exclusive license does not prohibit general recreational use of state lands that have not been closed pursuant to Rules VI, VII, or VIII.

~~(5)~~ (6) A license issued pursuant to this rule shall include provisions regulating motor vehicle use and requiring that only certified weed seed free hay be brought onto the state land. The license ~~and~~ may include other restrictions on the activity.

~~(6)~~ (7) The holder of a special recreational use license shall comply with all provisions of that license.

~~(7)~~ (8) Pursuant to 77-1-804(8), MCA, the department may assess a civil penalty of up to $1,000 for each day of violation of this rule. The department may waive the civil penalty for minor or technical violations. The penalty

assessment standards and procedures contained in Rule X are applicable to civil penalty proceedings under this rule. (AUTH: 77-1-209, 77-1-804, MCA; IMP, 77-1-804, MCA.)

3. Approximately 500 persons presented oral or written comments on the rules. A summary of the comments and the agency's responses to those comments are as follows:

RULE I. OVERVIEW OF RECREATIONAL USE RULES

(1) **COMMENT:** Outfitting and other commercial uses of land already leased for grazing or agriculture should be prohibited.

RESPONSE: It is the duty of the DSL to generate revenues from state lands. DSL may obtain significant revenue for outfitting or other commercial use of state lands. DSL must therefore retain the authority to lease or license for these additional uses.

(2) **COMMENT:** A number of commenters requested clarification regarding the rules for use of state lands for other recreational purposes.

RESPONSE: DSL has added to Rule I a subsection (c) that generally explains the provisions regulating other types of recreation.

RULE II. ADMINISTRATION OF RECREATION ON STATE LANDS ADMINISTERED BY THE DEPARTMENT OF STATE LANDS.

(1) **COMMENT:** The exemption of certain land leased to the department of fish, wildlife, and parks in (2)(b) should be eliminated because that agency should be subject to the same rules as any other lessee.

RESPONSE: The comment pertains to lands DSL has leased to Fish, Wildlife, and Parks for state parks and fishing access site. In those leases, DFWP is given the right to control those lands. DSL cannot impose its license requirement on those lands.

(2) **COMMENT:** Amend (2)(c) to read: "the surface, beds and banks of rivers, streams and lakes that are open to the general public for recreational purposes under the stream access law."

RESPONSE: The suggested amendment clarifies the proposed rule. The amendment has been made.

(3) **COMMENT:** In implementing (5), area managers should be encouraged to hold the hearing within easy access of the affected state land.

RESPONSE: This comment does not require a change in the rules.

(4) **COMMENT:** DSL also leases land to local governments for parks. How will these be handled?

RESPONSE: An exemption for these lands has been added to section (2) and a cross reference to that section has been added to Rule IV(1).

(5) **COMMENT:** If lessees must open their leased state land to recreationists, DFWP should be required to do so also.

RESPONSE: DSL has no authority to regulate DFWP lands.

(6) **COMMENT:** To reflect current terminology, the term "game management areas" should be "wildlife management areas."

RESPONSE: The suggested amendment has been made in Rule II(2)(a)(i) and in Rule V(1)(f).

RULE III. DEFINITIONS

GENERAL COMMENTS:

(1) **COMMENT:** Add a definition of "notice to lessee" and include in it the names, addresses, phone numbers, general recreational use license numbers of all members of the party, the dates of use, vehicle license number, and (if adopted) the state lands vehicle permit number.

RESPONSE: Rule IX has been amended to require some of the information requested here. See Comment No. 4 to rule IX. It would be better for ease of use to include the information required in the notice rule rather than to put the requirements in a definition. These are requirements for notice rather than a definition of the term "notice."

Section (3) Definition of "closure"

(1) **COMMENT:** DSL should not, through a closure, prohibit travel across land with permission of lessee.

RESPONSE: A lessee may under this rule allow a person not conducting general or special recreational use to travel across the state land.

Sections (5) & (6) Definitions of "dedicated county road" and "dedicated public road"

(1) **COMMENT:** (a) "Dedicated county road" should be a road built and regularly maintained by the county and for which the county receives state gas tax funds.

(b) Dedicated county roads should be "roads constructed, repaired, and regularly maintained by a county government and for which the county receives a share of gasoline tax monies excluding all roads designated on official government maps as "primitive roads", "unimproved roads", "unsurfaced or soil-surfaced roads", or "trails".

(c) Only roads that have been in continuous use up to the time of rule adoption should be included in these definitions.

RESPONSE: Because 77-1-804(6) provides that motorists are restricted to "dedicated county roads" and because the language suggested by the commenter would narrow this statutory provision, the suggested amendment has not been made. However, there are probably very few "dedicated county roads," as the term is defined in Rule III(5), on state lands because most county roads on state lands were established by an easement process rather than a statutory or common law dedication procedure. The effect of the suggested amendment would therefore be minimal. Most county roads on state lands probably fit within the category of "other county roads" contained in Rule V(1)(a)(i), and the suggested limitation of the definition to roads maintained by the county has been added to that paragraph.

(2) **COMMENT:** Definition of "dedicated public roads" should be the same as department of transportation's

definition for administration of the gas tax. This would eliminate rarely maintained field access roads.

RESPONSE: Recreational access program applies to "legally accessible state lands." State lands are legally accessible if there is public access via, among other means, "dedicated public road." The intention was to open any state land which the public can legally access. The language suggested by the commenter would eliminate a number of those state tracts from general recreational use. The suggested amendment has therefore not been made.

(3) **COMMENT:** In (5) and (6), the definitions should clearly indicate whether a two-track road across state lands would qualify as a "dedicated county road."

RESPONSE: Two-track dedicated county roads are included in the definition. Two track county roads that have not been dedicated are not included within the definition.

(4) **COMMENT:** In (6), why is "dedicated county road" singled out? Isn't a "dedicated county road" useable by the public under state law?

RESPONSE: Yes. It is singled out only for purposes of clarification.

Section 10 Definition of "general recreational use."

(1)(a) **COMMENT:** A number of commenters stated that this definition of "general recreational use" should be expanded to include specific activities: four wheeling; motorcycling; mountain biking; huckleberry picking; wood gathering; outdoor hobbies, including future hobbies; snowmobiling; hiking; cross-country skiing; photography; antler gathering; mushroom hunting; climbing; reading; bird watching; wildlife observation; dicky bird watching; camping; horseback riding; picnicking; rock hunting; nature study. Another person suggested that the definition include spouses who accompany persons who fish.

(b) **COMMENT:** One person stated that the definition, as written in the proposed rules, is inconsistent with the law because the law defines the term as activities "compatible with the use of state lands." This narrowing of the definition violates the principle of administrative law that importance is to be given to all parts of a statute. At a minimum, the rules should be revised to provide for site-specific openings upon petition and notice to the lessee. For example, a tract might be opened for a specific period of time to a local Audubon Society for a brief period of time.

(c) **COMMENT:** Other persons suggested alternate definitions that would expand the activities included, such as "any lawful activity that gives pleasure;" "any lawful outdoor activity;" or "recreation." Some stated that the definition in the present rules is too narrow, citing as reasons that the narrow definition:

- unlawfully narrows the statutory definition of the term, which the commenter stated includes hunting, fishing, and other compatible uses of state lands;
- discriminates against other types of recreationists;

- is not in compliance with the statutory requirement that recreation be allowed "to the fullest extent possible" or the multiple use law;
- because the title of House Bill 778 doesn't indicate that there are any restrictions;
- limits the revenue that could be generated from licenses sold to persons who do not hunt or fish;
- would subject other recreationists, such as huckleberry pickers, to the requirement to obtain a special recreational use license under Rule XIV.

RESPONSE: DSL has elected not to expand the definition to include the other activities suggested for the following reasons:

(1) It is not clear that these activities have an economic value. An economic study on the surface use of state lands, to be commenced soon, should answer this question.

(2) To a large extent, state lands are already open for these activities. They may currently be conducted on unleased, unlicensed lands. On leased or licensed lands, they may be conducted with the lessee's or licensee's permission or authorization of DSL.

(3) At the beginning of the program, it is better to limit the scope until lessees, recreationists, and DSL personnel become familiar with it, especially in view of the increased workload for DSL personnel. One major source of workload could result from additional closure petitions that might be generated from expanding the definition.

(4) Enforcement of the recreational use license requirement as it relates to licensed hunting and fishing is the responsibility of DFWP. If the definition were expanded, enforcement would fall upon DSL personnel for those other activities. This increased workload could not be accomplished.

Section 77-1-203 contains both the multiple use provision in subsections (1) and (2) and the general recreational use provision in (3). Subsection (3) gives the Board the authority to determine what uses are compatible with the use of state lands and thus within the definition of general recreational use. The provision in the statement of intent recommending recreational use to the fullest extent possible refers to the land available to general recreational use, not the types of recreation included in the term.

With regard to comment (b), DSL agrees with the commenter's analysis of administrative law. However, section 77-1-101(b) defines "general recreational use to include "other activities determined by the board to be compatible with the use of state lands." The activities are included only if the Board of Land Commissioners in its discretion makes this determination.

Because of the reasons listed above, DSL declines to find these additional uses compatible with the use of state lands.

(2) **COMMENT:** A number of people objected to the inclusion of coyote and varmint hunting and recommended that the definition be limited to licensed hunting and fishing. The reasons given were:

- The legislative compromise that allowed passage of HB778 was that only licensed hunting and fishing would be in the definition;
- Allowing year-round access to leased lands creates unacceptable management problems for the lessee;
- Allowing persons with rifles to be on leased lands year-round creates a safety problem for lessees;
- Allowing minors with .22 calibre rifles on leased land greatly increases the risk of vandalism;
- An EIS must be prepared before the definition is expanded;
- Lessees might need a recreational use license to engage in pest and predator control;
- Gopher and coyote hunting will cause elk herds to move, thereby causing damage to the landowner;
- Inclusion of gopher and coyote hunting contravenes the legal definitions of game animals.

RESPONSE: For the same reasons listed in response to the previous comment DSL declines to find coyote and varmint hunting to be compatible with the uses of state lands. Non-game hunting has been eliminated from Rule III(10) and other rules have been changed for consistency.

(3)(a) **COMMENT:** Allow coyote and gopher hunting only at the lessee's discretion.

RESPONSE: This is the effect of eliminating coyote and gopher hunting from the definition of general recreational use.

(b) **COMMENT:** Allow coyote and gopher hunting only during regular hunting seasons when game hunters may be on leased land anyway.

RESPONSE: Coyotes and gopher hunting have been removed from the definition of "general recreational use" pursuant to a previous comment.

(4) **COMMENT:** Exclude "trapping" from the definition.

RESPONSE: Trapping has not been included in the definition of general recreational use but trapping may be conducted with lessee permission on leased and licensed land.

(5) **COMMENT:** (a) A number of persons objected to expanding the definition to include scouting. Landowners objected that scouting is unnecessary and not useful because the game would move between scouting and hunting season. A number of recreationists who use unleased, unlicensed state forest land objected to the inclusion of scouting because they fear that their use of the land immediately prior to hunting season would be viewed as scouting and they would be cited. A number of persons stated that the Legislature did not intend to include scouting. Some pointed out that the inclusion of scouting would not increase recreation license revenue. One person indicated that allowing scouting will facilitate cattle rustling.

(b) Other persons objected only to the length of the scouting period. They suggested one or two days or a week would be sufficient.

RESPONSE: DSL finds that scouting is an integral part of hunting as practiced in Montana and that it gives the hunter an opportunity to become familiar with property boundaries before the actual hunt. However, a 30-day period could create additional management problems for lessees and licensees. Also, the ability of game to move makes the 30-day scouting period of questionable validity. Therefore, DSL has narrowed the scouting opportunity to the day and the weekend before the hunting season during which the recreationist intends to hunt. On unleased and unlicensed land, a general recreational use license will not be required at all for scouting.

(6) **COMMENT:** Persons who scout should be required to have a hunting or fishing license.

RESPONSE: The scouting period has been limited to the weekend and the day before the hunting seasons. DSL therefore sees little potential for abuse of the scouting provision and declines to add an additional requirement that the person scouting carry his or her hunting license.

(7) **COMMENT:** For scouting purposes, the rules need to clarify whether the standard seasons or the fishing district exceptions apply.

RESPONSE: This has been done in the definition of general recreational use by specifying that scouting may be done only prior to the hunting seasons.

(8) **COMMENT:** This rule should restrict fishermen to bona fide fishing activity and travel only in the stream corridor except for a direct route to and from a point of legal access to the state land.

RESPONSE: Such a rule would be difficult to enforce. In the absence of evidence that the recreational use license will be used for uses other than hunting or fishing, DSL declines to insert this suggested language.

(9) **COMMENT:** Can a fisherman with a general recreational use license take his family along without a general recreational license? What if they have picnics after fishing?

RESPONSE: This comment brings to light a void in the rules. It is commonplace for a person who fishes to bring along a son or daughter. Hunters commonly bring along friends to assist in carrying game. The definition of general recreational use has therefore been amended to allow this practice as long as the persons accompanying the recreationist have a recreational use license. A rule of common sense should be applied to meals. If the meal is eaten during a break in the hunting or fishing, it is allowable as an ordinary part of hunting or fishing.

(10) **COMMENT:** Several persons stated that no horse or mule access should be allowed at all; one because he felt that it would facilitate cattle rustling. Another recommended that horses not be allowed on CRP (Conservation Reserve Program)

lands. Another asked how horseback riding can be considered to be hunting.

RESPONSE: Horseback use is considered to be a common part of the hunting, including scouting, experience to many hunters. Horseback use is limited to day use under general recreational use. This day use only restriction should minimize illegitimate use of horses on state tracts. Horseback use on CRP lands is not foreseen to be a problem. The ASCS has informed DSL that incidental day use will not constitute a violation of the CRP contract.

(11) COMMENT: If horseback access is allowed, the lessees should be compensated for grass that the recreationist's horses eat.

RESPONSE: One day of a horse grazing amounts to only .04 AUMS and a horse used for hunting will probably not be allowed to graze freely while on the state tract. Therefore, day horseback use will have minimal effect on the grass resource.

(12) COMMENT: Does the definition mean that only hunting and fishing will be allowed on state land or that all other uses would be free of charge. The commenter recommended the latter.

RESPONSE: In general, other uses would be free of charge unless they are included in the definition of special recreational use.

(13) COMMENT: Include a definition of the term "rodent."

RESPONSE: No definition is necessary because rodent hunting has been removed from the definition of "general recreational use."

(14) COMMENT: One person testified that he likes to shoot pop cans on state land. He asked how a game warden will know whether he is hunting when the warden finds him with a gun.

RESPONSE: The question is one of proof. The state has the burden of proving a person is hunting. This requires evidence in the form of statements and actions, such as shooting at game.

(15) COMMENT: Traditionally state lands west of the Continental Divide have been open for all recreational use. Under Section (10), all recreational use other than hunting and fishing would require a special recreational use license. This is ridiculous.

RESPONSE: This comment is not correct. Section (10), as amended, only addresses licensed hunting and fishing. Special recreational use is generally defined by the rules as commercial and organized recreational activities (Rule III, Section 19). On unleased or unlicensed lands (common west of the Continental Divide), all other recreational activities can be done without a special recreational use license.

(16) COMMENT: What is "non-concentrated hunting" as used in 77-1-101?

RESPONSE: "Non-concentrated hunting" is licensed hunting by individuals not falling within the definition of special recreational use (Rule III, Section 19).

(17) **COMMENT:** Recreationists should be limited to hunting season, or big game hunting season, as regulated by the department of fish, wildlife and parks.

RESPONSE: With the elimination of non-game species hunting, and limitation of the scouting period, access for hunting is limited to the licensed season and three days prior to the season. Limitation of "hunting" to big game would impermissibly narrow the scope of recreation available under HB778. Fishing access is limited to the fishing season.

Section 11 Definition of "growing crop"

(1) **COMMENT:** The term "growing crop" be limited to "unharvested row crops" or "unharvested cereal crops."

RESPONSE: Limiting the definition of growing crops would eliminate valuable agricultural crops such as hay, alfalfa and grass seed. The production and harvest of these crops returns substantial income to the trusts. This income must be protected. The major impact of general recreational use will be during hunting seasons during the fall after most crops have been harvested.

(2) **COMMENT:** The term should include grass, which is a crop harvested by the grazing lessee's cattle and summer fallow.

RESPONSE: If grass and summer fallow were defined as a growing crop and categorically closed to recreational use, the opportunity for the public to participate in general recreational use would be drastically reduced. This would be in direct conflict with the intent of House Bill 778. DSL's Surface Management Rules do not define grass as a crop. Consistency between Surface Management Rules and Recreational Access rules should be maintained. The language pertaining to grass and alfalfa has been amended to clarify that only grass intended for harvest for hay or seed production is included.

(3) **COMMENT:** The term should include all crops from seeding to harvest.

RESPONSE: See response to Comment (1) above. The definition of growing crops as amended does include all crops from seeding to harvest.

(4) **COMMENT:** The treatment of winter wheat evoked numerous comments:

(a) A number of commenters supported the existing definition, alleging that winter wheat is dormant during the period and not susceptible to damage from pedestrians. Some said that ranchers graze and drive across winter wheat during this period. One said that hunting on winter wheat would lessen wildlife depredations.

(b) A number of commenters stated that winter wheat should be considered a growing crop even during dormancy because it is susceptible to damage during that period.

(c) Several commenters suggested that in many years winter wheat is not dormant by November 1. One commenter stated that in the Bozeman area dormancy occurs before November. One commenter suggested that winter wheat should not be included as a growing crop when the ground is frozen and the temperature remains below freezing.

RESPONSE: The opportunity for general recreational use on winter wheat would be very limited. The definition of growing crop has been amended to include winter wheat from seeding till harvest. If a lessee wishes to allow general recreational use on any growing crop (including winter wheat), he or she may petition the department to exempt that lease from the categorical closure on growing crops. See Rule VI.

(5) **COMMENT:** Exclude alfalfa from the definition from November 1 to February 28.

RESPONSE: Alfalfa is not considered a growing crop after the last harvest, which generally precedes November 1.

(6) **COMMENT:** The rule should be clarified as to whether tree farms contain a growing crops.

RESPONSE: The last sentence of this definition states: "The term does not include grass used for pasturage or trees."

Section 13 Definition of "legally accessible state lands."

(1)(a) **COMMENT:** The term "right-of-way" should be changed to "publicly owned transportation right-of-way" and the term easement should be "public access easement of record."

(b) **COMMENT:** The term should be amended to clarify that the term "public" modifies "rights-of-way" and "easement."

RESPONSE: The definition has been clarified by adding "public" before "easement" and "right of way." The term "of record" has not been added because some public easements are not of record and therefore some state lands that are accessible by the public would be excluded from the definition of "legally accessible state lands." The term "transportation" could be interpreted to refer to right of way for pipelines and power lines and has therefore not been added.

(2) **COMMENT:** (a) The terms "right-of-way" and "easement" are too vague. Access should be limited to county roads.

(b) Access should be limited to state, federal, and county roads.

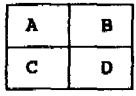
RESPONSE: These terms are contained in 77-1-101(7) and cannot be eliminated by rule. Section 77-1-203(3) allows general recreational use of lands within the definition of "legally accessible state lands." Thus, the second suggested amendment cannot be implemented.

(3) **COMMENT:** Does the definition include an easement, held by a private individual, to cross both private land owned by another person and state land?

RESPONSE: Yes. If a person can reach state land legally, the person has a right to engage in general recreational use with a license unless the land has been closed to general recreational use.

(4) **COMMENT:** A number of persons commented on corner to corner access. The issue is whether, in the following diagram, a person who has a right to be on tracts A and D but no right to be on Tracts B and C can jump from A to D where

they touch if the person does not touch Tracts B and C, but rather only occupies airspace over Tracts B and C.



The following comments were made:

(a) Corner-to-corner access is legal and the rules should so state and require ranchers to provide corner access using a turnstile; or

(b) Corner-to-corner access is not legal and the rules should so state;

(c) The legality of corner-to-corner access is disputed and the rules should not address the subject. If it becomes a problem, the lessee can apply for a site-specific closure.

RESPONSE: The issue of corner to corner access is contested and has not been resolved by the Montana Supreme Court. DSL cannot resolve it in a rule.

(5) **COMMENT:** Are lessees required to allow recreationists to park on their state leases?

RESPONSE: In Rule V(1)(a)(iii), DSL has allowed parking under certain restrictions.

(6) **COMMENT:** This definition discriminates against lessees of legally accessible lands and favors lessees whose lands are not legally accessible.

RESPONSE: This definition is contained in 77-1-101(7) and cannot be changed in the manner suggested by the commenter.

(7) **COMMENT:** The lessee should be given more consideration than other adjacent landowners.

RESPONSE: This definition is contained in 77-1-101(7) and does not give DSL the discretion to treat lessees differently than other landowners.

(8) **COMMENT:** Under this definition, a person who is driving down a road on state land without a recreational use license could be fined up to $1,000, just for being in this state.

RESPONSE: This is not correct. This definition applies to roads off state land that are used to get to the state lands. Furthermore, no general recreational use license is required to use public roads on state lands.

Section 14 Definition of "livestock"

(1) **COMMENT:** The term should:

(a) include privately owned bison and elk; (b) contain the same definition as 81-3-201(3), MCA, which includes bison and elk; (c) not include buffalo; (d) not include horses, mules, and llamas because these animals have no rights on land that has been leased for grazing.

RESPONSE: Section 81-3-201(3) defines livestock as any bovine animal, horse, mule or ass, regardless of its age or sex and includes llama, bison, sheep and elk. The livestock

industry requested the inclusion of other animals used for the protection of livestock.

Comments (a) and (b) are acceptable. Comment (c) is unacceptable because bison are classified as livestock under 81-3-201, MCA. Comment (d) is not acceptable because horse, mules and llamas are herbivores which are likely inclusions to a ranch operation.

Section 15 Definition of "motorized vehicle"

(1) COMMENT: Snowmobiles should not be included because they pack snow and make roads useless to other people.

RESPONSE: Snowmobiles have been removed from the definition for a different reason. Under Rule V(1)(b), snowmobiling will be allowed under certain restrictions because it is a common form of transportation employed by hunters and persons who fish.

(2) COMMENT: Motorcycles should not be included in the definition so that they can go off roads.

RESPONSE: Motorcycles are motor powered and most definitions of motorized vehicles include motorcycles. Environmental impacts from motorized vehicle use is a great concern to DSL, the public and lease holders. Adverse use of motorcycles could cause long term damage to the resources by reducing availability and quality of forage, removal of ground cover, increased erosion and disturbance of livestock. Consequently motorized vehicle use is restricted by rule.

Section 19 Definition of "special recreational use"

(1) COMMENT: Camping should be deleted.

RESPONSE: For purposes of this rule, camping has been limited to leased or licensed land but not entirely eliminated. For the rationale, see Response to Comment 1 to Rule V(1)(c).

(2) COMMENT: Will snowmobiles need a special use license as well as a general license when hunting or fishing?

RESPONSE: No.

(3) COMMENT: Substitute the following language for (b): "non-commercial activities in which more than 10 persons are participating or which involve more than two entries per year to the same lease."

RESPONSE: It is not desirable to define the size of an organization or the number of entries in this rule. This would restrict the ability of the department to authorize a special recreational use to an organization of less than 10 persons or for a single entry.

RULE IV GENERAL RECREATIONAL USE OF STATE LANDS; LICENSE REQUIREMENT

Section 1

(1) COMMENT: The lessee should have the right to see recreationists' licenses to see if they have legal right to be there. The recreationist should have to identify himself to the lessee upon request.

RESPONSE: Giving a lessee the right to inspect a recreationist's license could lead to confrontation. Also, the right to inspect the license is at least a quasi-law

enforcement function that should not be delegated to persons who have not had law enforcement training. The state could incur liability for the lessee's actions in this situation. However, a lessee should not be precluded from making inquiry as to the recreationist's status. A provision allowing for inquiry has been added as section (6). In addition, a cross-reference to this provision has been added to Rule X.

(2) **COMMENT:** All kids should be required to complete a hunter safety course.

RESPONSE: This is already required via the hunting license issued by DFWP. It is therefore not necessary here, especially in view of the fact that the rules have been amended to remove predator and varmint hunting from the definition of "general recreational use."

(3) **COMMENT:** A person should not be able to enter state land to fish in places where there is no water in which to fish.

RESPONSE: A general recreation use license would not confer this authority.

(4) **COMMENT:** Use a sticker attached to hunting license to save on paperwork.

RESPONSE: Because licenses must be available beginning March 1, 1992, licenses have already been printed. This comment will be considered for future years.

(5) **COMMENT:** License should be numbered and stuck to car front, rear window, or license plate.

RESPONSE: The license requirement applies to individuals, not vehicles. To allow enforcement personnel to ensure that all persons who are recreating have licenses, the rules require that the recreationist carry the license.

(6) **COMMENT:** (a) Require proof of liability insurance when buying license.

(b) The cost of liability insurance should be included in the cost of the license.

RESPONSE: DSL does not believe that it has the authority to require a recreationist to obtain liability insurance.

(7) **COMMENT:** The lessee should be allowed to set limits as to numbers of people and duration of stay.

RESPONSE: The law does not allow lessees to set such limits unless the state land has been included in a block management area pursuant to 77-1-804(6), MCA.

(8) **COMMENT:** Minors, or persons under 12 years of age, should only be allowed to recreate on the state land if accompanied by an adult.

RESPONSE: This concern was raised mainly in regard to gopher and coyote hunting. These activities have been removed from the definition of "general recreational use." DSL does not perceive a need to apply this requirement to fishing, which does not involve the use of firearms and hunting, for which the hunter safety training is required.

(9) **COMMENT:** Recreationists will damage archeological sites on state land.

RESPONSE: State tracts with unique or special cultural features can be closed pursuant to Rules VII(1)(d) and VIII(1)(d).

(10) **COMMENT:** If I purchase a general recreational use license in order to recreate on a specific tract and find that the tract is closed, I should be able to get a refund.

RESPONSE: The license grants access to all legally accessible state lands that are not closed, whether or not the right of access is used. No refund language has been inserted.

Section 2.

(1) **COMMENT:** The March 1 license renewal date is unfair to snowmobilers who have to get snowmobile license by July 1.

RESPONSE: The March 1 date coincides with the conservation license and DSL lease renewal date. The general recreational use license is issued for hunting and fishing, not snowmobiling.

(2) **COMMENT:** The recreational use license should only be issued for a 90-day period.

RESPONSE: Section 77-1-801(1) provides that the license is an annual license.

(3) **COMMENT:** Modify the section to read: "may be purchased at any authorized license agent of the department of fish, wildlife and parks."

RESPONSE: The suggested language more accurately describes the license agents. The suggested language has been inserted.

(4) **COMMENT:** Modify the section to read: "Any person may purchase a recreational use license for their spouse, parent, child, brother or sister who is otherwise qualified to obtain the license."

RESPONSE: The suggested language would apply the same rules to the recreational use license as are currently applied to the DFWP licenses. It has been inserted with a minor grammatical change and deleting the language regarding qualifications because there are no qualifications for a recreational use license.

(5) **COMMENT:** At the time of purchase of a license, a person should be notified that he is liable for violation and damages or this language should be put in the license.

RESPONSE: The license states that the licensee's activities are subject to all rules and restrictions. Liability for damages is established by the general negligence law, not HB778 or these rules. DSL declines to attempt to summarize this law in a few words on the license form.

Section 3.

(1) **COMMENT:** This section should apply to the lessees and lessee's agent as well as the recreationist.

RESPONSE: Under the current wording of the rule, this section does apply to the lessee or lessee's agent if he or she is engaging in general recreational use. If the lessee or agent are performing activities pursuant to the surface lease or license, the requirements of the lease or license apply. Restrictions, such as the prohibition against off-road vehicle

use, could impair the lessee's ability to operate under the lease.

Section 4.

(1) **COMMENT:** Are anti-hunters who harass hunters considered to be "other person(s)"

RESPONSE: Yes.

(2) **COMMENT:** (a) Lessee must have right to ask for identification, check licenses and ask recreationists to leave if they don't have a license or are doing physical damage to the land. There are not enough game wardens to enforce these rules. Adjoining landowners, law enforcement officers, and DSL employees should be able to do so also.

(b) It should be a criminal act for the lessee to threaten, intimidate, or ask to see the license of the recreationist.

(c) Is asking for identification "interference?"

RESPONSE: Language allowing the lessee and DSL employees to ask to see the recreational use license has been added. DSL declines to allow adjoining landowners who are not lessees to check identification because DSL has no authority over adjoining landowners.

(3) **COMMENT:** Delete "or attempting to make."

RESPONSE: The language is intended to prevent harassment of persons preparing to recreate on state land (fishermen walking to the stream) who have not commenced actual fishing or hunting. These situations are actually part of hunting and fishing, however. Therefore, the language quoted is not necessary. Furthermore, it could be interpreted to apply off state land. It therefore has been deleted.

(4) **COMMENT:** Add the language of 77-1-801(2) & (3) to rules.

RESPONSE: This language requires recreationists to show their licenses to game wardens and imposes a misdemeanor penalty for violation. The comment is accepted and the change has been made.

(5) **COMMENT:** Add: "A recreational user shall be required to show his recreational use license to any person asking to see it, and this and/or a request to cease and desist in order to prevent unlawful use or trespass shall not be deemed interference."

RESPONSE: It would be an unwarranted intrusion on the rights of recreationists to allow any person to stop the recreationist. See response to Comment 1 Rule IV(1).

(6) **COMMENT:** This subsection should be eliminated or rewritten to specifically define "interference."

RESPONSE: According to Webster's Ninth New Collegiate Dictionary, "to interfere" means "to interpose in a way that hinders or impedes." This is exactly what the rule is meant to prohibit. No further definition appears necessary.

(7) **COMMENT:** (a) Use "no lessee or his agent" instead of "other person". Provide arbitration process for lease cancellation penalty.

(b) The phrase "or other person" should be "or his agent" so that the lessee does not lose the lease because of the interference of another person.

RESPONSE: (a) The term "other person" includes the lessee's agent and everyone else. The suggested language would unnecessarily narrow the scope of the rule. The language regarding loss of lease has been removed pursuant to the next comment.

(b) Under the rule as written interference by a person other than the lessee or lessee's agent would not be attributed to the lessee.

(8) **COMMENT:** The reference to loss of lease should be eliminated because the lessee should not be exposed to both civil penalties and loss of lease.

RESPONSE: Under the law, DSL has the right to do both. However, a reference to lease cancellation in this rule is not necessary. It has therefore been deleted.

(9) **COMMENT:** (a) The prohibition on interference with the recreationist conflicts with the prohibition in Rule V(1)(e) that the recreationist may not interfere with the lessee's operation. How can the lessee enforce this if he cannot interfere with the recreationist?

(b) Section (4) will prevent lessees from obtaining evidence of damages or other rule violation.

(c) If a lessee is herding cattle and interferes with a hunter, has he violated this rule?

RESPONSE: (a) and (b) - Rule X(4) prohibits interference with one who is making lawful general recreational use. If the recreationist is violating Rule V, the use is not lawful.

(c) A lessee may engage in normal management functions. Herding of cattle would constitute interference only of done intentionally to interfere with the recreationist and not as part of his or her normal management activities.

(10) **COMMENT:** Must the lessee provide access to the state tract by gates, etc.?

RESPONSE: No.

(11) **COMMENT:** The lessee should be able to hold a rifle or credit card as evidence of a violator's identity.

RESPONSE: It is doubtful that DSL has authority to authorize the lessee to seize a recreationist's property. Such authorization would be unwise because it could be misapplied by lessees, who are not trained in law enforcement, and could lead to conflict.

RULE V. GENERAL RECREATIONAL USE OF STATE LANDS; RESTRICTIONS

General Comments

(1) **COMMENT:** There should be no restrictions other than restrictions on shooting, leaving gates open, and littering.

RESPONSE: HB778 requires adoption of the notice requirement and restrictions on motor vehicle use. It also authorizes other restrictions to reduce impacts on the land and lessees. DSL has adopted other restrictions it considers reasonable to implement these goals.

Section 1

(1) **COMMENT:** (a) This section is too restrictive for snowmobiles. Snowmobilers have been using old mining and logging trails and open hills and this rule makes no provision for that. This could say "except for snowmobiles when authorized except on cultivated lands."

(b) All roads of the department should be open to snowmobiling unless marked.

RESPONSE: To address this concern, the term "snowmobile" has been removed from the definition of "motor vehicle" in Rule III. There has been added to this rule a new subsection (b) that allows less restricted snowmobile use on unleased and unlicensed state land. The department declines to open all roads on leased or licensed land unless posted as open this makes the treatment of snowmobiles consistent with other motor vehicles.

Section 1(a)

(1) **COMMENT:** (a) Snowmobiles, trail bikes, all terrain vehicles should be required to stay on roads designated as open.

(b) Are snowmobiles, motorcycles and ATV's restricted to designated roads?

RESPONSE: For snowmobiles, see response to previous comment. Trail bikes and ATV's are required to stay on designated roads.

(2) **COMMENT:** Roads not posted as open should be considered closed.

RESPONSE: See responses to comments on Proposed Amendment #1.

(3) **COMMENT:** The rule should require that horse trailers be parked on "dedicated roads".

RESPONSE: Rule V(1)(a)(iii) regulates parking, including parking of horse trailers. Horse trailer parking should not differ from motor vehicle parking. Parking within 50 feet of a customary access point is allowed to address potential safety problems.

(4) **COMMENT:** All roads should be open unless designated as closed. This should include two tracked trails, jeep trails, skid trails, etc.

RESPONSE: In response to the first suggestion, see the response to comments on Proposed Amendment #1. DSL may designate some jeep roads as open, but this determination must be made on a case-by-case basis to guard against erosion, protect water quality, control noxious weed spread, and comply with laws which protect threatened or endangered species.

(5) **COMMENT:** To prevent damage to the land, the rules should include a provision regulating what motorists on one-lane roads do when they meet oncoming traffic.

RESPONSE: This is not an uncommon occurrence in Montana. DSL has not experienced substantial damage resulting from these occurrences and does not believe a rule is necessary.

(6) **COMMENT:** Roads should not be closed, if critical for access to other public lands, to preserve elk or grizzly habitat.

RESPONSE: It is important that DSL have the opportunity to close roads where appropriate to protect lessees improvements and leasehold values, reduce costs of road maintenance, provide for healthy and huntable wildlife populations, control spread of noxious weeds, and to comply with laws such as those which address water quality and threatened or endangered species.

(7) **COMMENT:** Any road a lessee uses should be open to the public at all times.

RESPONSE: All persons conducting general recreational use on state land are restricted to the same roads. This includes state land lessees when performing general recreational use. Surface and mineral lessees also have certain rights not granted to the public in their lease in regards to access for leasehold purposes. The lessee may also have purchased a private easement on the state land granting additional access privileges.

(8) **COMMENT:** DSL should prepare special provisions for handicapped recreationists.

RESPONSE: A special provision expanding the roads available for handicapped persons has been added to Rule V(1)(a)(ii).

(9) **COMMENT:** Lessee should have authority to give hunter permission to drive motorized vehicle to retrieve downed game if done in a manner that will minimize damage to lease.

RESPONSE: Section 77-1-804(6) does not allow motorized vehicle use off federal roads, state roads, dedicated county roads or roads designated by DSL as open for motor vehicle use.

(10) **COMMENT:** Add: "lessee has authority to designate routes for vehicular travel onto or across state lands for purpose of access to other leased or private land owned by the lessee."

RESPONSE: The lessee may apply to the Department to designate a travel route across the state land. The decision remains with the Department. Allowing the lessee the authority would create problems with enforcement, weed control and damage determinations.

(11) **COMMENT:** Lessee should be able to require foot access during times of high moisture or department should be required to maintain roads.

RESPONSE: DSL cannot authorize the lessee to impose the restriction on Department roads designated as open. The lessee may in a serious situation, however, request DSL to impose restrictions, or request the road be closed.

(12) **COMMENT:** (a) Delete "other county roads" from the rule. DSL has no authority to add these roads.

(b) Limit accessible roads to "county, state, and interstate roads" or public thoroughfares.

(c) Restrict motor vehicles to "federal, state, and maintained county roads and others designated by the Department."

(d) Restrict "other roads" to roads constructed and maintained by DSL.

(e) Recreationists should be able to use the same roads as the lessee can use.

RESPONSE: Section 77-1-804(6) provides, in part, that motor vehicle use on state lands is restricted to "federal, state and dedicated county roads and those roads designated by the department to be open for motorized vehicle use." Thus, DSL does have authority to designate county roads other than dedicated ones as open. Most county roads are not dedicated county roads. In order to avoid the situation in which everyone but a recreationist can use a county road that crosses state land, DSL included "other county roads" in Rule V(1). However to eliminate conflict over certain roads, the status of which may be in dispute, the rule has been amended to provide that the other county roads must be established and regularly maintained by the county.

(13) COMMENT: Lessee should be able to enforce the requirement that vehicles stay on the roads.

RESPONSE: Under HB778, enforcement of this requirement is through a civil penalty assessed by DSL, and, under 87-3-125, MCA, criminal enforcement by DFWP. The law does not give the lessee enforcement authority. The lessee may, however, report violations to game wardens or DSL personnel.

(14) COMMENT: Vehicles travelling from one "area" to another must be certified as noxious weed-free by the department of state lands or a county extension agent before driving on state lands.

RESPONSE: It would be unrealistic and impossible for DSL or county extension agents to certify vehicles as weed free.

(15) COMMENT: The department should be more specific on defining designated roads.

RESPONSE: For each area, designated roads will be indicated by on-site signing or by area-specific designation, such as preparation of a list of roads that are open or closed.

(16) COMMENT: Motorized vehicles should not be driven on fall seeded crops.

RESPONSE: DSL agrees. Rule V prohibits driving of motor vehicles off roads. Rule VI categorically closes land on which there growing crops.

(17) COMMENT: DSL should prepare a statewide travel plan that identifies and limits vehicle use to designated roads only.

RESPONSE: State trust lands are characterized by a scattered ownership pattern intermingled with other federal, state and private lands. DSL will cooperate with other agencies who produce travel access plans (such as BLM and USFS) to include roads DSL has designated as open in their travel plans.

(18) COMMENT: Rules on motorized vehicle use should be the same as for Bureau of Land Management land.

RESPONSE: House Bill 778 became law when approved by the Legislature and Governor. The law specifically restricted

motor vehicle use. Consequently motorized vehicle use on state land could not match rules for vehicle use on land administered by the Bureau of Land Management.

(19) **COMMENT:** If roads are not obvious, they should be marked with wire flags.

RESPONSE: If roads are not obvious, they are in most instances not open for public access.

(20) **COMMENT:** On line 4, insert: "in consultation with the leaseholder" after "Department."

RESPONSE: Under Rule XIII(4), DSL is required to notify the lessee before designating as open. When notified, the lessee may give DSL his or her opinion on the designation. No additional language is necessary.

(21) **COMMENT:** Allowing motor vehicle use on designated roads may lead to recreationists seeking prescriptive easement across deeded land when designated road eventually crosses deeded land based on use authorized by the department of state lands designation.

RESPONSE: DSL cannot authorize the public to use roads off state lands. If the public uses a road on private land, it is the responsibility of the private landowner to prohibit that use so that a prescriptive easement is not obtained.

(22) **COMMENT:** State must assume liability for accidents resulting from recreational use of "other county roads" since they are not dedicated county roads.

RESPONSE: The term "other county roads" has been modified by limiting the term to county roads regularly maintained by the county. These roads are already open for public use. DSL's liability should therefore be extremely limited.

(23) **COMMENT:** Most roads should be closed to preclude vandalism and necessity of spraying for control of noxious weeds.

RESPONSE: This is already addressed with the restrictions listed in Rule V. The purpose of the restrictions as listed is to limit motor vehicle travel, which should limit vandalism and weed control to a large extent.

(24) **COMMENT:** Can the public drive on old dedicated county roads that have not been legally abandoned but are no longer used?

RESPONSE: Section 77-1-804(6) provides that dedicated county roads on state lands are open for use. They remain dedicated until abandoned.

Section 1(b)

(1) **COMMENT:** The rule should be amended to require weapons must be discharged away from buildings.

RESPONSE: Wherever discharge in the direction of a building is not reasonable and prudent, it is already prohibited by (1)(b). No further language is necessary.

(2) **COMMENT:** Discharge of firearms should be restricted within limits as designated by following comments: 3-3/4 mile, 1½ mile, 1 mile, 3/4 mile, ½ mile, ¼ mile, 200 yards, 100 yards, and reasonable and prudent.

RESPONSE: The comments show a wide variation of distance restrictions perceived to be pertinent. One-quarter mile is a reasonable distance, given all the recommendations.

(3) **COMMENT:** Different distance restrictions should apply for rifles, shotguns, and archery.

RESPONSE: Different distance restrictions would complicate the rules. The inhabitant has the authority to allow shooting within ¼ mile of the dwelling. Distance restrictions do not apply to archery hunting.

(4) **COMMENT:** Prohibit discharge of firearms on state lands adjacent to towns, major highways, or significant numbers of human habitations or large towns.

RESPONSE: Rules V, VII, and VIII allow for restricting or closing state land to the discharge of firearms when it is determined to be necessary in order to protect public safety. This provides an adequate system for protection of public safety.

(5) **COMMENT:** How does the firearm restriction apply to private buildings adjacent to state lands?

RESPONSE: The discharge of firearms restriction applies to all inhabited dwellings whether on state land or on private property adjacent to state land.

(6) **COMMENT:** Does a building inhabited only during the summer as a classroom remain an "inhabited dwelling during the winter?"

RESPONSE: No. An inhabited dwelling is generally defined as a structure used as living quarters for a major portion of each year. A building used for a temporary classroom does not qualify as an inhabited dwelling. Rule VIII allows for a petition to be submitted in support of a site-specific closure for public safety purposes. The fact that an occupied dwelling is temporarily unoccupied, such as for winter vacations of up to 3 or 4 months, does not render the dwelling unoccupied.

(7) **COMMENT:** How will recreationists be aware of firearm restriction zones on state lands?

RESPONSE: It is the duty of the hunter to know the rule and the location of inhabited dwellings.

(8) **COMMENT:** Firearm restrictions should not limit ability of inhabitant to control predators around house.

RESPONSE: With the revision of general recreational use definition to exclude predator and varmint hunting, the restrictions do not limit the inhabitant's ability to control predators.

(9) **COMMENT:** (a) Lessee should have option of posting safety zone around house.

(b) The land near residences should be marked.

RESPONSE: Nothing in these rules or the rules regulating surface leases prohibits such posting on state lands up to a quarter-mile from the occupied dwelling or out-building. It may therefore be done. However, marking of all land near residences by DSL is not practical due to budget constraints.

(10) **COMMENT:** Department of Fish, Wildlife and Parks already has rules regulating firearm use and this rule should not be added.

RESPONSE: DFWP does not have specific firearm discharge regulations.

(11) **COMMENT:** Who will enforce distance restrictions?

RESPONSE: The Department of Fish, Wildlife and Parks wardens are responsible for enforcement.

Section 1(c)

(1) **COMMENT:** A number of comments on camping were received:

(a) Eliminate this restriction.

(b) Camping should not be allowed outside of designated campground.

(c) Camping should be allowed outside of designated campgrounds except on lands in crops.

(d) Allow tent camping without attached recreational vehicle.

(e) Camping should only be allowed where it wouldn't interfere with lessee's operation.

(f) Department of state lands should designate a number of campgrounds.

(g) Camping should be allowed anywhere but not more than 14 days.

(h) The Legislature intended that camping be allowed. Evidence of that in that 77-1-804(6) allows DSL to adopt restrictions on camping.

(i) The 14-day limitation should be eliminated.

RESPONSE: DSL is amending the proposed rule to accept the elimination of the camping restriction outside designated campgrounds on unleased and unlicensed lands due to its minimal potential for conflict with current uses. To further facilitate this amendment, family reunions have been removed from the definition. On leased and licensed lands, however, there is a greater potential for conflict and interference with use. The potential conflict can best be managed by restricting camping to designated campgrounds or through issuing a special recreational use license. Tent camping will be allowed outside of designated campgrounds on unleased or unlicensed lands without a special use license and on leased lands with a special use licanse where it would not interfere with the lessee's operation. Camping will be limited to 14 consecutive days in order to prevent degradation of campsites. DSL intends to designate a number of campgrounds after the passage of these rules.

Section 1(d)

(1) **COMMENT:** A number of comments were received on open fires:

(a) Open fires should not be restricted to designated campgrounds.

(b) No open fires should be allowed.

(c) Open fires should only be permitted if: attended, snow in on the ground, when tent camping and no recreational vehicle is present, no fire danger exists, special use license

is issued. Leaving a campfire without drowning or smothering it should be a misdemeanor.

(d) There is no greater fire danger from recreationists than from lessees who burn stubble and slash.

(e) No fires, even those that are not open, should be allowed outside campgrounds.

RESPONSE: (a) - (d) DSL is amending the proposed rule to remove the restriction on leased and unlicensed lands. Open fires on leased or licensed lands are restricted to designated campgrounds to protect leasehold interest. Existing fire regulations require that fires not be allowed to spread or be left unattended until extinguished. During periods of high fire danger open fires on all lands would be further restricted. Because a distinction between leased, licensed land and unleased, unlicensed land is being made at this and other places in the rules, DSL is adding to Rule III a definition of "lease" to include grazing and other non-recreation related licenses and is amending the definition of "lessee" to reference the new definition. This will make the text of the rules more readable.

(e) Experience indicates that few wildfires are started from non-open fires, such as tent stoves and backpack stoves.

Section 1(e) Interference with lessee's operation

(1) **COMMENT:** (a) Hunting and discharge of firearms should be prohibited when livestock are present in a pasture.

(b) Use of firearms that would endanger livestock on adjacent private land should also be prohibited.

RESPONSE: (a) Hunting in the presence of livestock would not constitute interference in all cases.

(b) Rule V(1)(c) requires use of firearms in a careful and prudent manner. This prohibits shooting that would endanger livestock on adjacent land. No additional language is necessary.

(2) **COMMENT:** Dogs should be restricted on land where livestock are grazing.

RESPONSE: The rule as written prohibits interference with livestock by recreationists' dogs.

(3) **COMMENT:** Who is to judge what recreationist activity will interfere with livestock operations? It is a subjective judgment and lessee could overreact.

RESPONSE: DSL will make the ultimate determination as to interference. If DSL's determination is appealed, the final determination will be made by the courts.

(4) **COMMENT:** Delete this rule.

RESPONSE: Section 77-1-804 allows restrictions to address interference with the presence of livestock.

(5) **COMMENT:** What does "discharge of firearms that would interfere with the authorized use of the tract for livestock" mean?

RESPONSE: An example would be a discharge in close proximity to livestock.

Section 1(f)

(1) **COMMENT:** Legally accessible state lands should not be included in block management restrictions.

RESPONSE: The purpose of the Department of Fish, Wildlife, and Parks' block management program is to manage wildlife and control the impacts of hunting on designated areas. Subsection (1)(f) has been adopted to allow DSL to cooperate in this worthwhile program.

(2) **COMMENT:** Does block management restrictions supersede these rules year around or only for part of the year?

RESPONSE: The block management restrictions only supersede these rules for the time that the block management restrictions are in effect.

(3) **COMMENT:** Placing state lands in block management area would be an unconstitutional delegation of state authority to the lessee.

RESPONSE: This delegation is authorized by 77-1-804, MCA. DSL does not believe that delegation of this authority violates the Montana Constitution.

(4) **COMMENT:** (a) State lands that are included in a block management area should not include those of another lessee whose lease just happens to be within the block management area.

(b) Only lands that are not legally accessible should be in a block management program.

RESPONSE: Although DSL currently allows the lessee to determine whether to place a leased state tract under block management, DSL does wish to eliminate its authority to make this decision for each tract. The proposed changes have not been made.

Section 1(g)

(1) **COMMENT:** Add: "Recreationists must pack out all litter."

RESPONSE: The suggested amendment has been made with slight modifications.

(2) **COMMENT:** Lessee should be able to cite people who litter leased land.

RESPONSE: DSL cannot delegate to private individuals the ability to issue citations on behalf of DSL.

(3) **COMMENT:** You need enforcement provisions, and a fine should be imposed of $250 to $500 and well publicized to serve as a deterrent.

RESPONSE: Violation of this rule subjects the violator to a civil penalty of up to $1,000 under Rule X. It is not DSL's policy to publicize violations of its rules.

(4) **COMMENT:** Leaving a gate open should also be prohibited.

RESPONSE: If cattle are present, leaving a gate open could be interference, which is prohibited by Rule V(1)(e). No additional language is necessary.

Section 2

(1) **COMMENT:** Lessee should be notified of any informal hearing concerning department imposed restrictions.

RESPONSE: No informal hearing is provided for in this rule. However, language requiring that the lessee be notified

prior to the decision has been added. The lessee may then consult with DSL personnel informally.

(2) **COMMENT:** No restrictions should be imposed except for things like leaving gates open, littering, destroying property, driving across crops, shooting near buildings, etc. These should only result in license revocation.

RESPONSE: Additional restrictions may be necessary to protect property and the lessee's improvements and operations. They are contemplated by 77-1-804(6), MCA.

(3) **COMMENT:** Print on the back of license: (1) No hunting around cattle; (2) Children under 18 years of age must have adult supervision; (3) No large caliber rifle fire within one mile of a residence or building; (4) No fires except in designated areas; (5) All activities limited to daylight hours; (6) Licenses are to be shown to any game warden, sheriff, official or lessee.

RESPONSE: The format of the license need not be specified in the rules. The license forms have already been printed, but DSL will consider this idea for future printing. The first four and last proposed restrictions are considered with comments on Rule V. Restricting recreationists to daylight hours would constitute an unreasonable restriction, especially for hunters, who often hunt till dark and camp (which is being allowed on unleased, unlicensed land) or walk or drive out after dark.

RULE VI. GENERAL RECREATIONAL USE OF STATE LANDS; CATEGORICAL CLOSURES

Section 1

(1) **COMMENT:** Delete the entire rule.

RESPONSE: DSL finds that certain state lands should be categorically closed to protect the privacy, safety, or property of its surface lessees. The comment is therefore rejected.

(2) **COMMENT:** (a) "Land leased for cabin sites or home sites" should be clarified as to whether it includes only the land on which the home or cabin exists.

(b) The whole cabinsite should not be closed.

RESPONSE: (a) The term includes all the land leased under the cabinsite lease or license. The leased land will be posted pursuant to this rule.

(b) Cabinsites are generally small. In western Montana most do not exceed 5 acres. In eastern Montana, most do not exceed 15 acres. Closure of the entire cabinsite is therefore justified.

(3) **COMMENT:** Cropland should be closed year-round but hunting allowed with the permission of the lessee.

RESPONSE: Section 77-1-804(3)(b) authorizes closure due to "the seasonal presence of growing crops." This does not authorize year-round closure. If the lessee wishes to open the land, he or she can petition to terminate the categorical closure.

(4) **COMMENT:** All state lands with useful structures should be closed.

RESPONSE: Implementation of this suggestion would unduly restrict public recreation. Individual situations in which closure may be warranted can be dealt with through petitions for site-specific closures.

(5) COMMENT: How do rules affect administrative access by other public resource managements agencies such as the Bureau of Land Management?

RESPONSE: These rules have no effect on administrative access by other public resource management agencies. Administrative access requires either an easement or a land use license from the DSL. These rules only allow for designating access routes for general recreational use as defined in Rule III(11).

(6) COMMENT: Categorical closures should also apply to summer fallow, stubble, and growing crops whether living or fallow.

RESPONSE: DSL does not believe as a general rule that walking across stubble and summer fallow is harmful to an agricultural operation. Growing crops are categorically closed under this rule.

(7) COMMENT: The rule should not provide for exclusive use of state lands for commercial uses such as outfitting.

RESPONSE: Commercial leases are not issued for outfitting. Issuance of a special recreational use license for outfitting does not exclude general recreational use.

(8) COMMENT: The intent of legislature was to include presence of livestock as a categorical closure.

RESPONSE: Section 77-1-804(3) does not list presence of livestock as a ground for categorical closure.

(9) COMMENT: Lands next to large population centers should be categorically closed.

RESPONSE: Site-specific closure under Rules VII(1)(h) or (k) or VIII(1)(h) or (k) would be more appropriate because it provides for public hearing and consideration of site-specific conditions.

(10) COMMENT: As evidenced by the Statement of Intent to HB778, the presence of livestock was intended to be grounds for closure.

RESPONSE: The Statement of Intent states: "It is acknowledged that certain state lands will merit closure from public recreational use due to certain considerations, including but not limited to the presence of growing crops and livestock..." DSL is of the opinion that general recreational use can occur on most tracts where livestock is present, especially in view of the fact that it has inserted in Rule V(1) a prohibition on activities that would interfere with the lessee's activities. To allow closure where substantial disruption of livestock occurs, DSL has included Rules VII(1)(d) and VIII(1)(j).

Section 2

(1) COMMENT: Must federal resource management agencies such as the Bureau of Land Management petition for access to cross categorically closed state lands for administrative needs?

RESPONSE: Administrative access requires either an application for an easement or land use license.

(2) **COMMENT:** Lessees should be allowed to permit general recreational use on categorically closed lands at their own discretion without having to petition.

RESPONSE: Section 77-1-804(3) does not allow DSL to grant the lessee this authority.

(3) **COMMENT:** Lessee should be notified of any hearings pursuant to Rule VI(2).

RESPONSE: The suggested amendment has been made.

Section 3

(1) **COMMENT:** (a) Categorical closure signs should be provided to the lessee free of charge.

(b) DSL should determine format for categorical closure signs and allow lessees to make their own.

RESPONSE: DSL will not provide free signs due to budget constraints. The rule has been amended to allow lessees to provide signs to DSL design and content specifications.

RULE VII. GENERAL RECREATIONAL USE OF STATE LANDS; PROCEDURE FOR SITE SPECIFIC CLOSURES PRIOR TO SEPTEMBER 2.

NOTE: Because Rules VII and VIII are very similar, comments applicable to both rules are summarized under Rule VIII but were considered to be comments on Rule VII. When comments on Rule VIII resulted in an amendment to that rule, a parallel amendment has been made to Rule VII. The comments applicable to Rule VII only are summarized below.

Section 1

(1) **COMMENT:** Delete whole rule.

RESPONSE: Section 77-1-804(1), (2) and (5) require adoption of site-specific closures rules.

(2) **COMMENT:** In subsection (1)(b), although recreationists begin using state lands in March 1992 (especially gopher and coyote hunting), site specific closures will not be implemented until September, 1992.

RESPONSE: Because predator and varmint hunting has been removed from the definition of general recreational use, the petition process will be complete before any hunting can commence. The effects of fishing are much less. No interim closure procedure, other than emergency closures, will be inserted in the rule.

(3) **COMMENT:** Subsections (1)(a), (1)(b) and (1)(h) should be deleted because they must be based on a history of general recreational use. This rule applies only to 1992, a year for which there will be no history of general recreational use.

RESPONSE: On unleased, unlicensed tracts and on certain leased tracts there is a history of recreational use. Also, for state tracts that have been closed to recreationists there may be a history of recreational use on adjacent non-state tracts.

(4) **COMMENT:** Because these rules will not take effect till mid-March, move the dates to April 1 for closure

petition, April 15 for posting of notice, and May 15 for objections. This would allow closure before fishing season.

RESPONSE: This comment has not been accepted because DSL anticipates a number of petitions filed the first year and other program start-up tasks will strain its personnel under the existing schedule and might prove impossible under the suggested schedule.

(5) **COMMENT:** Allow lessee to close land if a land management problem arises because of recreational access.

RESPONSE: Section 77-1-804 provides that closures are to be made by DSL. If the lessee foresees a management problem, he or she may petition for closure under Rule V(1).

Section 3

(1) **COMMENT:** During first year, lands should be closed when the petition is submitted and while public hearing held.

RESPONSE: Section 77-1-804 provides that there be an opportunity for a public hearing must be held before closure can occur. Also, because predator or varmint hunting have been eliminated from the definition of general recreational use, no hunting will occur on any tract before a decision has been made on a closure petition.

(2) **COMMENT:** Paragraph (3)(c)(iii) should be eliminated. Rejection of a petition does not mean that conditions would not change within the next year so that a petition would have merit.

RESPONSE: The suggested amendment has been made because Rule VII applies only to the first year of the program. There will be no prior year's petitions for the first year of the program.

RULE VIII, GENERAL RECREATIONAL USE OF STATE LANDS; PROCEDURE FOR SITE SPECIFIC CLOSURES AFTER SEPTEMBER 1, 1992

General Comments:

(1) **COMMENT:** This rule is too broad in that it gives the lessees too many options.

RESPONSE: The comment makes no specific suggestions for amendment of the rule and does not indicate which grounds are not justified. Therefore no change has been made.

(2) **COMMENT:** Bureau of Land Management is concerned as to how the rules will affect administrative access to BLM lands. Must BLM provide a massive inventory of administrative access needs prior to implementation of the regulations?

RESPONSE: These rules do not affect administrative access. Administrative access must be obtained by easement or land use license. The BLM does need to apply for easements and land use licenses, but it does not need to be done in entirety prior to the implementation of these rules.

(3) **COMMENT:** Leave the grounds for closure open-ended by including in the introduction to (1) the phrase "including, but not limited to."

RESPONSE: Because closure of a tract prevents public access, closures should be granted only when the rights of the lessee would be substantially impaired or there are other substantial public policy reasons for closure. The list in

the proposed rules is a comprehensive listing of these criteria. If experience in administering the rules reveals that a category should be added, the rule can be amended. To leave the criteria open-ended would authorize many petitions that would not be granted. This would not be efficient for the petitioners or DSL.

(4) **COMMENT:** Allow closure if the tract is of little recreational value and is in the middle of the lessee's operation.

RESPONSE: If substantial disruption of the livestock operation would occur, closure is allowable under Rule VIII(1). No additional grounds for closure are therefore necessary to accommodate the commenter.

(5) **COMMENT:** Add the following as grounds for site-specific closure: "an imminent threat caused by potential substantial public use, of immediate, irreparable property damage or bodily injury or the leasehold tract or on adjacent land."

RESPONSE: The comment is accepted and the rule has been amended with a minor modification.

(6) **COMMENT:** Allow site-specific closure if a state tract is extremely valuable for outfitting and general recreational use would decrease that value.

RESPONSE: Closure of these sections would diminish revenue from recreational use licenses. DSL declines to incorporate the suggested change at a time when it is not known how many recreational use licenses will be sold and the economic study on recreational use has not been completed.

(7) **COMMENT:** Rule VIII appears to allow closure at DSL's discretion without proof of involved users.

RESPONSE: If persons who object to closure believe that damage was not caused by recreationists, they may state this at the hearing or in writing. DSL will consider this testimony.

(8) **COMMENT:** Make protection of winter wheat a criterion for site-specific closure.

RESPONSE: The definition of "growing crops" in Rule III has been amended to include winter wheat even during dormancy. Therefore, land in winter wheat is categorically closed under Rule VI.

(9) **COMMENT:** Site-specific closure should be allowed to protect the confidentiality of the mineral lessee.

RESPONSE: The extent of a mineral operator's right to keep information confidential is currently the subject of a district court case in Helena. DSL declines to adopt a rule until a decision has been reached in that case.

(10) **COMMENT:** The lessee should be able to prevent recreational access during periods of drought.

RESPONSE: Rule VI(1)(e) categorically closes land on which DSL has declared the danger of fire to be extreme. This is adequate to curtail activities that could cause fire during periods of drought.

Subsection (1)(c) Threatened, endangered, or sensitive species.

(1) **COMMENT:** Will lands closed under these criteria be closed year-round?

RESPONSE: Length of closures imposed under this section will be determined on a case-by-case basis. Some closures may be year-round and others only seasonal or temporary.

(2) **COMMENT:** All of Montana could be inhabited by threatened or endangered species. Scientific studies on these species lack credibility.

RESPONSE: Although Montana has not been surveyed completely for the presence of threatened or endangered species, it is unlikely that the entire state is occupied by these species. Before making site-specific closures under this subsection, DSL would determine whether recreational use would be likely to have an adverse effect on the species in question. The department is not prepared to comment on the credibility of unidentified scientific studies.

Subsection (1)(e) Wildlife Protection

(1) **COMMENT:** Areas with sufficient wildlife cover should not be closed.

RESPONSE: If there is sufficient cover on the tract or nearby and wildlife is not otherwise threatened, the tract would not be closed under this criterion.

(2) **COMMENT:** Only birthing and hatching areas should be protected.

RESPONSE: Other areas such as breeding or cover areas may also be important for wildlife.

Subsection (1)(f) Noxious Weed Control

(1) **COMMENT:** Recreationists should not have to pay [suffer] for weeds spread by the lessee.

RESPONSE: If significant noxious weed management goals can be achieved by closure, then closure should be allowed, no matter how the weeds were introduced. However, DSL would consider the public's interest in recreating on the tract in determining the duration of the closure.

(2) **COMMENT:** Because the public is already paying for weed control, a closure for weed control should preclude the lessees from using the tract also.

RESPONSE: Closure under this rule only applies to general recreational use. Once closed, the lessee cannot use the tract for general recreational use either. Regulation of other uses is beyond the scope of these rules.

(3) **COMMENT:** Land should not be closed due to weed infestations because many infestations predate the recreational access program.

RESPONSE: Closure may be necessary in order to inhibit spread of the weeds from general recreational use.

(4) **COMMENT:** Add at the end of this rule: "and management of noxious weeds under an approved county weed management plan."

RESPONSE: Not all counties have county weed management plans.

(5) **COMMENT:** Because all activities have the potential to spread weeds, (1)(f) should be eliminated.

RESPONSE: Section (1)(f) is designed to allow closure should significant infestations occur. It will not be interpreted as broadly as the commenter suggests.

Subsection (1)(g) The presence of buildings, structures or facilities.

(1) **COMMENT:** Areas with buildings should only be closed to hunters with firearms or rifles.

RESPONSE: Closure prohibits all general recreational use. However, the result desired by the commenter could be accomplished through a site-specific restriction under Rule V(2).

Subsection (1)(i) Substantial disruption of livestock management on the tract.

(1) **COMMENT:** (a) A number of persons indicated that "any" disruption, rather than "substantial" disruption, should justify closures because any disruption will adversely affect the lessee and because substantial disruption is difficult to prove, especially when the lessee lives a long way from the leased tract. Others stated that it places an unfair burden on the lessee.

(b) Similarly, others recommended that tracts be closed to recreational access while cattle are grazing or while the state tract is included in an area subject to grazing during the lessee's normal rotation.

(c) Similarly, one person suggested changing "calving, lambing" to "livestock grazing." Another suggested adding "grazing or feeding."

(d) Other commenters stated that the mere presence of livestock should not preclude general recreational use. One stated that "disruption" should be defined better because some animals, such as sheep, are easily disrupted. Several stated that the lessee could arrange his grazing rotation to avoid state tracts during hunting season.

(e) One commenter said that access should be controlled jointly by the state and the lessee so the lessee does not have to alter normal management patterns.

RESPONSE: Disruption of certain operations, such as calving, lambing, or shipping, should be grounds for closure. However, minor disruptions of livestock should not outweigh the public's interest in recreating on the tract. The rule has been changed accordingly. DSL cannot delegate its authority to make closure decisions to the lessee. However, DSL will consider the lessee's input in making closure decisions.

(2) **COMMENT:** The effect of traffic should be added to this criterion.

RESPONSE: The effect of traffic will be considered in determining whether disruption has occurred and the extent of any disruption.

(3) **COMMENT:** The phrase "on the tract" should be removed.

RESPONSE: The language has been removed so that the effects off the state tract can be considered.

(4) **COMMENT:** The state should provide the closure signs to the lessee.

RESPONSE: Due to budget constraints, this comment has not been accepted.

(5) **COMMENT:** Lessees should not have to pay rentals from the time during which their cattle are removed due to recreational use. Any disruption would require the cattle to be taken off.

RESPONSE: The purpose of this rule is to provide for closure when an unacceptable amount of disruption is occurring. Thus, the lessee's mechanism for dealing with this situation is a closure petition rather than relief from the rental obligation.

Section 3

(1) **COMMENT:** Subsection (a) opens the door to special interest groups to close down all state lands because of threatened, endangered, or sensitive species or to mineral development or timber harvesting.

RESPONSE: Any person, corporation, organization or agency is free to petition for site-specific closures using the procedures in this section. Each petition would be considered on its own merits. There is no guarantee that a petition would be granted.

(2) **COMMENT:** A number of persons stated that the January 31 deadline for submission of petitions should be changed because ranchers may not be in a position to make management decisions by January 31. A date of April 1 was suggested. Another person suggested that there be no deadline. Another suggested allowing short closures, such as for moving cattle between pastures, within 30 days notice to the area office.

RESPONSE: A schedule is necessary to allow DSL personnel to plan their work schedules. The comment suggesting a modified schedule is accepted with some modification of the suggested schedule to accommodate DSL administrative needs. The suggested temporary closure on 30-day notice does not allow DSL sufficient time to comply with the legal requirement to provide public notice, opportunity to object, and opportunity for hearing. A shortened schedule, using an April 1 petition date to allow a decision before September 1, has been adopted. Public notice of hearing by posting has been substituted for newspaper notice, which is more time consuming. In addition, the deadlines in Rule VI have been adjusted to allow for petitions to lift categorical closures to be filed by April 1.

(3) **COMMENT:** After site-specific closures are in effect under (c), must the Bureau of Land Management go through the petition process if additional administrative access needs arise?

RESPONSE: Administrative access by the BLM requires an easement or land use license. These rules have no effect on the existing requirements for easement or land use license.

(4) **COMMENT:** Under (c)(iii), a petition should not be dismissed if there have been changed conditions.

RESPONSE: DSL agrees. Language implementing this comment has been added.

Section 4

(1) **COMMENT:** This section provides for posting of notice of a closure on specific tract only at the courthouse in the county where the land is located and the DSL offices in the area and unit where the land is located. A statewide listing is to be available in Helena only. Thus a person living in Missoula would not have notice of a proposed closure in eastern Montana. At a minimum, persons should be allowed to request to be notified of closure petitions for tracts for which they request notice.

RESPONSE: For administrative efficiency reasons, DSL does not intend to maintain a list of persons desiring to be notified in the event a particular tract is petitioned for closure. Persons may obtain this information by requesting it from DSL after the deadline for filing of petitions. No rule amendment is therefore necessary.

Section 5

(1) **COMMENT:** This section should more clearly state that public notice and hearing are required for a DSL initiated closure. The rule only references petitions.

RESPONSE: The suggested change has been made for public notice. A public hearing is required only if an objection is filed and a hearing is requested.

(2) **COMMENT:** This section appears to leave users, such as snowmobilers, out of the closure decision process.

RESPONSE: Section (5) allows any person, including snowmobilers, to object. Users such as snowmobilers may find out about petitions for site-specific closures by reviewing the public notice posted, by May 1 each year, at the county courthouse, the Departments' unit office, area office and main office in Helena. Prior to any decision by the Department, users may object to the closure proposal and request public hearing to comment and provide information.

(3) **COMMENT:** The lessee should be notified of any objection or hearing.

RESPONSE: The suggested amendment has been made in section (6).

Section 10

(1) **COMMENT:** (a) Signs should disclose type of closure (permanent, temporary, emergency, etc.) and duration of closure; also lessee's name, address and phone number.

(b) Replace "lessee" with "petitioner". Lessee should not be responsible for signing if someone else requested the closure.

(c) Signs should be cost shared between the department of state lands and the lessee.

(d) Recreationist or department of state lands should pay for signs, not lessee.

(e) DSL should be responsible for posting all signs.

RESPONSE: While the final design and content of the sign has not yet been decided, it is intended that it will contain the type and duration of closure. The final decision to adopt

the closure is made by the Department and therefore the lessee's name, address and phone number will not be on the sign. Under 77-1-804(2) it is the duty of the lessee, not the petitioner or DSL, to post the closure. Due to budget constraints, DSL will not post, provide or cost share the signs. However, language allowing the lessee to make the signs to DSL specifications has been added to Rules VII and VIII.

(2) **COMMENT:** (a) Must temporarily closed lands be posted?

(b) Does the law require me to post and remove signs every time I move my cattle?

RESPONSE: (a) Yes. Section 77-1-804(2) requires all closures to be posted.

(b) Mere presence of cattle on the tract does not close a tract to general recreational use. If a tract has been temporarily closed under Rules VII or VIII, the proposed rule provides that the lessee must remove the signs at the end of the closure period. This does not apply to seasonal closures, however.

Section 11

(1) **COMMENT:** There should be inserted a provision for extending an emergency closure for the duration of the public notice, hearing, review process if a seasonal or permanent closure appears to be warranted.

RESPONSE: The rule has been amended to allow the emergency closure to be extended without specifying a limitation on the period of extension.

Section 13

(1) **COMMENT:** Unleased tracts should be reviewed at least every three years.

RESPONSE: There is no reason to review unleased tracts on a different interval from leased tracts. Since the most common length of lease is ten years, it is appropriate that unleased tracts also be reviewed every ten years. However, an awkward phrasing in the rule has been clarified.

(2) **COMMENT:** The lessee should be notified in writing of a closure review.

RESPONSE: This suggested amendment has been made.

RULE IX. GENERAL RECREATIONAL USE OF STATE LANDS: NOTICE TO LESSEES

Section 1

(1) **COMMENT:** Recreationists should be required to give advance notice, of: 24 hours; 5-7 days; within 30 days of use; sufficient to allow for adjustment of ranch operations.

RESPONSE: Recreationists may not always know which specific tract of land they will access for general recreational purposes ahead of time. With the proposed change to the definition of general recreational use in Rule III, lessees will be aware of the time period that most recreationists may require access to the state land.

(2) **COMMENT:** Recreationist should not be required to notify the lessee.

RESPONSE: Notice is required, at the lessee's discretion, by 77-1-806, MCA.

(3) **COMMENT:** Customary access points might be difficult to identify in the snow and not be suitable for snowmobiles.

RESPONSE: DSL agrees climatic conditions could result in limiting use and identification of these sites.

(4) **COMMENT:** DSL should pay for notification signs.

RESPONSE: Due to budget constraints, the rule has not been amended to require DSL to pay for these signs.

(5) **COMMENT:** Recreationist should be required to leave a message on lessee's telephone recorder, if available.

RESPONSE: Language implementing this suggestion has been added. Rules have been amended to provide for notice by telephone answering machine.

(6) **COMMENT:** (a) Is a single notice sufficient for the entire year? This should be clarified.

(b) Notice should be for the entire season.

RESPONSE: The rule has been amended to provide that notice is effective for three consecutive days unless the lessee agrees to a longer period or unless the recreationist is embarking on an extended back country trip that would render additional notice impossible or extremely impractical. One purpose of notice is to allow the lessee to notify the recreationist of his management activities. Making notice effective for the entire season would defeat this purpose.

(7) **COMMENT:** Lessee should post notice of activities they are conducting on state lands.

RESPONSE: That is the purpose of the personal or telephone notice. Section 77-1-806 provides that one purpose of the notice requirement is "minimizing impact upon the leasehold interest."

(8) **COMMENT:** It is unclear in the rules what happens when the recreationist enters state lands at other than customary access points and doesn't see a notification sign.

RESPONSE: The law and rule impose upon the recreationist the duty to find the customary access point and leave notice. If he or she does not, the recreational use license may be revoked pursuant to Rule IX(5).

(9) **COMMENT:** The rule should be eliminated and it should be the sole responsibility of the recreationist to notify the lessee.

RESPONSE: Section 77-1-806 requires the lessee to make himself available for notification.

(10) **COMMENT:** The DSL should provide names and addresses of lessees requiring prior notification.

RESPONSE: This suggestion has not been incorporated because the additional workload it would create could not be carried out at current staffing levels.

(11) **COMMENT:** The lessee should have the right to reject the recreationist upon notification. It is important for the lessee to be able to limit the number of persons using the tract.

RESPONSE: Under 77-1-203(3) and 77-1-801(1), a person who purchases a recreational use license may engage in general

recreational use of state lands without the lessee's permission.

(12) COMMENT: Will notification apply for administrative access by other public resource management agencies such as the bureau of land management?

RESPONSE: The notification requirement applies only to persons engaging in general recreational use.

(13) COMMENT: The term "anyone" is all encompassing and conflicts with "recreational user" used elsewhere in the law and rules.

RESPONSE: The term "anyone" in Rule IX(1) is modified by the phrase "entering the leasehold for general recreational use." The suggested amendment has not been made.

(14) COMMENT: Notification should be on a "per use" basis.

RESPONSE: The rule has been modified to provide that notice may be given for three consecutive days only. This will provide the lessee with a good idea of the number of people on the tract without requiring unnecessary repetitive notifications.

(15) COMMENT: The recreationist should be able to provide notice by sending a form to a central location.

RESPONSE: Section 77-1-806 requires that the recreationist attempt to contact the lessee to minimize impact on the leasehold interest and to learn private property boundaries.

(16) COMMENT: Notification should be limited to a drop box or sign-in sheet. This would promote uniformity and avoid confusion.

RESPONSE: See response to the immediately preceding comment.

(17) COMMENT: Lessee should request permission from DSL at least six months in advance, in order to require prior notification.

RESPONSE: Section 77-1-806 allows the lessee to require notice by posting state land without DSL approval.

(18) COMMENT: (a) Notification by mail should be allowed.

(b) Notification by mail should not be allowed because in some areas mail is delivered only three times a week.

(c) Notification by mail should be allowed; if allowed, then require a 5-day advance notice.

RESPONSE: See response to Comment #15 above.

(19) COMMENT: It is unclear what will happen should the lessee fail to adequately post a request for notification.

RESPONSE: If posting is inadequate, the lessee is not entitled to notice. The rule has been amended to clarify that the recreationist must notify only if the posting meets the requirements of the rule.

(20) COMMENT: You need to define "customary access points."

RESPONSE: A definition has been added to Rule III.

(21) **COMMENT:** The lessee should not be required to maintain legibility of the sign. Due to vandalism, this will be a constant chore.

RESPONSE: If the lessee wishes to have notice, the sign must be legible. The lessee can maintain legibility most effectively and economically.

(22) **COMMENT:** There should be added a provision that, if the lessee's sign is illegible, the lessee may tack notice at the customary access point.

RESPONSE: If the lessee's sign is not legible, notice is not required. A provision clarifying that notification is required only if posting pursuant to (1) has occurred has been added.

(23) **COMMENT:** Personal notification should be required.

RESPONSE: For convenience of the recreationist and the lessee, DSL will allow telephone notification. The purposes of notification can be accomplished by telephone notification.

(24) **COMMENT:** Subsections (c) and (d) should be amended to require clear and unambiguous directions using appropriate mileages to the lessee's residence and the drop box.

RESPONSE: The rules have been amended to require clear directions. The word "unambiguous" has not been added because it is encompassed in "clear." Mileage is not necessary in all situations and has therefore not been added.

Section 2

(1) **COMMENT:** Drop boxes should not be allowed.

RESPONSE: Drop boxes are the only means that DSL has been able to identify to provide an alternative means of notification, which is required by 77-1-806(1). No other alternative notice methods were suggested to DSL during the comment period. Mail notice was suggested as a primary notice, not an alternative notice. Mail would not be suitable as an alternative means because it would not provide timely notice to the lessee.

(2) **COMMENT:** Drop boxes should be paid for or put up by DSL.

RESPONSE: Due to budget constraints, this comment has not been accepted.

(3) **COMMENT:** Who will ensure the drop box is in place?

RESPONSE: It is the lessee's responsibility to ensure that the drop box is in place.

(4) **COMMENT:** How will recreationist know if no drop box exists?

RESPONSE: Rule IX(1) requires that the notification sign posted by the lessee identify the location of the nearest drop box.

Sections 3, 4 and 5

(1) **COMMENT:** Telephone notification of lessee should be between the hours of:

8:00 a.m. to 5:00 p.m.
6:00 a.m. to 9:00 p.m.
7:00 a.m. to 9:00 p.m.
8:00 a.m. to 10:00 p.m.
8:00 a.m. to 6:00 p.m.

RESPONSE: Many lessees objected to persons at their door or on the telephone at 6:00 a.m. and after 9:00 p.m. The rule has been amended to require that notice be between 7:00 a.m. and 9:00 p.m.

(2) **COMMENT:** (a) Notification must be absolute in counties with over 6% state land.

(b) Notices should be required without lessee posting.

RESPONSE: Section 77-1-806 provides that the notification requirement is at the discretion of the lessee and that, if voice contact is unsuccessful, an alternate means must be provided. That statute also provides that the lessee who wishes to be notified must post notice of this fact. The requested changes cannot be made.

(3) **COMMENT:** The recreationist should be required to notify the lessee by telephone or in person unless the distance to the telephone for lessee or lessee's agent is more than ten miles.

RESPONSE: There is no objective standard by which to judge whether the distance should be five or ten miles. Therefore, because very few people objected to the five mile standard, the proposed amendment has not been adopted.

(4) **COMMENT:** (a) Notification should include: Recreationist's name; Recreationist's address; Recreationist's phone number; Recreationist's vehicle license number; Recreationist's conservation license number; Recreationist's social security number; Type of recreation, i.e. elk hunting, vermin hunting, etc.; Use of horses or other stock.

(b) Notification should include: Recreational License Number; Address.

RESPONSE: The rule has been amended to require the recreationist to provide name, address, and recreational use license number in addition to name and dates of use. This information is adequate to allow lessee to identify the recreationist.

(5) **COMMENT:** Notification forms should be provided when general recreational use license is purchased.

RESPONSE: Due to budget constraints, a form will not be provided.

RULE X, GENERAL RECREATIONAL USE OF STATE LANDS; CIVIL PENALTIES

Section 1

(1) **COMMENT:** A criminal penalty should be imposed for off-road vehicle use.

RESPONSE: Under 87-3-125 and 87-1-102 off-road or off-trail motor vehicle use by hunters is a criminal offense. For violations by persons fishing and those hunters who are not prosecuted under those statutes, DSL may assess a civil penalty under this rule.

(2) **COMMENT:** Delete the lessee from being assessed civil penalties under Rule X. The lessee should not be held accountable for recreationist violations.

RESPONSE: Because a recreationist may be assessed a civil penalty for violation of the indicated rules, lessees should also be subject to civil penalties for violations of those rules. Under this language, only the lessee's violations would be attributable to the lessees. Rule V (restrictions) was inadvertently omitted from the list of rules the violation of which results in a civil penalty. Because 77-1-804(8) provides that civil penalties are assessable for violation of restriction rules, Rule V has been added to the list.

(3) COMMENT: Fines are excessive and will limit the recreational use of state lands.

RESPONSE: The maximum fine is set by 77-1-804(8) at $1,000. Because some offenses may warrant this amount of penalty, DSL declines to lower the maximum by rule. Under the criteria in Rule X(2), however, many penalties will be below $1,000/day.

(4) COMMENT: Criminal and civil penalties should not be imposed for the same violation.

RESPONSE: If a criminal fine is levied, DSL would not pursue a civil penalty. For most violations, however, no criminal penalty is provided by law. Language providing that DSL will not impose a civil penalty where a criminal penalty has been imposed has been added.

(5) COMMENT: Rules should impose existing penalties rather than $1,000/day.

RESPONSE: See response to Comment (3) above.

(6) COMMENT: Fines for damaging state land should be stiff, such as $4,000 - $5,000.

RESPONSE: Under 77-1-804(8), the maximum civil penalty that can be assessed for violation of the rules is $1,000.

RULE XI. GENERAL RECREATIONAL USE OF STATE LANDS; DAMAGE REIMBURSEMENT.

Section 1

(1) COMMENT: (a) Either DSL or DFWP, or both, should be liable for all damages on private land caused by recreationists on state land.

(b) DSL should have liability insurance to cover damage to state and private lands that result from these rules.

RESPONSE: DSL cannot by rule accept financial liability for these damages. Under current law, the state is liable for damages only if it can be shown that the damages result from negligence on the part of the state. The state is self-insured for these claims.

(2) COMMENT: (a) Damage reimbursement should include reduced production such as lower winter wheat yields, damage to forage, poor health and loss of weight of livestock, etc.

(b) Damage to the lessee's improvements on his private land should be compensable.

RESPONSE: Section 77-1-809 provides for reimbursement of costs for repair or replacement of improvements, livestock or crops. This rule reflects the statutory language. Section 77-1-808(3)(a) provides that damage reimbursement money is to

be spent on lease improvements. This excludes improvements on the lessee's private land. Language clarifying this provision has been added to section (1).

(3) **COMMENT:** The mineral lessee should be provided the opportunity for damage reimbursement.

RESPONSE: DSL agrees. Rule XI has been amended accordingly. In addition, Rules VII and VIII have been amended to allow site-specific closure due to damage to surface improvements of a mineral lessee.

(4) **COMMENT:** Damage funds should be sufficient for all claims to include fires, weeds, and littering.

RESPONSE: The amount of funds available for damage and weed reimbursement is dependent on the number of recreational use licenses sold. It is impossible to predict with certainty whether the funds will be adequate.

(5) **COMMENT:** The lessee should not be responsible for providing the burden of proof of damage resulting from general recreational use. Because of coyotes, it is often difficult to tell whether a cow that has been dead for two days was shot.

RESPONSE: Section 77-1-809 requires that the lessee provide "reasonable proof supporting the involvement of recreational users."

(6) **COMMENT:** Who is liable if the recreationist uses private lands which have incorrectly been designated as state land on publicly available maps?

RESPONSE: It is the recreationist's responsibility to determine what land he is on.

(7) **COMMENT:** The recreationist should be reimbursed for loss of use of state lands.

RESPONSE: The recreationist has no property right in state lands that would require compensation.

(8) **COMMENT:** The lessee must have the right to protect improvements.

RESPONSE: The restrictions imposed under Rule V are for the purpose of protecting the land and any improvements. Rules VII & VIII provide an avenue for further protection if the lessee wishes to apply for closure.

(9) **COMMENT:** Damage to forage destroyed by fire shall be compensated with an equal amount of weed-free hay for all grass destroyed both on state land and private land.

RESPONSE: Section 77-1-809 does not provide for reimbursement for loss of forage.

(10) **COMMENT:** The DSL should pay all attorney or lessee expenses if a lessee must go to court to collect on a damage claim.

RESPONSE: Under existing law, costs are available to successful plaintiffs. Attorney fees are available if the state violates a clear legal duty or imposes a frivolous defense. DSL declines to expand its responsibility by rule.

(11) **COMMENT:** Only damages in excess of $500 should be reimbursable.

RESPONSE: It is uncertain whether DSL has authority to adopt the suggested provision. DSL is of the opinion that

lessees should be able to apply for reimbursements for lesser amounts.

(12) **COMMENT:** Who will determine if a hunter is responsible for loss of livestock?

RESPONSE: The lessee has the burden of showing involvement of a recreationist. DSL will determine whether the burden has been met. It is uncertain whether DSL's decision would be subject to judicial review.

(13) **COMMENT:** Who will pay for damage of cleanup of litter on state lands?

RESPONSE: The responsibility is that of the recreationist to pick up his or her litter. Neither the rules nor DSL's surface lease form assign the responsibility to any other party.

(14) **COMMENT:** Define "improvement." A road could be an improvement.

RESPONSE: The term "improvement" is defined in 77-6-301 as "improvements directly related to conservation of the land or necessary for proper utilization of it." The statute further states that improvements "may consist of fences, cultivation, improvement of the land itself, irrigation ditches, sheds, wells, reservoirs, and similar improvements." Damage to any of these could be compensable under Rule XI.

Section 2

(1) **COMMENT:** Damage reimbursement should be allowed only if the damage can be proven to have been caused by a specific recreationist.

RESPONSE: Section 77-1-809 requires only "reasonable proof supporting the involvement of recreational users."

Section 3

(1) **COMMENT:** Lessee's insurance rates would increase greatly if insurance companies pay the claims.

RESPONSE: This may occur. A lessee may choose not to file an insurance claim and instead request damage reimbursement pursuant to Rule XI.

(2) **COMMENT:** Lessee should be allowed damage compensation before filing insurance claim.

RESPONSE: This is allowed. Under Rule XI(5) damage reimbursement is withheld pending action by the insurance company only if a claim has been filed.

Section 4

(1) **COMMENT:** The department should provide compensation within 30 days of receipt of affidavit or should pay interest until reimbursement is paid.

RESPONSE: Investigation of the claim could take more than 30 days. Whether DSL could pay interest is uncertain. In view of this uncertainty and the possibility the claims may exceed funds available DSL declines to include a requirement to pay interest.

Section 5

(1) **COMMENT:** Does the lessee collect twice, once from his insurance and once from the state?

RESPONSE: Under Rule XI(5), if a lessee has filed an insurance claim, payment is made only if the insurance claim is denied and all action is completed.

Section 6

(1) **COMMENT:** If the damage reimbursement fund is completely depleted, state lands should be closed to recreational use.

RESPONSE: Under 77-1-203(3), state lands are open to recreational use subject to closure and restrictions. Section 77-1-804(3) provides for categorical closures only of those lands "whose use or status is incompatible with recreational use." This does not appear to authorize the categorical closure suggested by the commenter.

RULE XII, GENERAL RECREATIONAL USE OF STATE LANDS: WEED CONTROL MANAGEMENT

Section 1

(1) **COMMENT:** Existing noxious weeds are a result of many activities including transport by domestic livestock, transport in hay, recreational activities, and by wildlife.

RESPONSE: The department agrees that these are sources of noxious weeds. Noxious weeds are a problem throughout the state and there is a definite need for control and prevention of spread. On leased lands the lessee is responsible for weed control. See response to Comment (3) below.

(2) **COMMENT:** Weeds spread by recreationists aren't that big of a problem.

RESPONSE: Spread of noxious weeds can and has been directly linked to motor vehicles. Restriction of motorized vehicle use on state land will reduce noxious weed spread. Any spread of noxious weeds results in an expensive and time consuming problem.

(3) **COMMENT:** Determining the source of new weed infestations will be difficult. It is difficult to demonstrate that weeds came from recreationists because the recreationist's vehicle leaves the area before the weed comes up.

RESPONSE: 77-1-810 requires that there be "reasonable proof supporting the involvement of recreational user" before funding is available. See Comment (1), Section (3) of this rule.

(4) **COMMENT:** Any spread of existing weeds or new infestations should be the responsibility of the state, the public or the department of fish, wildlife and parks.

RESPONSE: A private landowner is responsible for weed control on his or her land and a state lessee is responsible for weed control on the state lease. However, 77-1-810, MCA, requires that the DSL establish a weed control management program for the control of noxious weeds reasonably proved to be caused by recreational use of state land. That plan may include direct compensation for weed control activities or participation in other weed control activities.

(5) **COMMENT:** The state should be responsible for weeds spread onto adjacent private land.

RESPONSE: According to the statement of intent from HB778, reimbursement is to be paid only for weed management on state lands.

(6) COMMENT: Weed control should be handled entirely by the local weed board and reimbursed by the land board.

RESPONSE: All counties in Montana do not have active local weed boards. Therefore all weed boards are not administratively capable of handling monetary and control efforts. However, the rule has been amended to provide that assistance may be provided through the county weed board.

(7) COMMENT: The application process is too lengthy and complicated.

RESPONSE: DSL received specific comments from several agricultural organizations on how to administer "the weed control" rule. Those comments were used to construct the guidelines and procedures as written in the rules because they provide a system of accountability to ensure effective and legitimate use of funds targeted for noxious weed control.

(8) COMMENT: The rules should require recreationists to take certain steps to prevent spreading of noxious weeds.

RESPONSE: The rules restrict vehicle use on state lands and allow for closures in order to prevent the spread of noxious weeds.

(9) COMMENT: Add "or county commissioners" after Montana Department of Agriculture.

RESPONSE: The Montana Weed Control Act does not give authority to county commissioners to designate noxious weeds. 7-22-2102(7), MCA.

(10) COMMENT: Lessee should be permitted to petition DSL to close those noxious weed infested parcels for recreational use with the verification of local county weed boards.

RESPONSE: Rule VIII(1)(f) allows for a lessee to petition for a site-specific closure due to noxious weed control. The department's intention is to consult the local county weed board whenever such a petition is received.

(11) COMMENT: Support requiring lessee to cost share when weed control is paid for by funds from weed control portions of general recreational use account.

RESPONSE: DSL envisions review of all plans submitted for weed control funds. Final cost share amounts will be determined on a case-by-case basis depending on the specific factors relating to the plan and the noxious weed infestation.

(12) COMMENT: Change title of this rule to "Weed Management."

RESPONSE: The title of 77-1-810, MCA is "Weed Control Management." The title of Rule XII has been amended to reflect this title.

(13) COMMENT: Have existing weed infestations been mapped?

RESPONSE: Weed infestations on state tracts are noted on the DSL field evaluation forms completed during renewal inspections. The individual infestations have not been compiled to any extent beyond the individual tracts. Local

weed boards may have mapped infestations within their districts.

(14) **COMMENT:** Add a provision that this applies to weed infestations created after March 1, 1992.

RESPONSE: The rule has been amended to apply to weed infestations created after February 29, 1992.

(15) **COMMENT:** Funding should not be first come, first served basis but rather should depend on the merit of the plan.

RESPONSE: A first come, first served basis was selected to ensure a fair opportunity to everyone. Plan merit is important and each plan will be reviewed to ensure all requirements as listed in Rule XII are included.

(16) **COMMENT:** Specify type of feed for horses and other animals used on state lands to prevent weeds. Certified weed seed free hay in plastic containers should be required.

RESPONSE: The definition of general recreational use provides that "day horseback use" is acceptable when hunting and fishing. It would be unusual for anyone to feed hay to a horse under these circumstances. Generally a high energy food source such as cake or oats would be used. If a special recreational use license is issued for more than one day of horseback use, a provision to use only certified weed-free hay will be required pursuant to Rule XIV. However, a plastic container will not be required because it would not be effective. Any weed seeds that would attach to the hay in transit would, in most instances, attach to the horse.

(17) **COMMENT:** Weed monies should be spent in the area from which they were collected.

RESPONSE: This suggestion could hinder control of high priority infestations and therefore has been rejected.

Section 3

(1) **COMMENT:** New weed infestations on previously clean ground should be prima facia evidence of being caused by recreational use, or better, the state should assume responsibility for weed control.

RESPONSE: Weed infestations can be the result of many activities as stated in Comment (1) of Section (1) above, a new weed infestation on previously clean ground should not be considered prima facia evidence of being caused by recreational use. The respective area manager must review each case and make a determination on the probable cause of the infestation. Responsibility for weed control is addressed under Comment (4) of Section (1) above.

(2) **COMMENT:** Affected weed districts should be informed immediately when a lessee is awarded funds, equipment, or supplies. The lessee and the DSL should check with local weed district before lessee's weed management plan is approved to ensure its compatibility with the overall weed district plan. Who will ensure proper administration of lessee's plan?

RESPONSE: Not all counties in Montana have established and/or active weed districts. Every county has a different perspective on noxious weed control efforts. Consequently, DSL will attempt to contact weed districts for comments and

concerns as they relate to a submitted weed control plan. The lessee is responsible for the plan's implementation and effectiveness. DSL intends that its field personnel provide on-ground review to ensure the plan is fully implemented and effective results have occurred.

(3) **COMMENT:** Add at end of (3)(c): "and a commitment to match funds granted from the general recreational use account on a dollar for dollar basis. The plan should propose any combination of recognized weed management techniques which will deal effectively with the weed problem."

RESPONSE: The department is unable to commit to match funds on a dollar-for-dollar basis due to the uncertainty of funds available in the recreational use account. The second sentence has been incorporated into Rule XII accordingly. In addition, authorization to provide assistance has been added to (3) and (4) to allow additional flexibility in weed control funding.

(4) **COMMENT:** Recommend that any DSL land not covered by a district weed management plan not be considered for weed control with these funds.

RESPONSE: Not all counties have district weed management plans. Therefore, a legitimate plan submitted by a lessee in an area without a district weed plan cannot and should not be disqualified on that basis.

Section 4

(1) **COMMENT:** (a) Noxious weed control is very expensive and has never been cost effective.

(b) Eliminate term "cost effective."

RESPONSE: Noxious weed control can be expensive. In order to get the best control, both short-term and long-term, all control options should be considered. The "cost effective" language has been replaced by "reasonable", which more accurately reflects DSL's intent.

(2) **COMMENT:** Money deposited in the account for weed control should only be used in the area of the state where it is collected.

RESPONSE: Money deposited into the account will not be traceable to the area where the individual recreational use license is sold.

(3) **COMMENT:** Add: "Application for weed management funds will be forwarded to the appropriate county weed district by the area land office for review and recommendations prior to acting on any application. Weed district recommendations shall address how the proposed plan fits the objectives of the district weed management plan."

RESPONSE: Not all counties in Montana have established and active weed districts. Every county has a different perspective on noxious weed control efforts. Consequently DSL will attempt to contact weed districts for comments and concerns as they relate to a submitted weed control plan. The lessee is responsible for the plan's implementation and effectiveness. DSL intends that its field personnel provide on-ground review to ensure the plan is fully implemented and effective results have occurred.

(4) **COMMENT:** Don't allow weed control program to go to county commissioners.

RESPONSE: Rule XII does not turn the weed control program over to the county commissioners.

(5) **COMMENT:** Keep options for weed control open.

RESPONSE: The department believes that the language of Rule V does allow flexibility for weed control.

RULE XIII. GENERAL RECREATIONAL USE OF STATE LANDS: OTHER PROVISIONS

Section 1

(1) **COMMENT:** How will a recreationist know he's on private land if it isn't marked as such?

RESPONSE: For big game hunting, it has always been the recreationist's responsibility to determine where property boundaries are. HB778 extends this responsibility to general recreational use on state land. The recreationist may consult with the private landowner to determine the boundary as is intended in the lessee notification statute. Maps may also be helpful.

(2) **COMMENT:** (a) Recreationists should be required to show their license to the lessee upon request.

(b) Lessee should be able to make a citizens arrest if the recreationist does not have license.

(c) If recreationist doesn't have a license, lessee should be able to insist he leave.

RESPONSE: See response to Comment (1) to Rule IV (1), Comment (5) to Rule IV(4) and Comment (2) to Rule V(4).

(3) **COMMENT:** Recreationists should be required to have written permission from the leaseholder to hunt and fish.

RESPONSE: Section 77-1-203(3) and 77-1-806 do not allow the lessee to require a person with a recreational use license to obtain his or her permission.

(4) **COMMENT:** (a) Recreationists must be able to enter state land far enough to park vehicles off the road right-of-way. Provisions must be made for going through a gate and specify maximum distance from access points for allowed parking. Recommendation to enter up to 200 feet from any normal entrance.

(b) Off-road parking areas should not be established because they would be taking grazing land out of production and thereby reduce trust resources.

RESPONSE: Rule V has been amended to provide a parking area within 50 feet of a vehicular access point. Fifty feet was chosen to limit the area of impact. This would take an insignificant amount of land out of production.

(5) **COMMENT:** State lands access points must be marked with informative signs designating if motor vehicles are allowed, if campfires are permitted, hours of use and if firearms can be fired.

RESPONSE: Costs of signing each state tract with the requested information would be prohibitive. Effort has been made in the rules to describe specifically the situations in which motor vehicles, campfires and discharge of firearms

either are or are not allowed. Hours of use for general recreation are already designated in the hunting and fishing regulations.

(6) **COMMENT:** Administrative money obtained from $5.00 license should be used to mark boundaries of state land, by fencing or posting, or both.

RESPONSE: $1.50 out of each $5.00 license fee will be deposited in the state land's recreational use account for administration of the recreational use program. That $1.50 is to be used for damage compensation, weed control, and departmental costs associated with the recreation program. It is doubtful that sufficient money will be available in the account to fund efforts beyond damage compensation, weed control and recreational administrative costs.

(7) **COMMENT:** DSL should make available to the public maps which show what lands are subject to these rules and which of those that are leased.

RESPONSE: Due to budget constraints, DSL will not compile and distribute such maps.

Section 2

(1) **COMMENT:** Lessee should be able to request that the state fence and post its property at its own expense to eliminate trespass problems.

RESPONSE: Due to budget constraints, DSL will not fence and post its land.

(2) **COMMENT:** The definition of trespass in this section conflicts with other definitions of trespass.

RESPONSE: The commenter is correct. Section 77-1-806(2) requires the recreationist on state land to know the boundaries. This is similar to the law of trespass by big game hunters.

Section 3

(1) **COMMENT:** The DSL should determine the presence of legal access to each state tract and publish the access status of each tract. Or public access roads should be marked.

RESPONSE: For a number of state tracts, public access is disputed and can only be determined by the courts. Due to budget constraints, DSL will not publish a map of or mark those tracts to which public access is certain. However, language encouraging the recreationist to contact the landowners and to use accurate maps has been added.

Section 4

(1) **COMMENT:** Delete.

RESPONSE: Section (4) seeks to avoid potential conflicts between the recreationist and a lessee who does not know that a road has been opened. It will not be deleted. A grammatical change has been made.

Section 5

(1) **COMMENT:** The rules should include only hunting and fishing as general recreation uses. Other uses should require a special recreational use license. This section should therefore be deleted.

RESPONSE: Section 77-1-101(6) includes in the definition of "general recreational use", "other activities determined by

the board to be compatible with the use of state lands." Section (5) provides a process to bring additional uses to the attention of the Board.

(2) **COMMENT:** The language should be amended to provide that the definition of "recreational use" will be expanded on leased parcels only if the lessee consents.

RESPONSE: Under 77-1-101(6), the determination is to be made by the Board of Land Commissioners. The Board cannot delegate or share this decision.

(3) **COMMENT:** This section should be eliminated because the law already defines general recreation and because a person who wishes to engage in a recreational activity other than hunting and fishing can obtain a special recreational use license under Rule XIV.

RESPONSE: See response to comments (1) and (2) above.

RULE XIV, SPECIAL RECREATIONAL USE OF STATE LANDS

Section 1

(1) **COMMENT:** Outfitting permits should require public review.

RESPONSE: Special recreational use licenses that are of significant interest to the public are subject to public notice and review under existing law. No rule amendment is necessary.

(2) **COMMENT:** There should not be special recreational use permits.

RESPONSE: Section 77-1-804(7) requires DSL to adopt rules providing for a special recreational use license.

(3) **COMMENT:** Rule should require submission of an application for a special recreational use license a certain number of days before the event.

RESPONSE: No set number of days can apply to all proposed uses. A simple request may be handled almost immediately while a proposed use that may require competitive bidding or public review may require a substantially longer period.

(4) **COMMENT:** (a) Lessee should be notified of any special use permit and be given the opportunity to object or meet the bid.

(b) Special recreational use of leased state land should be allowed only with the consent of the lessee.

RESPONSE: The rule has been amended to require that DSL attempt to notify the lessee. If the lessee is unavailable, DSL should be able to act expeditiously. Because DSL's obligation is to generate revenue, it cannot allow the lessee to disapprove. If the license is advertised for bid, the lessee can bid. Granting of a preference right would hinder the bidding process and has not been included.

(5) **COMMENT:** If the department of state lands area offices issue the special recreational use licenses, the application process should be simplified so that issuance is immediate and fees are reasonable.

RESPONSE: The department proposes to issue special recreational use licenses from the local offices for most

routine uses that involve minimal conflict and relatively standard fees. In some instance where there exists more potential for conflicting use or a requirement for competitive bidding to determine full market value, the issuance will require a longer period.

(6) COMMENT: Outfitting should be closely monitored and illegal outfitting by a lessee should result in lease cancellation and a fine.

RESPONSE: Unauthorized outfitting by the lessee subjects the lessee to lease cancellation and civil penalty under 77-1-804(8). No amendment to the rule is therefore necessary.

(7) COMMENT: How will the full market value of the use be determined, especially in view of the fact that the economic study appropriation has been cut from the department of state lands' budget?

RESPONSE: The economic study has been restored to the Department's budget. The department will rely on the results of the study to assist in establishing full market value for various recreational uses of state lands. Until the study is completed, the department will rely on competitive bidding where competition exists. Where competition doesn't exist, the department will rely on existing information from other public and private resources.

(8) COMMENT: (a) Establish a set fee, perhaps $250, for the special recreational use license to eliminate the nightmare of trying to establish fees for each individual use.

(b) Costs should be defined so that groups holding events can determine entry fees.

RESPONSE: The set fee may not equate to full market value for every use. It would be hard to define a set fee that would cover all proposed activities. The fee for the use will be determined before issuance of the license. Once the license is issued a group can determine entry fees.

(9) COMMENT: By requiring a special recreational use license for camping, you are discriminating against those who like to camp.

RESPONSE: Rule V has been amended to require a special license for camping only on leased or licensed land. For much of this land, a special use license may be the only means of obtaining permission to camp, since permission of the lessee would otherwise be required.

(10) COMMENT: People camping with horses should use certified weed-free hay.

RESPONSE: The suggested amendment has been made in Rule XIV(6), which applies to special recreational use. Only day use of horses is allowed in conjunction with general recreational use.

(11) COMMENT: Will non-commercial recreational groups or individuals rock collecting need a special use permit?

RESPONSE: Rock collecting by organizations would require a special recreational use license. Rock collecting by individuals on unleased, unlicensed land would be allowed. On leased or licensed land, permission of the lessee/licensee or special permission of DSL would be required. Furthermore,

collection of fossils from state lands requires an antiquities permit from the State Historic Preservation Office.

(12) **COMMENT:** Is a special use permit required for snowmobiles on state lands? Is a general recreational use permit also required?

RESPONSE: Snowmobile activities by organizations require a special recreational use license. Individual snowmobile activities do not require either a recreational use or a special recreational use license.

(13) **COMMENT:** All snowmobilers should be allowed to use groomed trails and surrounding area on state lands already permitted by the Flathead Snowmobile Association without extra cost and permits.

RESPONSE: In this instance, individual snowmobilers may use these trails without extra cost or licenses.

Section 2

(1) **COMMENT:** It is unreasonable to require special use license applicant to provide a description or a map of area to be used.

RESPONSE: The DSL needs a description or map of the area for which a special use license is requested to help determine if the proposed use is compatible with other resources in the area, and to find out if there are any restrictions in effect.

(2) **COMMENT:** Lower the age requirement. A driver's license can be obtained at age 15.

RESPONSE: Section 77-6-108 provides that only a person who is 18 years of age or the head of a family can hold a state lease. The rule has been amended to reflect the statute.

Section 3

(1) **COMMENT:** Standardize fee for snowmobile events.

RESPONSE: It is likely that similar snowmobile events will have similar fees but the department is required to set the fee at the full market value of the proposed use.

(2) **COMMENT:** The special recreational use license has to carry a "fair market value" on it.

RESPONSE: The term "full" market value is used in the Constitution and has been retained.

(3) **COMMENT:** How will full market value be determined?

RESPONSE: See response to Comment (7), Section 1 of this rule.

(4) **COMMENT:** The trust obligation may require that general recreational use be precluded on certain leases if that would greatly increase the full market value of a special recreational use license for outfitting or some other commercial purpose.

RESPONSE: Section 77-1-203 requires that all legally accessible state lands be open to general recreational use unless closed pursuant to 77-1-804.

(5) **COMMENT:** Commercial enterprises should be charged on a per head per day basis to ensure equal opportunity for all the recreating public and just compensation to the school trust.

RESPONSE: DSL is required to obtain full market value for the use regardless of the means to arrive at that value.

(6) COMMENT: No special recreational use permits shall be issued until an economic analysis is completed.

RESPONSE: Until the surface use economic analysis is completed, DSL will determine the full market value of special uses on a case-by-case basis. DSL will continue to issue special recreational use licenses until the study is completed in order to meet its responsibility to generate revenue.

(7) COMMENT: If rock collectors need a special use permit, it should cost no more than a general recreational use license.

RESPONSE: The department is required to collect full market value for the use regardless of how the cost compares to a recreational use license.

(8) COMMENT: DSL Should have a standard fee for snowmobile trails through state land. Twenty-five dollar fee per year for trails of a club is a sufficient event fee; for poker rides and such, a $10.00 fee should be adequate.

RESPONSE: See response to Comment (1) above.

Section 4

(1) COMMENT: In the case of outfitting, how would a non-exclusive license have value? Is the issuance of an exclusive license politically possible? How would such a license be awarded?

RESPONSE: As described in Rule XIV, Section 4, it is intended that an exclusive license for outfitting would only limit other outfitters from using the tract and would not prevent the general recreational user from hunting and fishing on the same tract. The department has received inquiries concerning this type of use in the past and the Forest Service and BLM currently issue, for a fee, similar licenses. The department would, where competition existed, advertise and award licenses for outfitting by competitive bid.

(2) COMMENT: Provide an outline of the criteria for issuance of exclusive licenses. Criteria such as lessee imposed restrictions, geographic area, difficult or inconvenient access, possible site damage from vehicles and boat trailers and other uses as come to mind.

RESPONSE: The criteria cannot be identified because of the expected variety of special recreational use requests. Special recreational use licenses cannot exclude use of legally accessible state lands by the general recreational user.

ARM 26.3.156

(1) COMMENT: Prairie dogs are invading state lands; control should not be left solely to the lessee.

RESPONSE: This comment is beyond the scope of the rules.

(2) COMMENT: Lessee isn't responsible for recreationist-caused fires, but who is?

RESPONSE: The recreationist is liable for fires he or she causes.

(3) **COMMENT:** (a) The lessee should not be responsible for weeds, pests, and protection of state land over which he has no control.

(b) The lessee should not be solely responsible for weed control.

RESPONSE: Recreational use of the land should have no effect on pests. Rule XII provides financial assistance for weed problems related to recreational use.

(4) **COMMENT:** The state should be liable to adjoining property owners for such things as fire and spread of weeds.

RESPONSE: DSL cannot, by rule, assure liability or bind the Montana Legislature to appropriate money for these purposes.

(5) **COMMENT:** The rule should require recreationists to put out fires and to reimburse lessees for firefighting expenses.

RESPONSE: Under current law, persons who start fires are responsible for costs of fighting and damages caused by fires they start intentionally or negligently. To minimize this liability recreationists who start fires will fight those fires. No rule is necessary.

AMENDMENT I - TREATMENT OF ROADS (RULE V(1)(a)

(1) **COMMENT:** Exclude from the rules because rules should be uniform statewide to avoid confusion and simplify administration.

RESPONSE: DSL agrees and has not included this amendment in the proposed rules.

(2) **COMMENT:** All roads should be open everywhere unless posted closed.

RESPONSE: DSL anticipates that there will be fewer DSL roads designated as open than designated as closed. Therefore, it would be more cost effective to only identify those roads designated as open.

(3) **COMMENT:** Any county, state or federal road should be open west or east of the continental divide, except pickup roads.

RESPONSE: The proposed amendment does not affect federal, state and county roads described in Rule V, Section 1(a) are designated as open for motor vehicle use for general recreation on state lands east or west of the Continental Divide.

(4) **COMMENT:** What will the state lands open road density be in the future if this amendment is adopted?

RESPONSE: DSL has no statewide open road density standard. Current road densities are established locally on a site-specific basis. It is beyond the scope of these rules to define statewide open road density standards.

(5) **COMMENT:** In favor, but no roads that are currently open should be closed.

RESPONSE: It is important that DSL have the opportunity to close roads where appropriate to protect lessee improvements and leasehold values, reduce costs of road maintenance, provide for healthy and huntable wildlife

populations and to comply with laws which address water quality, noxious weeds and threatened and endangered species.

(6) COMMENT: There are already enough roads closed.

RESPONSE: DSL will continue to close DSL roads when appropriate for the reasons described in the response to Comment (5) above.

(7) COMMENT: Amend to allow designating roads as open or closed in conformance with travel plans of the agency(ies) and/or large landowner(s) managing intermingled or adjoining lands.

RESPONSE: The rules already allow for this cooperation where it is appropriate for state land management.

(8) COMMENT: Roads leading to any area in the west should be closed if that area contains noxious weeds.

RESPONSE: As described in response to Comment (5) above, road closure decisions by DSL consider noxious weed problems.

(9) COMMENT: Should state, "all roads of the department are open to snowmobiling unless marked."

RESPONSE: Rules have been changed to allow the use of unleased and unlicensed lands by snowmobiles unless posted as closed. On leased or licensed lands, snowmobiles can only be used on open DSL roads.

(10) COMMENT: Department roads west of the continental divide should be closed.

RESPONSE: If concerns such as those addressed in response to Comment (5) above can be satisfied, roads west of the continental divide are open for public use in order to allow for traditional uses of state forest land by the public.

(11) COMMENT: County, state or federal roads giving access to state or federal lands but not used much in the past should be rebuilt and maintained.

RESPONSE: DSL has no authority to rebuild or maintain county, federal or state roads. DSL also has no funding to conduct these activities on either department owned or county, state or federal roads.

AMENDMENT II - EXCHANGE OF PRIVATE AND STATE LANDS (RULES VII(1) AND VIII(1))

(1) COMMENT: Agree with the proposal that the proposed language be implemented.

RESPONSE: Language adopting the proposal is included in Rules VII and VIII and provides criteria for the exchange procedure. Section (7) had been added to Rule IV to ensure that the license requirement is enforceable on the private land. In addition, a cross-reference to Rule IV(7) has been added to Rule X(1).

(2) COMMENT: Who will determine whether the land is of "equal or greater recreational value"?

RESPONSE: The lessee must provide justification and evidence of recreational value in the application process. DSL will, based on evidence provided and independently acquired, make the determination.

(3) COMMENT: Delete this provision, not necessary, complicates administration.

RESPONSE: Based on public comment, the amendment may result in increased recreational access for general recreational use and therefore was included in the final rules.

(4) **COMMENT:** The exchange idea would be more difficult to implement west of the Continental Divide because the land is fully timbered and surrounded by USFS land and is therefore more difficult to sign.

RESPONSE: DSL agrees that posting of signs may be more difficult. However, this is not sufficient reason to reject the proposed amendment. Signing can be dealt with on a site-specific basis.

(5) **COMMENT:** State land should be revised to advise of closure and location of substituted parcel. Memo of understanding should be instituted between the department and lessee to clarify requirements and list of substituted lands should be maintained at the DFWP and DSL offices.

RESPONSE: DSL agrees and will establish procedures for signing of both tracts, agreement with lessee and availability of lists of substituted tracts. The rule has been written to provide procedures for the posting of signs.

(6) **COMMENT:** Include, if public review is provided for all closures, recreationists should be involved in any decisions made. Applications should be reviewed by a TAG [Technical Action Group] team composed of DSL, DFWP, BLM, USFS and recreationists. The decision should be made by the Land Board and reflected on maps and in public postings.

RESPONSE: Use of a TAG team as suggested would significantly affect the timeliness of exchange decisions. Also, this is a recreational use decision on state lands and management authority for state lands does not lie with other agencies. The Land Board has traditionally delegated decisions of this type to DSL to ensure they are timely and effective. DSL does not currently print maps but information will be available to other agencies who do. Lists will be available from DSL offices.

(7) **COMMENT:** Land to be exchanged should be in the same general area and of equal worth and should not be otherwise available.

RESPONSE: The rule has been amended and includes these criteria.

(8) **COMMENT:** General recreational use should be required for use on exchanged private property.

RESPONSE: DSL agrees and Rules VII and VIII have been amended to require general recreational use on exchanged private property.

(9) **COMMENT:** Private exchange land should be subject to all rules whenever practical and would be treated as if state land was open to general recreational use.

RESPONSE: DSL agrees and has amended Rules VII and VIII to include the restrictions and requirements of Rules V and IX.

(10) **COMMENT:** Opposed because lessee's discretion would govern and recreationists would be deprived of most valuable recreation land.

RESPONSE: Including the exchange proposal in the site-specific closure process allows for review and comment by the public, including recreationists, in advance of the decision. The rules require that the recreational value of the private exchanged tract be equal to or greater than the state tract.

(11) **COMMENT:** Weed and damage funds should be available on private lands.

RESPONSE: Under 77-1-808 through 77-1-810, weed and damage funds are intended to be spent on state lands.

(12) **COMMENT:** Good idea in theory but would become a legal nightmare if liability is not addressed.

RESPONSE: Liability has been addressed by requiring the private landowner to hold the state harmless from liability.

(13) **COMMENT:** Exchanged land must be clearly noted and marked in all maps and consistently updated. DSL must provide public notice of where the private land is and should include description and a map.

RESPONSE: DSL does not currently print maps but information will be available to other agencies who do. Lists will be available from DSL offices.

(14) **COMMENT:** An exchange should be allowed only if a majority of recreationists approve.

RESPONSE: The exchange provisions that have been added to Rules VII and VIII contain provisions for public notice and hearing. Recreationists will be able to make their wishes known in writing or at the hearing. No vote provision has been added, however, because it would not be possible if DSL wishes to retain its authority to manage the land.

(15) **COMMENT:** There should be a provision that the lessee can close the private land at a later date if he wishes.

RESPONSE: A provision authorizing cancellation of the agreement upon 60-day written notice has been added to Rules VII and VIII.

(16) **COMMENT:** Only allow an exchange for state land to which there is no public access.

RESPONSE: The suggestion would defeat the purpose of the exchange provision because most tracts that lessees might wish to close have public access. It therefore has not been adopted.

GENERAL COMMENTS

(1) **COMMENT:** HB778 should be repealed.

RESPONSE: DSL cannot repeal a statute by rule.

(2) **COMMENT:** There should be no new rules for access.

RESPONSE: Section 77-1-804 requires DSL to adopt access rules.

(3) **COMMENT:** (a) Public access to leased lands should not be allowed.

(b) I am a state lessee who takes good care of the state land. Every year I have problems with fence cutting, vehicles on crops, etc. Why expose lessees to more of this?

(c) The rules should be written so restrictively as to allow the lessee nearly as much control of the state land as if the lessee were the owner. Public ownership of state lands does not mean that any person can do what that person wants on state land, but rather that the revenues go for the benefit of all.

RESPONSE: Section 77-1-203(3) opens all legally accessible state lands, including leased lands, to general recreational use subject to closures and restrictions.

(4) COMMENT: Several persons said that if the rules are implemented, they will close their private land to recreationists.

RESPONSE: HB778 requires DSL to implement a recreational access program. DSL has no authority to regulate recreational use on private land.

(5) COMMENT: (a) The rules were meant to address eastern Montana problems and should apply to leased lands east of the Divide only.

(b) HB778 does have merit, but pertains more to western Montana than here.

(c) The rules should treat lands east and west of the Continental Divide differently because there is more cropland east of the Divide.

RESPONSE: Section 77-1-804 requires adoption of rules that apply statewide. However, DSL has amended several rules to provide different standards to apply on unleased, unlicensed land, most of which occurs west of the Divide.

(6) COMMENT: DSL received a number of comments on the $5.00 fee and how it should be expended:

(a) The school trust will benefit financially from this program only if recreational rights are put up for lessee.

(b) No fee should be charged to Montana residents because this is their land.

(c) Provide a family rate for recreational license.

(d) Five dollars is not enough to support the program or the schools. The recreational use license should be $30.00.

(e) Triple the license fee for non-residents.

(f) The access fee should be equal to what lessee pays.

(g) A portion of the fee should go to develop wildlife habitat.

(h) If damages exceed the amount available for reimbursement, the access fee should be raised and lessee should be paid with interest.

(i) Recreationists should be charged enough to cover all costs of programs plus a special fee for the trust.

(j) Provide a fee per day of use license, valid for the period between dates specified when purchased.

(k) State lands must be open at all times to all citizens.

(l) Fee should be a minimum $5/day for camping and fishing and $50/day for hunting.

(m) DSL should add $1 to recreational use license and use the money to survey state lands and another add-on to provide maps showing state lands that are open.

(n) More than 50 cents per license should be allocated to the DFWP license agents.

(o) The lessee should not be required to buy a recreation permit.

(p) The fee should be imposed only after vote of the people.

(q) Four dollars of the fee should be to improve state land.

RESPONSE: Section 77-1-802 sets the fee at $5.00/person and requires allocation of the fee as follows: $3.00 to the trustees for which the land is held; $1.50 to DSL for program administration, and $.50 for DFWP license agents.

(7) COMMENT: Notification of the lessee should not be required.

RESPONSE: DSL cannot change this statutory requirement by rule.

(8) COMMENT: Violations of the rules should be treated as criminal cases.

RESPONSE: Section 77-1-804(8) specifies a civil penalty and no criminal penalty for violation of this rule.

(9) COMMENT: (a) The provision that makes a person criminally liable for trespass from state land onto private land should not be imposed unless the boundaries of the state land are marked, or only if the private landowner makes the boundary.

(b) These trespass penalties should not be imposed. There are already enough trespass fines.

RESPONSE: Section 77-1-806 provides that trespass from state lands onto private lands is an absolute liability criminal offense.

(10) COMMENT: The recreationist should be required to pay the lessee the actual value of all damages.

RESPONSE: Under current law, the lessee may sue a recreationist who intentionally or negligently damages his or her property for the actual value of the damage.

(11) COMMENT: DFWP should assume liability for damage or resource degradation on state lands or private property caused by recreationists. If there's not enough money in the compensation fund, shortage should be made up from DFWP budget.

RESPONSE: DSL has no authority to adopt a rule making DFWP pay for damages.

(12) COMMENT: 77-1-809 places undue burden on lessees with regard to affidavit requirement and cost documentation.

RESPONSE: DSL cannot change this statutory requirement in rules.

(13) COMMENT: 77-1-809 fails to recognize that persons/entities other than lessees may sustain damage.

RESPONSE: DSL cannot change this statutory requirement in rules.

(14) **COMMENT:** Require recreationist to show proof of liability insurance for property damage.

RESPONSE: Section 77-1-203(3) and 77-1-801 open state lands to persons who are under 12 years of age or who purchase a recreational use license. DSL has no authority to impose an insurance requirement.

(15) **COMMENT:** Those who own motor vehicles pay for weed management through license fees.

RESPONSE: Section 77-1-810 requires that DSL establish a weed control management program for control of noxious weeds reasonably proved to be caused by the recreational use of state lands.

(16) **COMMENT:** (a) Composition of Board of Land Commissioners should be changed by placing recreationists and lessees on the Board.

RESPONSE: The composition of the Board of Land Commissioners is set by Article X, Section 4 of the Montana Constitution to include the Governor, Attorney General, Secretary of State, Superintendent of Public Instruction, and State Auditor. In addition, 77-1-113 provides that it is unlawful for any member of the Board to lease state land.

(17) **COMMENT:** Ban all hunting or sell state lands to the heirs of the homesteaders.

RESPONSE: DSL has no authority to implement this comment by rule.

(18) **COMMENT:** Add another fee to DFWP conservation license for weed control on state lands.

RESPONSE: DSL has no authority to regulate the DFWP conservation license.

(19) **COMMENT:** A private landowner who is not the state's lessee should not be able to allow access to leased state land without the lessee's permission.

RESPONSE: Section 77-1-101(7) defines "legally accessible state lands" to include state land to which the recreationist gained access by securing permission of a private landowner to cross private land. The suggestion cannot be implemented.

(20) **COMMENT:** If there's no funding for the EIS and the economic analysis, hold up the whole thing.

RESPONSE: HB778 becomes effective on March 1, 1992. DSL cannot delay the effective date by rule. The Legislature in the January, 1992 special session provided funding for an economic analysis of the surface of state lands. DSL has determined that an EIS is not necessary.

(21) **COMMENT:** No permit should be required to enter state land from federal land.

RESPONSE: Section 77-1-801 requires a permit for all general recreational use, no matter how the recreationist entered the state land.

(22) **COMMENT:** Include state lands, including access points, in the DFWP permit drawings.

RESPONSE: Section 77-1-203(3) and 77-1-801 open state lands to general recreational use by persons who are under 12 years of age or who purchase a recreational use license.

(23) COMMENT: Leases should go to the highest bidder. Don't allow the current lessee to match the bid, then get it released through some review process. Allow public to bid for all surface uses of state tracts, with the high bidder being allowed to use the land for all purposes.

RESPONSE: The right of the lessee to match the highest bid and to apply for a reduction of the bid is contained in 77-6-204 and cannot be repealed by rule. Existing statutes on agricultural leasing and HB778 would have to be amended before an all-purpose surface lease could be implemented.

(24) COMMENT: Change age from 12 to 18 years and require adult supervision of people under 18.

RESPONSE: Section 77-1-203(3) and 77-1-801 opens legally accessible state lands to general recreational use by 12 years of age and older who purchases a recreational use license.

(25) COMMENT: Open all parks to hunting.

RESPONSE: DSL has no authority over state parks; they are managed by DFWP.

(26) COMMENT: A family of five would be required to pay $50.00 to hunt and fish. This is very expensive, especially in view of the fact that your department is already funded from taxpayer dollars.

RESPONSE: The cost would be $25.00 if all family members are 12 years old or older. This cost is set by 77-1-802 and cannot be changed by rule.

(27) COMMENT: If loss in revenue results to the schools as a result of HB778, then a mechanism should be put in place to replace it.

RESPONSE: DSL cannot by rule put in place a mechanism to repeal HB778.

(28) COMMENT: All persons who buy a hunting license should be required to purchase a general recreational use license.

RESPONSE: Under federal law allocating federal funds to states for fish and wildlife, all revenues from hunting licenses must be allocated to the state fish and wildlife agency.

(29) COMMENT: Lessee and state should have joint control by agreement to accommodate lessee's operation, control number of hunters on tract and because state can't afford more people to enforce rules.

RESPONSE: Section 77-1-804 provides that DSL must make closure and recreation decisions. The rule allows the lessee to have input into that decision. Under HB778, the only way that the number of hunters on a tract can be restricted is through the block management program administered by DFWP.

(30) COMMENT: If there is a problem between the state lessees and the recreationists, they should work it out between themselves. No laws or rules are necessary.

RESPONSE: HB778 was passed by the 1991 Montana Legislature. Section 77-1-804 of that bill requires DSL to adopt rules to implement the bill.

(31) COMMENT: The lessee should be consulted to determine whether certain kinds of hunting should be prohibited on a certain tract.

RESPONSE: The lessee may advise DSL of any restrictions that may be needed on the tract pursuant to Rule V(2). Also, Rule V(2) was amended pursuant to another comment to provide notice to the lessee before restrictions are imposed.

(32) COMMENT: Submit to the people a referendum on a tax to eliminate private leasing of state land or to allow public access.

RESPONSE: A referendum cannot be established by rules. Legislative action is required.

(33) COMMENT: Instead of adopting new rule for recreational use and applying them to forest lands, why not apply the existing state forest land recreational use rules to all state land?

RESPONSE: HB778 requires DSL to adopt rules that include restrictions, closures, notice to the lessee, and weed and damage compensation to the lessee. Current state forest rules do not contain those provisions.

(34) COMMENT: Close all state lands to all users for one year, then start over.

RESPONSE: Montana Statutes require DSL to conduct the recreational use and surface leasing programs. It cannot by rule suspend that program.

(35) COMMENT: It seems to me what we need is an educated or wise user. A suggestion may be to have special recreationists complete a user course before using state lands before acquiring a license.

RESPONSE: Sections 77-1-203(3) and 77-1-801 give persons under 12 years of age and those who purchase a recreational use license the authority to make general recreational use of legally accessible state lands, subject to restrictions and closures. Adoption of a user course is outside the scope of DSL's authority and also, due to budget constraints, could not be implemented.

(36) COMMENT: Don't apply the recreational use program to the Flathead.

RESPONSE: DSL has no authority to exempt a region of the state from the rules. In response to comment received from persons in western Montana, DSL has adjusted the rules relating to the definition of "motor vehicle" and "general recreational use," and the restrictions on snowmobiles, camping, and open fires.

(37) COMMENT: Public comments will not be used--just thrown away.

RESPONSE: DSL staff members read all comment letters, listened to the tapes of each hearing, and prepared written summaries of the comments. In adopting the final rules, the Board of Land Commissioners reviewed the comment summaries and approved a response to each comment.

(38) COMMENT: State land is public land. It is unconstitutional to require a fee to use state land because it restricts freedom of movement. Public lands, the public land budget, and tax dollars support the rangeland act, which does not exclude state school lands.

RESPONSE: State lands are held in trust by the state for various institutions, such as the public schools, units of the university, the School for the Deaf and Blind, the State Veteran's Home, and state reform school. Under Article X, Section 11 of the Montana Constitution and to federal law, DSL must manage these lands to generate revenues for these beneficiary institutions. Thus, under federal law and the Montana Constitution, DSL is required to charge for compensable use of state lands. DSL has determined that hunting and fishing are compensable uses.

(39) COMMENT: Montana is the last of the 14 western states to open lands to have public recreational access to its state lands. The Constitution requires that the public have access to state lands.

RESPONSE: Nothing in the Montana Constitution requires public access to state lands. State lands in the western states have different recreational statuses. In Oklahoma and Nebraska, the surface lessee leases all surfaces uses, including recreational use, and therefore controls recreational use. In Colorado, the surface lessee controls recreational use and may charge for it. Recreational use in New Mexico is open because the state fish and game agency pays for recreational use. Texas has a mixture of systems for different type state lands. State lands in North Dakota, South Dakota, Wyoming, Idaho, Utah, Arizona, Oregon, and Washington are open to the public.

(40) COMMENT: The rules are too complex. DSL should simply adopt Bureau of Land Management or U.S. Forest Service rules. There is no difference between state lands and federal lands. Put all rules for recreational use of state lands administered by all agencies in one document and hold one hearing.

RESPONSE: State lands are different from federal lands. Most are leased for agriculture or grazing. This requires a balancing between the interests of the lessee and the recreationist. In order to strike this balance, HB778 requires DSL to adopt rules to provide for restrictions, closures, notice, and lessee notification. DSL has attempted to draft rules that address most concerns raised by interested parties. The detailed nature of certain rules has resulted from the numbers of concerns raised by the parties.

(41) COMMENT: Rules are valid only if they relate back to exact word of the law; otherwise they are unconstitutional.

RESPONSE: DSL has attempted to the best of its ability to adopt rules that implement HB778.

(42) COMMENT: The $3.00 of the $5.00 license fees should go to school teachers, not school administrators.

RESPONSE: Under law, the $3.00 goes to the school equalization program. DSL has no authority to dictate how school equalization funds are spent.

(43) **COMMENT:** There should be a cost accounting of this program with the $5.00 fee compared to additional costs incurred to the departments of state lands and fish, wildlife and parks.

RESPONSE: DSL intends to keep track of the time and funds expended on the recreation program. The Legislature established the $5.00 fee with the intent that $1.50 of the fee provides for administration, weed control and damage reimbursements.

(44) **COMMENT:** Because $1.50 is not adequate to pay for administration, weeds and damage reimbursement, the lessee's lease payment should be reduced, the $5.00 fee should be $8.00, $50.00 or $100.00.

RESPONSE: It is unknown at this time how many general recreational use licenses will be sold. Therefore, it is not known how much money will be available for weeds, damage reimbursement, and administration. The costs of administration, weed control and damage reimbursements are also not known because no history of the program exists. The existing lease rental rates for existing uses are established by statute and there is no allowance for rental reductions.

(45) **COMMENT:** The Legislature probably violated the Constitution in specifying a value of one year's recreational use as $3.00. It should be more.

RESPONSE: The Legislature attempted to determine the value of recreational use of state lands. Because of a lack of history on recreational use of state lands, this was a difficult determination. However, the Legislature has funded an economic study to determine, among other things, whether the charge is appropriate.

(46) **COMMENT:** Put a cap on administrative expenditures so more is left for weed and damage reimbursement.

RESPONSE: It is not known what the annual administrative expenditures may be. DSL will not be able to absorb additional recreation program administrative expenses in the current level budget. Therefore, no cap will be placed in the rules.

(47) **COMMENT:** We cannot afford to create more government jobs in this country.

RESPONSE: DSL cannot absorb the new recreational use program cost in the current level budget unless existing services or programs are dropped. Additional employees resulting from the recreation program will be limited to the funds available in the recreational use account which results from the $1.50 deposited per recreational use license sold.

(48) **COMMENT:** Charging only hunters and fishermen unlawfully discriminates against other recreationists. Why pick out one group of recreationists to burden with the license requirement and other restrictions.

RESPONSE: DSL has applied the license requirement to hunting and fishing because those uses have a compensable value. Other uses will be studied over the next year to determine whether they have a compensable value.

(49) COMMENT: This law constitutes double taxation for motorcycles who already pay a fee under the 1988 motorcycle licensing law to have public lands made available for motorcycle recreationists.

RESPONSE: Motorcycling has not been included in the definition of general recreational use and therefore does not require a recreational use license. Motorcycle use conducted in conjunction with general recreational use is restricted to state and federal highways, dedicated county roads, other regularly maintained county roads, and other roads designated by DSL.

(50) COMMENT: This law violates the constitutional right to bear arms by prohibiting a person from carrying arms on state land without a $5.00 recreational use license.

RESPONSE: The recreational use license fee is imposed for using state lands, not for carrying firearms. The fee is also imposed for use of state lands for fishing, which does not involve use of firearms.

(51) COMMENT: From where will the money come to pay for extra workload generated by this program come?

RESPONSE: HB778 directed that $1.50 from each recreational use license sold is to be placed in the State Lands Recreation Use Account. This account is to be used for administration of the program, weed control and damage reimbursement.

(52) COMMENT: (a) Why wasn't a takings implication assessment done?

(b) Implementation of these rules violates the current surface lease and may require that the lessee be compensated.

(c) If these rules are adopted as now written, the lessee should be compensated for this additional burden upon his lease.

RESPONSE: The rules have been written to protect the interests of the lessee through restrictions, closures, notification, and weed and damage reimbursement.

(53) COMMENT: Will snowmobilers be compensated for loss of use of land they've been using?

RESPONSE: Historically, unleased, unlicensed state land has been open for snowmobile use. Rule V has been amended to allow this use to continue.

(54) COMMENT: Persons should be allowed to hike on state land for free on forested land in the Swan Valley. The people have always had the right to walk across state lands. These rules take that right away.

RESPONSE: Hiking has not been included in the definition of "general recreational use" and therefore a recreational use license is not required for this activity.

(55) COMMENT: DSL must ask the Governor and special session to fund the economic study and amend the law to specify a minimum fee and allow the board to set the access

fee at full market value as periodically determined by the board.

RESPONSE: The economic study has been funded. HB778 was not amended in the January, 1992 special session.

(56) COMMENT: State land grazing fees are too low.

RESPONSE: The minimum annual grazing rentals on state lands are set by statute (77-6-507, MCA). In addition, grazing fees are beyond the scope of these rules.

(57) COMMENT: Recreationists should be made aware when obtaining a license that purchaser will be held responsible and liable for violations and damages.

RESPONSE: DSL intends to have information available for distribution at authorized license agents that outlines the rules pertaining to recreational use of state lands. Future licenses may have pertinent information printed on the back of the license.

(58) COMMENT: How will the fee be enforced when there are not enough enforcement people now? How will fish, wildlife and parks enforce these laws? Its people are already over-extended.

RESPONSE: Enforcement may be difficult due to current existing responsibilities. Personnel needs will become more apparent after the program has been in effect for a year or two.

(59) COMMENT: State lands should be policed year-round and an enforcement officer should be on duty at all times. Don't give any more duties to game wardens - give a person in each area the rights of a deputy that can be called to check licenses and enforce rules.

RESPONSE: The definition of general recreational use has been amended to licensed hunting and fishing. This should limit the need for enforcement to specific time periods during the year. The rules have been amended to require a recreationist to show DSL personnel his or her recreational use license and to provide that a lessee request to see the license does not constitute interference. (The rules do not, however, require the recreationist to show the license to the lessee.) See response to Comment 22 above.

(60) COMMENT: There should be a program similar to TIPMONT where sportsmen can report violations and vandalism on state lands.

RESPONSE: DSL is considering this suggestion and may implement a toll-free number in the future if the need becomes apparent. Implementation of the suggestion would not require a change in the rules.

(61) COMMENT: DSL should prepare a map showing all state lands that are open to access and all roads that can be used to access them. Make this map available at hunting and fishing license outlets. Current Bureau of Land Management maps are inaccurate and should be updated.

RESPONSE: Due to limited budget resources, DSL is unable to produce a map as suggested. In addition, the legality of access across many roads is not known at this time and DSL has no authority to make determinations on roads off state lands.

(62) **COMMENT:** (a) All access points should be marked so that outfitters and minority conservationists cannot defeat the access program.

(b) DSL should incorporate into the rules a long-range program to mark critical access points and key parcels of state land.

RESPONSE: Due to limited budget resources, DSL is unable to mark all access points during the current biennium. Additionally, it would be extremely difficult to mark all access points due to the vast number of state tracts and their respective access points. Also, see response to the previous comment.

(63) **COMMENT:** State lands should be marked with blue paint.

RESPONSE: Due to limited budget resources and the vast number of state tracts, this suggestion cannot be implemented. However, DSL is considering requiring all closure, restriction and notification signs to have a light blue background.

(64) **COMMENT:** The rules are overly restrictive because they are designed to protect intensively irrigated and cultivated state land. These rules should not apply to undeveloped grazing land.

RESPONSE: HB778 requires restrictions and closures procedure for all lands and the rules have been developed to pertain to all classes of state land. Certain closures and restrictions are as the Legislature dictated to protect the current uses of the land. Restrictions have been imposed to protect current leasehold values and yet allow general recreational use in a manner that will avoid conflict and damage.

(65) **COMMENT:** Hunters should not be allowed through fences.

RESPONSE: Vehicular access onto state lands is restricted by Rule V. Foot access through fences is not considered to be a problem. If fences are damaged as a result of recreational use, the lessee may request reimbursement for damages as outlined in Rule XI.

(66) **COMMENT:** It is illegal to block access to the back country.

RESPONSE: These rules deal with recreational use of state lands. The comment pertains to legal issues outside the scope of these rules.

(67) **COMMENT:** What is to keep a lessee from driving game off the state land onto private land?

RESPONSE: Sections 87-3-125 and 87-3-126 prohibit driving of game with a motor vehicle, aircraft, or boat. Section 87-3-142 prohibits the intentional disturbance of wild animals to prevent their taking by hunters. These statutes would prohibit the practice referenced by the commenter with motor vehicles and on foot while the hunter is present. Driving wild animals on foot at other times would be largely ineffective and temporary.

(68) COMMENT: 77-1-805(1) infers that 70-16-302 limits liability. Will liability still exist? Will the state take care of it and any legal action that may be initiated?

RESPONSE: Under 70-16-302, the lessee will be liable for injury or property damage that results from an act or omission of the lessee that constitutes willful or wanton misconduct.

(69) COMMENT: The rules should provide for lease termination for lessees who block access by such means as fences, ditches, and road obliteration.

RESPONSE: A lessee has an obligation to maintain the boundaries of the state lease (most commonly by fencing) so as to limit livestock use in accordance with the lease agreement. Vehicle use by recreationists is limited to specific roads in accordance with Rule V. Blockage of a legal access route is elsewhere prohibited. DSL currently has the authority to terminate a lease for lease violations. Therefore, there is not a need to include a clause in the rules for lessee termination for the reasons cited.

(70) COMMENT: (a) The state should pursue an aggressive effort to "rid" itself of these isolated, unmanageable lands, by exchange or sale.

(b) There needs to be an alternative or opportunity for private ranchers to purchase their state lands at some value above appraised value in order to prevent damage to their own privately-owned lands and to ensure greater return for educational purposes.

RESPONSE: The actions suggested are beyond the scope of the recreational use rules.

(71) COMMENT: In many cases state and federal land is overgrazed by lessee and grazing should be limited during big-game season.

RESPONSE: DSL and the Land Board have no authority over federal lands. DSL disagrees with the statement that in many cases state land is overgrazed. A lessee that overgrazes state land is subject to lease termination. DSL has cancelled leases for overgrazing and is now working with new lessees to remedy the past overuse. Limiting livestock use during big-game season does not address overgrazing problems. Grazing leases of state land do not restrict the season of use due to the scattered location of state lands. The most effective grazing use of state lands is generally through an integrated plan with deeded and possibly federal lands, which may include fall grazing season.

(72) COMMENT: Group all compliance dates in one section.

RESPONSE: The suggestion would require DSL to group Rules VI, VII, and VIII into one rule. This would cause confusion. Instead, DSL has prepared a schedule of deadlines which is available at DSL offices.

(73) COMMENT: How can the lessee manage the property when he can't control access?

RESPONSE: Under HB778, management must be accomplished through restrictions and closures, and communication with recreationists under Rule IX.

(74) COMMENT: People who have recreated on state land for five years have earned the right to make recreational use of them under the law of adverse possession.

RESPONSE: The law of adverse possession does not apply to state or federal land.

(75) COMMENT: Land exchanges should not result in a net loss of recreational opportunity on state lands.

RESPONSE: Land exchanges are beyond the scope of these rules. However, the effect on recreational access can be considered in the exchange process. Other factors are also relevant and must be balanced with recreational access.

Reviewed by:

John F. North
Chief Legal Counsel

Dennis D. Casey
Commissioner

Certified to the Secretary of State March 16, 1992.

BEFORE THE BOARD OF OIL AND GAS CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION OF NEW RULES 36.22.703, 36.22.1014, 36.22.1104, 36.22.1105, 36.22.1222 AND 36.22.1223; AND THE AMENDMENT OF RULES 36.22.302, 36.22.307, 36.22.602, 36.22.1001, 36.22.1002, 36.22.1005, 36.22.1012, 36.22.1013, 36.22.1103, 36.22.1207, 36.22.1226, 36.22.1227, 36.22.1241 AND 36.22.1242; AND THE REPEAL OF RULE 36.22.1204; PERTAINING TO THE ISSUANCE OF OIL AND GAS DRILLING PERMITS, DRILLING AND PRODUCTION WASTE DISPOSAL PRACTICES, THE FILING OF REPORTS, LOGS, AND OTHER INFORMATION, BLOW-OUT PREVENTION AND SAFETY REQUIREMENTS, SPILL NOTIFICATION REQUIREMENTS, HYDROGEN SULFIDE GAS REPORTING REQUIREMENTS, AND OTHER ENVIRONMENTAL REQUIREMENTS.	NOTICE OF ADOPTION OF NEW RULES 36.22.703, 36.22.1014, 36.22.1104, 36.22.1105, 36.22.1222 AND 36.22.1223; THE AMENDMENT OF RULES 36.22.302, 36.22.307, 36.22.602, 36.22.1001, 36.22.1002, 36.22.1005, 36.22.1012, 36.22.1013, 36.22.1103, 36.22.1207, 36.22.1226, 36.22.1227, 36.22.1241, AND 36.22.1242; AND THE REPEAL OF RULE 36.22.1204.

TO: All Interested Persons:

1. On December 12, 1991, the board published notice at page 2386 of the Montana Administrative Register, Issue No. 23, of the proposed adoption of new rules I through VI, the revision of rules 36.22.302, 36.22.307, 36.22.602, 36.22.1001, 36.22.1002, 36.22.1005, 36.22.1012, 36.22.1013, 36.22.1103, 36.22.1207, 36.22.1226, 36.22.1227, 36.22.1241, and 36.22.1242, and the repeal of rule 36.22.1204.

2. The board held a public hearing on the proposed new rules, rule revisions, and the repeal of a rule, at 9:00 a.m., on January 30, 1992, at the Billings Petroleum Club located in the Sheraton Hotel building in Billings, Montana. No written or oral comments were presented on rules 36.22.302(1) through (26), 36.22.302(28) through (35), 36.22.302(50) through (64), 36.22.302(66) through (80), 36.22.602, 36.22.1001, 36.22.1002, 36.22.1012, 36.22.1013, Rule III (36.22.1104), Rule IV (36.22.1105), Rule V (36.22.1223), 36.22.1226, and 36.22.1242, and these rules are adopted as proposed. After consideration of the comments received on the remaining proposed rules, the board adopted those rules as proposed with the following changes (new material is underlined, deleted material is interlined), added an additional definition number (36) to ARM 36.22.302 for the phrase "harm to soil(s)," and repealed rule 36.22.1204:

36.22.302 DEFINITIONS

(1) through (26) same as proposed.

(27) "Flow line": (a) same as proposed.

(b) also means a pipeline used to transfer produced water

or other fluids from a production or injection facility to an injection or disposal well;

(c) same as proposed.

(28) through (35) same as proposed.

(36) "Harm to soil(s)" means a reduction in the plant productivity which existed at the site of a drilling well, idled well, shut-in well, or production facility prior to the initiation of oil and gas exploration or production activities.

(36) through (45) same as proposed but renumbered (37) through (46).

~~(46)~~ (47) "Net" means an open-meshed, twisted, knotted, knitted, or woven material used to completely cover a pit, pond, tank, or other oil or gas exploration or production facility.

(47) and (48) same as proposed but renumbered (48) and (49).

~~(49) "Oil-based drilling fluid" means any drilling fluid containing oil or petroleum additives in amounts of 5 percent or greater by volume.~~

(50) through (64) same as proposed.

(65) "Screen" means an open-meshed, twisted, knotted, knitted, or woven material that is firmly attached to a fence.

(66) through (80) same as proposed.

Comment: The Montana Petroleum Association (MPA) recommends that part (b) of definition number (27), "flow line," be expanded to include fluids other than produced water and to include injection facilities as well as production facilities. The rationale for the recommended change is that flow lines frequently transport fluids other than produced water to and from both production and injection facilities.

Response: The proposed amendment reflects standard industry practices and is an appropriate expansion of the definition. The board made the amendments as suggested.

Comment: Exxon Company, USA (Exxon), recommends that the existing definition number (35), "gas well," be retained or changed to reference a gas/oil ratio of 100,000 standard cubic feet (scf) per barrel of oil instead of 10,000 scf per barrel.

Response: The board's proposed amendment to definition number (35) implements a long-standing board policy for the classification of gas wells. The policy, as reflected in the board's proposed amendment to the definition, has served the board satisfactorily for more than ten years. The board also notes that any other operator may petition the board to have a well re-classified as allowed by part (c) of definition number (35). The board does not adopt Exxon's recommended change.

Comment: MPA recommends that the phrase "harm to the soil" in subsection (3) Rule 36.22.1005, subsection (2) of Rule 36.22.1207, subsections (1) and (2) of Rule 36.22.1226, and subsection (3) of Rule 36.22.1227, be replaced by the phrase "not render surface soils infertile." The basis for the proposed amendment is that the MPA feels the phrase "harm to soils" is too vague.

Response: The board agrees that the phrase "harm to soils" as used in the proposed rules is vague. However, the MPA's

suggested amendment also sets a vague standard. The board chooses to add definition number (36) for the phrase "harm to soils" to Rule 36.22.302, ARM.

Comment: Coastal Engineering Company recommends that the definitions of "screen" and "net" be amended to include "knitted" materials as an acceptable option for the screening or netting of pits, ponds, or tanks.

Response: There are some pit screening and netting materials of "knitted" construction on the market which can be used to protect against migratory bird mortality in oil and gas exploration and production operations. The addition of the "knitted" choice to definitions numbers (46) and (65) will allow for screens and nets of knitted construction to be used for purposes of these rules. The board made the amendments as suggested.

Comment: MPA recommends that the definition number (49) for "Oil-based drilling mud" be amended to allow for oil or petroleum drilling mud additives in amounts of up to ten (10) percent by volume without such mud being classified as "oil-based."

Response: The board recognizes that diesel fuel and other petroleum additives are frequently used in drilling mud for various purposes without conversion of the drilling fluid to an "oil mud" or "invert oil mud." Regardless of what technically qualifies as "oil-based drilling fluid" under industry standards, the board is concerned that petroleum-based drilling fluid additives could potentially degrade waters and cause harm to soils if not contained in lined reserve pits or properly disposed. However, the board believes that further study of the issue is necessary to determine the threshold percentage of oil or petroleum additives at which pit liners and special disposal requirements might become necessary. The board deletes the definition number (49), "oil-based drilling fluid," at this time and will revisit the issue in future rule-making. The board will continue to review drilling mud programs, reserve pit construction requirements, and drilling fluid disposal practices on a case-by-case basis in conjunction with the application for permit to drill.

36.22.307 ADOPTION OF FORMS Adopted as proposed.

Comment: MPA recommends that proposed new forms and amended forms be subject to the same public notice and comment procedures as required by the laws for formal rulemaking. MPA also states that proposed new or amended forms should not be adopted without public input.

Response: The board strongly endorses the use of public input on the policy and procedural matters it administers. However, the Montana Administrative Procedure Act (MAPA), Section 2-4-101 et seq., MCA, does not require the board to give written notice of, or solicit formal comment on, the adoption or amendment of administrative forms. See, Sections 2-4-202, and, 2-4-302, MCA (agency to adopt rule of practice to describe forms; agency to give written notice and provide for public comment on intended

action to adopt, amend, or repeal a rule). The board recognizes that such forms must conform to the Rules and statutes in effect at the time the forms are adopted. In keeping with its policy of cooperating with the public, the board has distributed the new and amended forms to the MPA and other organizations for written comment prior to adoption. The board does not adopt the suggestion of mandatory public notice and comment under MAPA for the adoption or amendment of administrative forms.

Rule I (36.22.703) HORIZONTAL WELLS (1) and (2) same as proposed.

(3) A horizontal well ~~must~~ meets the location requirements of ARM 36.22.702 if the point where the well bore first penetrates the common source of supply, the horizontal drainhole end point, and every part of the well bore lying between these points meet the minimum distance requirements from the drilling unit boundaries that would apply to a vertical well of the same projected depth, regardless of the surface location proposed.

(4) The operator of a horizontal well may designate an optional drilling unit, which must consist of two contiguous drilling units of the size and shape otherwise authorized for a vertical well of the same projected depth. The operator must receive administrative approval of the optional drilling unit before starting to drill the horizontal drainhole. Minimum distance requirements from drilling unit boundaries that would apply to the contiguous drilling units apply to the optional drilling unit, except that such requirements do not apply to the common boundary of the contiguous units. Any operator designating an optional drilling unit under this section must apply for proper well spacing ~~to be determined by the board after notice and public hearing~~ within 90 days after the completion of a well capable of production.

(5) and (6) same as proposed.

Comment: MPA recommends minor clerical changes to subsection (3).

Response: The board adopts the proposed non-substantive amendments to subsection (3).

Comment: Exxon recommends that subsection (4) be amended to require the operator to give all adjacent land and mineral owners notice of the operator's intent to designate an optional drilling unit prior to the drilling of a horizontal well.

Response: Exxon reads subsection (4) to require a board hearing on all optional drilling units. However, the rule requires advance administrative approval of the optional drilling unit and a board hearing only if the operator wishes to establish a permanent optional drilling unit if the well is capable of production. The intent of the administratively approved optional drilling unit is to avoid a board hearing if the well is not capable of production. The board adds language to the last sentence of subsection (4) to clarify this intent. Exxon's suggestion of a board hearing after giving notice to adjacent land and mineral owners is necessary only if the well is capable of production. Neither the board nor the operator can determine

with any certainty whether a well is capable of production until it is drilled and tested. The board does not adopt the suggested amendment but clarifies the rule as noted.

36.22.1005 DRILLING WASTE DISPOSAL AND SURFACE RESTORATION

(1) same as proposed.

(2) When a salt-based or oil-based drilling fluid is used to drill a well located within a floodplain, as defined by ARM 36.15.101, or in irrigated cropland, drilling waste and produced fluids that accumulate during drilling operations must be disposed of off-site in a manner allowed by local, state, and federal laws and regulations unless an alternative on-site disposal method is approved in writing by the board administrator.

(3) same as proposed.

(4) Within 10 days after the cessation of drilling or completion operations, all hydrocarbons must be removed from earthen pits used in association with drilling or completion operations or such pits must be fenced, screened, ~~or~~ and netted. Such pits that contain water with more than 15,000 parts per million total dissolved solids or salt-based drilling fluids must be fenced within 90 days after the cessation of drilling and completion operations.

(5) same as proposed.

(6) All earthen pits used in association with drilling and completion operations must be closed and the surface restored according to board specifications within one year after the cessation of drilling operations. Upon written application by the operator, an exception to the one-year pit closure requirement may be granted in writing by the board administrator upon a showing that:

~~(a) access to and use of the pit will be restricted to use by the operator;~~

~~(b)~~ (a) no dumping or disposal of waste or fluids in the pit will occur; and

~~(c)~~ (b) delayed closure of the pit will not present a risk of contamination to soils or water or a hazard to animals or persons.

Comment: MPA recommends that subsection (2) be amended to allow the operator to apply for an exception to the off-site drilling waste disposal requirement for salt and oil based drilling fluids.

Response: There are numerous on-site drilling waste disposal technologies available which render such wastes substantially inert. These available and evolving technologies are often the economically and environmentally preferred alternative for drilling waste disposal. The recommended amendment would allow the board administrator to consider on-site drilling waste treatment and disposal methods on a case-by-case basis as exceptions to the off-site disposal requirement imposed by subsection (2) of the rule. The board made the amendment as suggested.

Comment: MPA recommends that the first sentence of subsection

(4) be amended to read ". . . or such pits must be fenced, screened, or and netted." The rationale for the proposed amendment is to conform with subsection (1) of proposed Rule V which uses "and" instead of "or."

Response: The use of "or" as the connective in this sentence is a clerical error. The intent of the rule is to prevent livestock and wildlife mortalities, including migratory bird mortality, in reserve pits which contain oil and remain open for more than ten days after the cessation of drilling operations. The word "or" implies that the operator can install any one of the three listed items. However, the installation of all three items (a fence, a screen, and a net) are necessary to prevent livestock and wildlife mortalities. Therefore, "and" is the proper connective word. The board adopts the amendment as suggested.

Comment: Exxon comments that subsection (5) conflicts with subsection (6)(a) and recommends that a change be made to avoid the conflicting provisions.

Response: Subsection (5) prohibits use of the reserve pit for disposal after the cessation of drilling operations while subsection (6)(a) allows continued use of the reserve pit if such use is restricted to the operator. The two provisions conflict. Subsection (6)(a) is not necessary and is deleted to avoid any confusion. The board adopts the suggested amendment.

36.22.1012 SAMPLES OF CORES AND CUTTINGS Adopted as proposed.

Comment: Exxon comments that subsection (1) of this rule is very burdensome for the oil and gas industry and recommends that the rule be clarified as to what depth the samples will be required. Exxon also recommends that existing subsection (3) be amended to specify the criteria under which the board may exercise its discretion to relieve the operator of all or a portion of the sample requirement.

Response: The board typically requires that only a subset of samples be filed for any given well. Generally, no samples are required for development wells in areas with established geologic control. The amount and depth of required samples are designated by the board on the approved application for permit to drill (APD) form. Subsection (3) allows the board to exercise such discretion in deciding what samples will be required. The sample requirements specified in the rule have fulfilled the board's responsibilities to prevent waste and to protect correlative rights since 1972 without incident or objection. It would be burdensome to include in subsection (3) all of the potential criteria under which the board might exercise its discretion to relieve an operator of all or a portion of the sample requirement. The board exercises this discretion on a case-by-case basis by considering any number of potential factors including geology, existing well control in the area, the depth of the well, the well type (e.g., oil, gas, injection) and other factors. The operator may request a specific sample set when the APD is filed or may request a

reconsideration of any administratively imposed sample requirement. The board does not adopt the suggested amendment.

Rule II (36.22.1014) BLOWOUT PREVENTION AND WELL CONTROL EQUIPMENT

(1) same as proposed.

(2) Drilling spools for blowout preventer stacks ~~must have a working pressure rating equal to the rated working pressure of the attached blowout preventer and~~ must meet the following minimum specifications:

(a) through (5)(b) same as proposed.

(c) In addition to the initial pressure tests, the owner or operator must check ram- and annular-type preventers for physical operation each trip but not more than once each twenty-four (24) hour period.

(d) through (7) same as proposed.

Comment: MPA recommends that the title of this rule be amended to specify that the rule applies only to drilling wells.

Response: There is no need to amend the title of this rule because the rule will be contained in the drilling subchapter of the board's rules. The board does not adopt the suggested amendment to the title of this rule.

Comment: MPA recommends that subsection (2) be amended to make it clear that the drilling spool should not be separated from the blowout preventer.

Response: The proposed amendment would allow the operator to have drilling spools and blow out preventers of different working pressures as long as the lesser of the two rated working pressures is equal to or greater than the maximum anticipated pressure to be contained at the surface. The board adopts the amendment.

Comment: Exxon recommends that subsection (5)(c) be amended to require only one pressure test a day to be consistent with federal Bureau of Land Management requirements. Texaco contends that running a pressure test each trip is unnecessary and cost prohibitive. Texaco recommends that the frequency of the pressure test be left to the discretion of the operator.

Response: It is not uncommon for a drilling rig to trip more than once in a twenty-four hour period. The board feels that it would be unnecessary for a pressure test to be run more than once in a twenty-four period. However, for consistency and safety reasons, the frequency of the pressure test can not be left to the discretion of the operator. An amendment is made to subsection (2) to limit the frequency of the pressure test to every trip but not more than once every twenty-four period. The board adopts Exxon's suggested amendment and does not adopt Texaco's request that the frequency of pressure tests be left to the discretion of the operator.

36.22.1103 NOTIFICATION AND REPORT OF EMERGENCIES AND UNDESIRABLE INCIDENTS Adopted as proposed.

Comment: Exxon recommends that subsection (1) be amended to

replace the term "immediate" with the phrase "as soon as practicable, but within 24 hours of the incident." Exxon believes that the "immediate notice" requirement will cause some operators to neglect spill control in favor of racing to town to call the board.

Response: The board believes that common sense will prevail and that the operator will control an undesirable event before leaving the location to contact the board. The board does not adopt the amendment.

Comment: Exxon believes that the five day written report requirement in subsections (1) and (2) is unreasonable and burdensome to the operator and recommends that the time limit be increased to ten or fifteen days.

Response: The board notes that the written report is required within "five working days." The board believes that five working days will give the operator plenty of time to submit the required report. A more lengthy time limit does not allow for board intervention on a timely basis, especially in those instances outlined in subsection (2) where the written report is the only notice the board will receive of an undesirable event. The board does not adopt the amendment.

Comment: Exxon believes that spills contained within tank firewalls do not present the same level of environmental risk as do other spills, and recommends that contained spills not be subject to any notice or reporting requirements.

Response: The board disagrees that spills completely contained in earthen firewalls present less environmental risk than do uncontained spills in all cases. Exxon overlooks the potential environmental risk to groundwater and wildlife presented by oil contained in unlined and uncovered earthen firewalls. This rule fulfills the board's waste prevention responsibilities as well as the responsibility to protect the environment. Oil spills, even if contained within firewalls, could violate Section 82-11-121, MCA, which prohibits waste of oil or gas. The board does not adopt the amendment.

Comment: MPA and Exxon recommend that subsections (1)(a) and (1)(c) be amended to delete the references to groundwater. Both commentators believe that it would be difficult and expensive for the operator to determine whether a spill has entered groundwater.

Response: No doubt there can be substantial work and expense involved in determining whether a spill has contaminated groundwater. However, the importance of the groundwater resource merits all necessary protective measures. When in doubt, the operator should report the possibility that a spill may have entered groundwater. With timely notification, the board can work with the operator to determine whether groundwater contamination has occurred and whether remediation measures are necessary. The board feels strongly that the reporting requirements are not burdensome in relation to the potential risk to the groundwater resource. The suggested amendments are not adopted.

Comment: Exxon recommends that subsection (2)(b) requiring notification of gas releases be deleted in deference to the

reporting requirements under federal statutes such as the Comprehensive Environmental Response and Compensation Act (CERCLA) and the Superfund Amendment and Reauthorization Act (SARA).

Response: The board cannot delegate its authority to regulate oil and gas exploration and production activities to other state or federal agencies without specific legislative mandate. The board is charged with the responsibility of investigating and controlling waste of the natural gas resource and cannot rely on the reporting requirements of federal statutes to adequately monitor gas releases. The board does not adopt the proposed amendment.

36.22.1207 EARTHEN PITS AND OPEN VESSELS (1) same as proposed.

(2) The owner or operator may make temporary use of an unlined earthen pit to retain oil or water ~~temporarily~~ in the event of an emergency or to retain fluids generated in recompletion or workover operations. The oil, water, and contaminants must be removed from the emergency, recompletion or workover pit ~~and promptly~~ within forty-eight (48) hours and disposed of in a manner that will not degrade surface water or groundwater or cause harm to soils. An owner or operator must apply for and obtain a permit under ARM 36.22.1227 to construct or operate a permanent emergency pit. Repeated use of an earthen pit or pits to contain oil or water spills from an improperly or inadequately designed or maintained production facility does not constitute an "emergency" for purposes of this rule.

Comment: Exxon recommends that subsection (1) be amended to allow the operator to apply for an exception to the storage and disposal restrictions in this rule. Exxon believes that the operator should be granted such an exception if it can show that the proposed disposal, retention, or storage method is not prohibited by other rules or laws, will not cause waste of hydrocarbons, will not pollute soils, surface waters, or groundwater, and will not harm persons or animals.

Response: Exxon's stated criteria for an exception establishes an extremely difficult burden of proof under regulatory, economic and, environmental limitations. The board believes that the potential risks outweigh any benefit in allowing the retention, storage, or disposal of the enumerated wastes in earthen reservoirs and open receptacles. Any operator may petition the board for a variance from a board rule. An exception to this rule can only be granted for good cause after notice and hearing. The board does not wish to provide for an administrative exception to this rule and does not adopt the proposed amendment.

Comment: MPA recommends that workover and recompletion pits also be allowed in subsection (2) as temporary pits.

Response: Recompletion and workover pits are typically temporary, very small, and are used to retain small volumes of drilling muds, cement, water, and sometimes oil. The board has

not documented any instances of soil or water pollution attributable to the use of temporary earthen recompletion or workover pits to retain drilling muds, cement, or water. Recompletion or workover fluids which contain one or more of the substances enumerated in subsection (1) of this rule must be removed prior to the closure of the recompletion or workover pit and must be disposed in an environmentally safe manner. The board adopts the proposed amendment.

Comment: The board comments that the word "promptly" in subsection (2) is too vague.

Response: The board makes the clean-up and disposal time requirement in the rule more specific by using the phrase "within forty-eight (48) hours" rather than the term "promptly."

Rule V (36.22.1223) FENCING, SCREENING, AND NETTING OF PITS (1) and (2) same as proposed.

(3) This rule does not apply to earthen pits used solely for the purpose of drilling, completing, recompleting, working over, or plugging a well.

Comment: Texaco recommends that subsection (1) be amended to allow the operator the discretion to chose any of a number of "physical deterrents to protect mammalian and avian wildlife" including fencing, screening, flagging, strobe lighting, metal reflectors, and other unspecified options.

Response: The research on the subject of wildlife mortalities associated with oil and gas production pits establishes that the only satisfactory preventative measures include a combination of fencing, screening, and netting. The board does not adopt the proposed amendment.

Comment: Exxon recommends that subsection (3) be amended to exempt earthen workover pits from the requirements of this rule.

Response: Workover pits, if allowed by the board, are small, temporary, and present little risk to wildlife. The board adopts the proposed amendment.

Comment: Texaco recommends that subsection (3) be amended to exempt emergency pits from the requirements of this rule.

Response: Temporary emergency pits under ARM 36.22.1207(2) must be immediately cleaned and closed after the spill is controlled. Permanent emergency pits must be permitted under ARM 36.22.1227 and cannot be used to retain fluids for any longer time period than is necessary to control an oil or water spill with emergency actions. If a so-called "emergency pit" is not cleaned of oil or other fluids immediately after the emergency spill or release is controlled, it is not an "emergency pit." In short, both temporary and permanent emergency pits are to be immediately cleaned of all fluids, including oil, thereby posing no risk to wildlife and obviating any need to exempt them from this rule. The board does not adopt the proposed amendment.

Rule VI (36.22.1222) HYDROGEN SULFIDE GAS (1) The owner or operator of an oil or gas well drilled after the effective date of this rule that produces more than 20 MCF of gas per day containing more than 20 parts per million hydrogen sulfide must

submit a hydrogen sulfide gas report to the board with Form 4 ~~within 30 days~~ after the completion of the well.

(2) and (3) same as proposed.

(4) The hydrogen sulfide gas report required under this rule must include the following information:

(a) the name and location of the well(s);

(b) the name and address of the operator or owner of the well(s);

(c) and (d) same as proposed.

(5) The owner or operator of a production facility with the potential of accumulating hydrogen sulfide gas in concentrations of 100 parts per million or more must ~~prevent unauthorized~~ take measures to restrict and warn against access to the facility and must install a wind sock and hydrogen sulfide warning signs at such facility.

Comment: Exxon comments that subsections (1) and (2) of this rule impose different time limits for the submission of the gas analysis. Exxon recommends that only one time criteria apply.

Response: Subsection (1) applies to wells drilled and completed after the effective date of this rule. Subsection (2) applies to wells drilled and completed prior to the effective date of the rule. Different time limits are necessary because a reasonable time period for the submission of the gas analysis as applied to new wells will, in most cases, have already expired at the effective date of the rule if applied to old wells. The board does note, however, that subsection (1) would require the operator to submit the Form 4 and gas analysis for a new well within thirty days after the well is completed regardless of whether the well was developmental or wildcat. Such a requirement would conflict with the board's longstanding policy of allowing the operator of a wildcat well six months within which to submit a Form 4 completion report. The board amends subsection (1) to simply require that the gas analysis be submitted at the time the Form 4 is submitted. ARM 36.22.1011 governs the amount of time within which the operator has to submit a Form 4 completion report. The board does not adopt Exxon's proposed amendment.

Comment: MPA asks "why does the board need a complete gas analysis" as required under subsection (4)(d)? MPA comments that such a requirement is expensive for the operator and recommends that only the percent concentration of hydrogen sulfide gas be required.

Response: The gas analysis requirement is born out of the studies conducted in the board's December 1989 Programmatic Environmental Impact Statement (PEIS). The PEIS identified the need for accurate gas analysis information on oil or gas wells to facilitate the study of gas-related environmental and health impacts. The Air Quality Bureau of the Montana Department of Health and Environmental Sciences specifically requested that the board collect the gas analysis information for this purpose. The information collected will be compiled and analyzed by the Air Quality Bureau. The board agrees that there is a need for such information and feels that the expense to the operator is

warranted under the circumstances. As a practical matter, the laboratory must determine the concentration of all of the enumerated gas constituents to determine the percent hydrogen sulfide gas. There should be relatively little added expense to the operator for the laboratory to breakdown the percent concentrations of these gas constituents.

Comment: MPA and Texaco comment that subsection (5) imposes an impossible burden upon the operator to prevent unauthorized access to facilities with potential hydrogen sulfide gas dangers. The commentators recommend that subsection (5) be amended to require that measures be taken to restrict or warn against access.

Response: The rule as written does impose an unwarranted burden. The board adopts the proposed amendment.

Comment: The board comments that subsections (4)(a) and (4)(b) should refer to the term "well" in both the singular and plural form.

Response: The subsections are amended to apply to "well(s)".

36.22.1227 EARTHEN PITS AND PONDS Adopted as proposed.

Comment: Exxon recommends that subsection (3) be amended to allow the operator to apply for an exception to subsection (2).

Response: The board believes that the construction criteria contained in subsection (2) are reasonable and necessary to protect human health and the environment. However, the operator can request a public hearing to determine whether a variance from this rule, or any other board rule, should be granted. The board is reluctant to allow administrative discretion allowing exceptions to this rule because of the potential risk to human health and the environment. The board does not adopt the proposed amendment.

36.22.1241 SERVICE COMPANY REPORTS Adopted as proposed.

Comment: Texaco and Exxon recommend that the rule be amended to require the operator rather than the service company to submit information concerning work done on wells.

Response: In many cases, the only information the board receives concerning work done on a well is from the service company. The proposed amendment might work if all operators were as organized and efficient as Texaco and Exxon. Unfortunately, the board's experience is that it must be able to call on both the service company and the operator to submit well information if it wishes to maintain reasonably complete and up-to-date well files. The board does not adopt the proposed amendment.

3. General Comment: The Montana Legislative Council comments that the board needs to provide specific reasons on why it is choosing to act now and it needs to provide more detail about the problems which led it to propose new rules and amendments to rules.

Response: The specific problems which led to the adoption

of new rules II, III, IV, V, and VI, and the revisions to rules 36.22.302, 36.22.307, 36.22.602, 36.22.1001, 36.22.1001, 36.22.1005, 36.22.1103, 36.22.1207, 36.22.1226, and 36.22.1227, are more fully set forth in the board's three volume December 1989 programmatic environmental impact statement (PEIS). The sheer volume of the information contained in these documents prohibits a recitation of the specific problems in this notice of rule adoption. Copies of the PEIS documents are available to the public for review at any board office.

These new rules and rule revisions were adopted as part of a comprehensive program to protect human health and environment as mandated by Section 75-1-201, MCA, which provides in pertinent part:

(1) The legislature authorizes and directs that, to the fullest extent possible:

. . .

(a) all agencies of the state . . . shall:

(i) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in the decision-making which may have an impact on the environment;

(ii) identify and develop methods and procedures which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

. . .

(2) . . .

(b) The board of oil and gas conservation shall adopt a programmatic environmental impact statement . . . that must include but not be limited to:

. . .

(iv) an appropriate method for incorporating such environmental review as may be found to be necessary into the board's rules and drill permitting process, including environmental review; . . . .

The board is acting now on the adoption of environmental rules as an integral part of its compliance with Section 75-1-201, MCA, and its implementation of the actions specified in the PEIS. Action on the rules at this time will also serve to protect human health and the environment.

Rule I is adopted at this time to accommodate technological advances presented by new horizontal well drilling technologies. ARM 36.22.1012 is amended at this time to obviate a problem the board has had with operators submitting wet or unwashed samples. ARM 36.22.1013 is amended at this time to remedy a problem the board has with a lack of sufficient geologic information necessary for it to prevent waste of oil and gas and to protect correlative rights. ARM 36.22.1204 is obsolete, is unnecessary under current industry practices, and is, therefore, repealed at this time.

ARM 36.22.1241 failed to specify a particular type of work (namely, well plugging) for which the board requires information for its well files. The rule also failed to specify when reports are to be submitted. As a consequence, the board could

not rely on or require timely submission of reports. An amendment is made at this time to rectify the omission of the plugging work report and to specify a time period within which reports are to be submitted.

ARM 36.22.1242 is amended at this time because it requires the operator to file a copy of a tax report form with the board which is no longer required by the Montana Department of Revenue.

4. The board also received written comments at its Billings office from the Montana Environmental Quality Council (EQC) via telefax at 2:00 p.m. on January 30, 1992, from the Water Quality Bureau of the Montana Department of Health and Environmental Sciences (WQB) via telefax at 4:32 p.m. on January 30, 1992, and from the Montana Audubon Council (MAC) via telefax at 4:49 p.m. on January 30, 1992. The deadline for the submission of written comments was January 23, 1992, and the public hearing was conducted at the Billings Petroleum Club from 9:00 a.m. to 9:30 a.m. on January 30, 1992. The board considered all written and oral comments it received up until the time of the public hearing. The board considered and adopted these rules before 12:00 noon on January 30, 1992. The EQC, WQB, and MAC comments were not submitted within the time required by law and were not available to the board for consideration at the time it adopted the rules. However, the board will take the untimely comments under advisement and will consider possible rule changes in future rulemaking.

5. All of these rules will be effective April 1, 1992.

Donald D. MacIntyre
DNRC Chief Legal Counsel

Dee Rickman, Executive Secretary
Board of Oil & Gas Conservation

Certified to the Secretary of State, March 16, 1992.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.31.101, 42.31.102, 42.31.103, 42.31.105, 42.31.107, 42.31.108, 42.31.131, 42.31.201, 42.31.202, 42.31.205, 42.31.211, 42.31.212, 42.31.213, 42.31.302, and 42.31.303; and REPEAL of 42.31.104, 42.31.106 and 42.31.301; and ADOPTION of NEW RULE I (42.31.109); RULE II (42.31.110) RULE III (42.31.111); RULE IV (42.31.305); RULE V (42.31.306); and RULE VI (42.31.307) relating to commercial activities for cigarettes and tobacco products for the Income and Miscellaneous Tax Division	NOTICE OF THE AMENDMENT, of ARM 42.31.101, 42.31.102, 42.31.103, 42.31.105, 42.31.107, 42.31.108, 42.31.131, 42.31.201, 42.31.202, 42.31.205, 42.31.211, 42.31.212, 42.31.213, 42.31.302; and 42.31.303 and REPEAL of 42.31.104, 42.31.106 and 42.31.301; and ADOPTION of NEW RULE I (42.31.109); RULE II (42.31.110); RULE III (42.31.111); RULE VI (42.31.305); RULE V (42.31.306); and RULE VI (42.31.307) relating to activities for cigarettes and tobacco products for the Income and Miscellaneous Tax Division

TO: All Interested Persons:

1. On December 26, 1991, the Department published notice of the proposed amendments of ARM 42.31.101, 42.31.102, 42.31.103, 42.31.105, 42.31.107, 42.31.108, 42.31.131, 42.31.201, 42.31.202, 42.31.205, 42.31.211, 42.31.212, 42.31.213, 42.31.302, 42.31.303 and the repeal of 42.31.104, 42.31.106, 42.31.301 and the adoption of Rule I (42.31.109); Rule II (42.31.110); Rule III (42.31.111); Rule IV (42.31.305); Rule V (42.31.306); and Rule VI (42.31.307), relating to commercial activities for cigarettes and tobacco products at pages 2583-2589 of the 1991 Montana Administrative Register, issue no. 24.

2. A public hearing was held on January 28, 1992, where written and oral comments were received at the hearing and subsequent to that hearing.

3. After consideration of the comments presented, the department will further amend the following rules:

42.31.101 AFFIXING CIGARETTE TAX INSIGNIA (1) The affixing of cigarette tax insignia must be accomplished within the state of Montana. Only those wholesalers or retailers who have obtained approval from the department to use tax stamping equipment may affix cigarette tax insignia. Unstamped cigarettes must be obtained directly from cigarette manufacturers OR LICENSED WHOLESALERS.

~~(2) The affixing of cigarette tax insignia must be accomplished by or under the direct and immediate supervision of an experienced and responsible employee or owner.~~

AUTH: Sec. 16-11-103, MCA; IMP: Sec. 16-11-113 and 16-11-

115, MCA.

42.31.102 MARKING UNSTAMPED CIGARETTES (1) All ~~cases of unstamped~~ cigarettes sold in Montana must have a tax stamp except sales made to U.S. government, military and Indian purchasers AND LICENSED WHOLESALERS which sales are subject to the provisions of ARM 42.31.108 ~~be marked immediately after receipt to indicate date of receipt~~.

(2) The method of marking may either be by metered stamp, or by hand and/or heat applied decals ~~shipping tag, or gummed label or by writing on the case with a felt tip pen~~. The system of marking must be uniform and consistent. The marking system must facilitate a visible review to insure that cigarettes are stamped ~~within 72 hours of receipt~~ as required by ~~16-11-113~~ 16-11-111, MCA.

AUTH: Sec. 16-11-103, MCA; IMP: Sec. 16-11-111, MCA.

4. After review of the public comments the department believes that ARM 42.31.108 will also need to be amended. This rule was not part of the original notice of amendment and adoption because prior to the rule hearing the department did not believe it needed amendments. However, the rule will require the following amendment in order to follow the other changes to rules in this chapter.

42.31.108 SALES OF UNSTAMPED CIGARETTES (1) Remains the same.

(2) ANY LICENSED WHOLESALER PURCHASING UNSTAMPED CIGARETTES FROM ANOTHER LICENSED WHOLESALER MUST BE FULLY IDENTIFIED BY NAME, BUSINESS ADDRESS, EMPLOYER IDENTIFICATION NUMBER, AND WHOLESALE LICENSE NUMBER.

AUTH: Sec. 16-11-103 MCA; IMP, Sec. 16-11-132 MCA.

5. The department adopts new rule I (42.31.109); rule II (42.31.110); rule III (42.31.111); rule IV (42.31.305); and rule V (42.31.306) as proposed.

6. The department further amends new rule VI (42.31.307) as follows:

RULE VI (ARM 42.31.307) PREMIUM PROMOTIONS (1) Manufacturer's premiums may be attached to cigarette packs or cartons without being considered in violation of minimum pricing under the following conditions:

(a) the department is notified of the promotion AT LEAST 2 weeks in advance of the beginning date of the promotion; and

(b) the premiums are packaged along with each carton or package of cigarettes, OR SPECIFICALLY IDENTIFIED AS ASSOCIATED WITH THE SALE OF A PARTICULAR CIGARETTE OR CARTON OF CIGARETTES. FOR EXAMPLE, A PROMOTIONAL DISPLAY MAY DESIGNATE A FREE ITEM WILL BE PROVIDED WITH EACH PURCHASE OF A CARTON OF A SPECIFIC BRAND OF CIGARETTES. THE ITEM MAY BE PHYSICALLY A PART OF THE PROMOTIONAL DISPLAY;

(i) manufacturer's representatives may attach premiums at the retail locations;

(ii) there is a written contract between the manufacturer and the wholesaler, sub-jobber or independent jobber directing the attachment of premiums.

(2) ~~The contract and subsequent accounting transactions must be clearly segregated and reported from the normal purchase of product. For example, payments made to wholesalers, sub-jobbers, or any other agents must be maintained in separate accounts as documentation of the transaction and the payment for premium attachment services may not be netted against invoices for cigarette purchases~~ CONTRACTUAL ARRANGEMENTS AND PAYMENT FOR PREMIUM ATTACHMENT SERVICES MUST BE DOCUMENTED IN A MANNER CONSISTENT WITH STANDARD BUSINESS PRACTICES AND MAY NOT BE NETTED AGAINST INVOICES FOR CIGARETTES.

AUTH: Sec. 16-10-104, MCA; IMP: Sec. 16-10-301, MCA.

7. The comments received at the hearing along with others received subsequent to the hearing are summarized along with the response of the department as follows:

COMMENT: Montana Association of Tobacco and Candy Distributors, represented by Mark Staples, Executive Director and Mike Parker, President and owner of Penningtons, Inc. presented a concern that the current regulations do not allow licensed wholesalers to buy unstamped cigarettes from other licensed wholesalers. The effect of that prohibition is to burden wholesalers with potentially higher inventory values and slower turning inventories. Individual cigarette packings and brands have much smaller market shares than they used to. Many wholesalers are required to buy 60 cartons at a time, and if we can't share those among ourselves (licensed wholesalers) we have slow turning inventory, and risk of dry cigarettes that are returned to the manufacturers with very low profit return on the investment in the inventory.

RESPONSE: The department agrees to permit wholesaler-to-wholesaler sales of unstamped cigarettes provided they are accounted for on the monthly reports as suggested. This change in position will necessitate changes in ARM 42.31.101(1), 42.31.102(1) and 42.31.108, and a change in the wholesaler reporting form CT-206, revised 2-20-92.

If the department does not receive adequate documentation or accounting for such movement and cannot reconcile, we must presume the cigarettes were sold to a non-exempt customer and collect the tax.

COMMENT: The Association opposes Rule II which addresses the "Floor Tax." We request that this section be deleted and that the question of floor tax be addressed specifically each time a tax increase is proposed.

RESPONSE: The department reads the District Court Decision in the matter of Montana Association of Tobacco and Candy Distributors and Service Distributing, Inc. v. Department of

Revenue of the State of Montana, First Judicial District Court Cause No. ADV-89-746, as clarifying that it is within the department's discretion under current law to collect tax increases by implementing a so-called "floor tax." One of the complaints lodged in the course of that litigation was that the department was acting without rules. Promulgation of this rule answers that concern but more importantly, it places the public on notice of the Department's interpretation and administration of the underlying statutes. The department believes this to be the purpose of rulemaking. In the eventuality of future cigarette tax increases, we agree with the Association as to the desirability of legislative direction on this important point. Absent that specific direction, the rule will provide public instruction on how tax increases will be addressed.

COMMENT: With regard to Rule VI (Premium Promotions), separate contracts and separate accounting is unnecessary and unduly burdensome to the wholesalers. The Association also suggests the deletion of the manufacturer promotion, two-week notification requirement.

RESPONSE: In an audit or review situation, the department must be able to confirm that premium promotions do not involve minimum price issues. The department must be able to clearly trace both the contractual relationship and the resulting accounting transaction in the wholesaler and retailer records. The rules have been amended to include the language proposed by the Association. In addition the department has added language to address the contractual relationship.

The two-week notification requirement is proposed to protect the manufacturer, the wholesaler and the retailer. The department cannot confirm the legitimacy of a promotion we know nothing about.

COMMENT: Philip Morris U.S.A. represented by John Delano and Dave Odeen provided comments concerning Rule V, and asked if Montana interpreted this rule to prohibit a manufacturer-sponsored price reduction pass through to a consumer.

RESPONSE: Yes, any type of pass-through promotion is illegal if the promotion results in a violation of minimum price statutes. For example, the present minimum wholesale price for king filters is $14.81; the minimum retail price is $16.30. A $2.00 pass-through although intended to benefit the consumer, would result in a violation of minimum price in the transaction between the wholesaler and retail if the net sales price was less than $14.81, and the transaction between the retailer and consumer if the net sales price was less than $16.30.

A pass-through program is identical to a coupon offer only in that the intent is to offer the consumer a discount and an incentive to purchase. The development of the transaction is very different. The coupon offer involves a transaction between the manufacturer and the consumer; whereas, the pass-though involves an invoice transaction between the manufacturer, the wholesaler, the retailer and the consumer.

COMMENT: Does Rule VI limit "bounce back" offers and/or

promotional items that are not physically attached to the cigarettes?

RESPONSE: The rule does not limit "bounce back" offers as described in the written comments.

The rule was not intended to limit promotion to pre-packaged items. The department has amended the rule to allow for incentive items that are specifically designated as part of a manufacturer's promotion. The promotion item may be physically located near the product or may be ordered by the consumer.

COMMENT: The two-week promotion notification requirement is troublesome. A "routine promotion" such as tee-shirts and buy-one-get-one-free should be excluded from the requirement.

RESPONSE: The response to this comment is covered in the above comment. In addition, since the repeal of the prohibition of attaching promotional items, the department has received numerous complaints of violations. Pre-notification of the intended promotions has saved travel and personnel time in what would otherwise require an investigation. Costs to industry have also been avoided because the investigation was not required.

The two-week limitation, however, was not meant to limit the notification period to exactly two weeks. The rule has been amended to require notification at least two weeks prior to the promotion.

8. Therefore, the Department adopts, amends and repeals the rules with the amendments listed above.

CLEO ANDERSON
Rule Reviewer

DENIS ADAMS
Director of Revenue

Certified to Secretary of State March 16, 1992.

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

In the matter of the amendment of rules 46.12.4008 and 46.12.4010 pertaining to post-eligibility application of patient income to cost and care	)))))	NOTICE OF THE AMENDMENT OF RULES 46.12.4008 AND 46.12.4010 PERTAINING TO POST-ELIGIBILITY APPLICATION OF PATIENT INCOME TO COST AND CARE

TO: All Interested Persons

1. On February 13, 1992, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.12.4008 and 46.12.4010 pertaining to post-eligibility application of patient income to cost and care at page 191 of the 1992 Montana Administrative Register, issue number 3.

2. The Department has amended rule 46.12.4010 as proposed.

3. The Department has amended the following rule as proposed with the following changes:

46.12.4008 POST-ELIGIBILITY APPLICATION OF PATIENT INCOME TO COST OF CARE Subsections (1) through 2)(b) remain as proposed.

(i) $90 for veterans receiving the minimum veteran's administration PENSION ~~aid and attendance allowance;~~ or

Subsections (2)(b)(ii) through (9)(b)(iii) remain as proposed.

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

4. The Department has thoroughly considered all commentary received:

COMMENT: The Department incorrectly used the term "Aid and Attendance Allowance" to describe the payments allowed in ARM 46.12.4008(2)(b)(i). The correct term is "Veteran's Administration Pension."

RESPONSE: The Department has revised the rule to reflect this correction.

Russell E. Cater
Rule Reviewer

Russell E. Cater, as Dir.
Director, Social and Rehabilitation Services

Certified to the Secretary of State March 16, 1992.

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

In the matter of the amendment of rule 46.12.4101 pertaining to qualified medicare beneficiaries	)))	NOTICE OF THE AMENDMENT OF RULE 46.12.4101 PERTAINING TO QUALIFIED MEDICARE BENEFICIARIES

TO: All Interested Persons

1. On February 13, 1992, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rule 46.12.4101 pertaining to qualified medicare beneficiaries at page 194 of the 1992 Montana Administrative Register, issue number 3.

2. The Department has amended rule 46.12.4101 as proposed.

3. No written comments or testimony were received.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 16, 1992.

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

In the matter of the amendment of rules 46.15.102 and 46.15.103 pertaining to refugee assistance	)))))	NOTICE OF THE AMENDMENT OF RULES 46.15.102 AND 46.15.103 PERTAINING TO REFUGEE ASSISTANCE

TO: All Interested Persons

1. On February 13, 1992, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.15.102 and 46.15.103 pertaining to refugee assistance at page 196 of the 1992 Montana Administrative Register, issue number 3.

2. The Department has amended rules 46.15.102 and 46.15.103 as proposed.

3. No written comments or testimony were received.

Russell E. Cater
Rule Reviewer

Russell E. Cater acting
Director, Social and Rehabilitation Services

Certified to the Secretary of State March 16, 1992.

VOLUME NO. 44 OPINION NO. 27

AIRPORTS - Regional airport authority: crediting sick and vacation leave from prior public employment;
CITIES AND TOWNS - Regional airport authority: crediting sick and vacation leave from prior public employment;
COUNTY GOVERNMENT - Regional airport authority: crediting sick and vacation leave from prior public employment;
EMPLOYEES, PUBLIC - Sick and vacation leave statutes: applicability to regional airport authority's police force;
MUNICIPAL GOVERNMENT - Regional airport authority: crediting sick and vacation leave from prior public employment;
MONTANA CODE ANNOTATED - Title 2, chapter 18, part 6; sections 2-18-101, 2-18-601, 2-18-618, 2-18-620, 7-13-215, 67-1-101, 67-11-103 to 67-11-105, 67-11-201;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 68 (1990), 37 Op. Att'y Gen. No. 102 (1977).

HELD: A regional airport authority must give credit for sick or vacation leave to its airport police officers based upon their prior employment with other public entities.

March 5, 1992

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

Dear Mr. Paul:

You have requested my opinion concerning the following question:

> Is the regional airport authority required to give any appropriate credit for sick or vacation leave to its airport police officers based upon their prior employment with other public entities such as a city police department or a sheriff's department?

I conclude that a regional airport authority is a public entity and, therefore, upon satisfaction of relevant statutory criteria, it is required to give credit for sick and vacation leave earned by its airport police officers during prior employment with other public entities.

The Great Falls International Airport Authority (hereinafter "the Airport") is a regional airport authority created by Cascade County and the City of Great Falls. See §§ 67-11-103, 67-1-101(27), MCA. On occasion, the Airport has hired former law enforcement officers from Cascade County and the City of Great Falls to work as airport police. You have asked me

whether the Airport is required to give sick and vacation leave credit to these officers based upon their prior employment with Cascade County or the City of Great Falls.

The applicable Montana Code sections addressing government employees' sick and vacation leave appear in Title 2, chapter 18, part 6, entitled "Leave Time." Part 6 of chapter 18 contains a set of definitions that apply specifically to leave time: "For the purpose of this part [part 6], except 2-18-620, the following definitions apply ...." § 2-18-601, MCA. At the outset, therefore, it should be noted that for the purpose of examining the coverage of leave time benefits, the definitions within section 2-18-601, MCA, control. The definitions set forth in part 1 of chapter 18, which generally cover state employees and state agencies, are expressly not applicable to the leave time provisions within part 6 of chapter 18: "As used in parts 1 through 3 and part 10 of this chapter, the following definitions apply ...." § 2-18-101, MCA.

In part 6 of chapter 18, the code defines an employee as "any person employed by an agency except elected state, county, and city officials, schoolteachers, and persons contracted as independent contractors or hired under personal services contracts." § 2-18-601(2), MCA. An agency is defined for the purposes of part 6 as "any legally constituted department, board, or commission of state, county, or city government or any political subdivision thereof." § 2-18-601(1), MCA. Thus the application of sick and vacation leave statutes is not limited to state government employees. The statutes also apply to employees who work for county or city government or any political subdivision thereof. The question that must be answered, then, is whether the Airport is a political subdivision of Cascade County and the City of Great Falls.

An examination of the law reveals that the Airport is a political subdivision of Cascade County and the City of Great Falls. Section 67-11-103(1), MCA, declares that a regional airport authority is a public body created by a joint resolution of two or more municipalities. A county government is considered a municipality for purposes of section 67-11-103(1), MCA. See § 67-1-101(27), MCA. By statute, the municipalities must create a regional airport authority board of not less than five commissioners. § 67-11-103(1), MCA. The municipalities specify in the resolution the number of commissioners "to be appointed, their term[s] and compensation, if any." By its own terms a regional airport authority is the creation of two municipalities. In addition, it is provided "the same powers as all other political subdivisions" in the performance of governmental functions related to comprehensive airport zoning regulations. §§ 67-11-103(5), MCA.

The Airport is not a private corporation, but a public corporation formed by a resolution to serve the public. See §§ 67-11-103(1), 67-11-105, MCA. The Airport management is

granted a great deal of autonomy from the municipalities. However, the Airport's underlying function is to serve as a public agency. This underlying goal of serving the public is evident in section 67-11-105, MCA, which defines the functions of an airport authority:

> **Functions -- public and governmental.** The acquisition of any land or interest therein, pursuant to this chapter; the planning, acquisition, establishment, development, construction, improvement, maintenance, equipment, operation, regulation, and protection of airports and air navigation facilities, including the acquisition or elimination of airport hazards, and the exercise of any powers herein granted to authorities and other public agencies to be severally or jointly exercised are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity. All land and other property and privileges acquired and used by or on behalf of any authority or other public agency in the manner and for the purposes enumerated in this chapter shall and are hereby declared to be acquired and used for public and governmental purposes and as a matter of public necessity. [Emphasis added.]

Consistent with the legislative recognition that airport authorities are created by municipalities to serve the public, I conclude that the Airport is a public agency and a political subdivision of the municipalities that created it. Cf. 37 Op. Att'y Gen. No. 102 at 427 (1977) ("By virtue of the relationship between the county [that forms the district] and the district, it is clear that a hospital district is a subdivision of the county, created to provide the public with hospital service").

In 43 Op. Att'y Gen. No. 68 (1990), I concluded that a refuse management district was not a political subdivision for purposes of receiving a loan from the Board of Investments under the Municipal Finance Consolidation Act. In that opinion, I determined that a refuse disposal district was not a political subdivision because the district was not an independent governing body, capable of exercising authority separate from the county commissioners that created the district. 43 Op. Att'y Gen. No. 68 at 259. Here, as far as sick and vacation benefits are concerned under Title 2, chapter 18, part 6, MCA, the critical consideration is not whether an airport authority is an independent governing body, but the fact that the airport authority is a public corporation whose underlying function is to serve as a public agency. Unlike a refuse disposal district, the airport authority has a governing body, independent of the county commissioners. See §§ 67-11-104, 67-11-105, 67-11-201, MCA. Such autonomy may be contrasted to the dependence of the refuse disposal districts, under the law in effect at the time the prior opinion was issued, upon the approval of the county

commissioners before significant actions could be taken. See § 7-13-215, MCA (1989). The public and independent nature of the airport authority's duties makes the airport authority a political subdivision for purposes of the sick and vacation leave statutes.

Since the Airport is a political subdivision of the City of Great Falls and Cascade County, employees of the Airport are entitled to those sick and vacation leave benefits provided in Title 2, chapter 18, part 6, MCA. The transfer of particular benefits and computation of credits earned during prior employment will depend on the particular circumstances of the Airport employee and the satisfaction of applicable statutory criteria and definitions. It is significant to note that transfers of accumulated annual vacation and sick leave credits are limited to "transfers between agencies within the same jurisdiction." See §§ 2-18-617(3), 2-18-618(5), MCA. Consistent with the reasoning of this opinion, an employee transferring from the Great Falls Police Department or Cascade County Sheriff's Office to the Airport is transferring between agencies within the same jurisdiction and fulfills this aspect of the statutory requirements. The satisfaction of other relevant criteria, such as the requirement that a "transfer" be completed without a "break in service," must be determined following the application of appropriate statutory definitions to the particular employee's circumstances. See § 2-18-601(12), (14), MCA.

THEREFORE, IT IS MY OPINION:

> A regional airport authority must give credit for sick or vacation leave to its airport police officers based upon their prior employment with other public entities.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 44 OPINION NO. 28

COUNTIES - Whether a solid waste management district is a "political subdivision";
COUNTY GOVERNMENT - Whether a solid waste management district is a "political subdivision";
INVESTMENTS, BOARD OF - Whether a solid waste management district is a "political subdivision";
LOCAL GOVERNMENT - Whether a solid waste management district is a "political subdivision";
SOLID WASTE - Imposition of service charges on all properties within solid waste management district to repay revenue bonds and loans;
SOLID WASTE - Whether a solid waste management district is a "political subdivision";
MONTANA LAWS OF 1991 - Chapter 770, section 6;
MONTANA CODE ANNOTATED - Title 7, chapter 13, part 2; sections 1-2-102, 7-13-202, 7-13-204, 7-13-215, 7-13-231 to 7-13-233, 7-13-236, 7-13-237, 7-13-308, 17-5-1602(1)(b), 17-5-1604(3), 75-10-112;
OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 19 (1991), 43 Op. Att'y Gen. No. 68 (1990), 40 Op. Att'y Gen. No. 22 (1983).

HELD: 1. A solid waste management district is not a political subdivision for purposes of the Municipal Finance Consolidation Act.

2. A solid waste management district may impose service charges on all property within the district to repay loans and revenue bonds issued pursuant to section 7-13-236, MCA, as long as those service charges are not collected through tax notices and a lien upon property.

March 6, 1992

David M. Lewis, Director
Board of Investments
Department of Commerce
555 Fuller Avenue
Helena MT 59620-0125

Dear Mr. Lewis:

You have requested my opinion on two questions:

1. Is a solid waste management district a "political subdivision" for purposes of the Municipal Finance Consolidation Act?

2. Can a solid waste management district impose service charges on all properties within the district to repay loans and revenue bonds issued under section 7-13-236, MCA?

Your first question concerns whether a solid waste management district is a political subdivision under the Municipal Finance Consolidation Act (MFCA). As I stated in 43 Op. Att'y Gen. No. 68 at 256 (1990): "The MFCA is ... designed to give local government units the ability to borrow money at lower interest rates. § 17-5-1602(1)(b), MCA." The MFCA defines "local government unit" as "any municipal corporation or political subdivision of the state, including without limitation any city, town, county, school district, other special taxing district, or the board of regents of the Montana university system." (Emphasis added.) § 17-5-1604(3), MCA.

In 43 Op. Att'y Gen. No. 68, supra, I concluded that a refuse disposal district is not a political subdivision as that term is used in section 17-5-1604(3), MCA. Since the opinion was issued, the Montana Legislature passed Senate Bill 189 in 1991, which generally revised the laws relating to refuse disposal districts and the boards that manage these districts. One of the revisions was that the phrase "refuse disposal district" was changed to "solid waste management district." 1991 Mont. Laws, ch. 770, § 6. In addition to renaming the districts as solid waste management districts, the 1991 Legislature substantively amended Title 7, chapter 13, part 2, MCA, concerning solid waste management. Such amendments make it necessary to review my holding in 43 Op. Att'y Gen. No. 68 and determine whether a solid waste management district is a political subdivision for purposes of the MFCA under section 17-5-1604(3), MCA.

In 43 Op. Att'y Gen. No. 68 at 258, I stated that "to determine whether a refuse [disposal] district is a political subdivision under section 17-5-1604(3), MCA, an analysis of the nature and duties of a refuse [disposal] district is necessary." I examined the powers and duties of the board of the refuse disposal district under section 7-13-215, MCA (1989), which at that time expressly stated:

> The board of a refuse disposal district established and organized under this part has the following powers and duties, with the approval of the county commissioners of the counties involved[.] [Emphasis added.]

I held that in order to be a political subdivision, the refuse disposal district would have to be an independent governing body, capable of exercising authority separate from the county commissioners who created it. 43 Op. Att'y Gen. No. 68 at 259. I concluded that the board of the refuse disposal district was not an independent governing body due to the fact that under section 7-13-215, MCA (1989), the board's powers and duties were

subject to the approval of the county commissioners. Id. I specifically stated that "[b]ecause the refuse board is not a separate and independent body and has not been delegated supervisory authority over the refuse disposal district, I conclude that a refuse disposal district cannot be considered a 'political subdivision' as that term is used in section 17-5-1604(3), MCA." Id.

The 1991 Legislature, in an attempt to give solid waste management districts and their boards greater autonomy from the county commissioners, amended section 7-13-215, MCA, to read as follows:

> Except for powers specifically reserved by the counties in the resolution creating the district, the board has the powers and duties provided in 75-10-112.

Section 75-10-112, MCA, contains a very broad and expansive list of powers and duties that the solid waste management district board would assume under section 7-13-215, MCA. At first glance, it appears that if a board assumed all powers enumerated in section 75-10-112, MCA, then the board would be an independent governing body, separate from the county commissioners, and a political subdivision for purposes of the MFCA. However, the Legislature, in amending section 7-13-215, MCA, limited the powers and duties the board could assume under section 75-10-112, MCA, by inserting the language, "[e]xcept for powers specifically reserved by the counties in the resolution creating the district." Section 7-13-204, MCA, sets forth the powers the county can reserve for itself in the resolution. Section 7-13-204, MCA, specifically provides:

> (1) Before creating a solid waste management district, the commissioners shall pass a resolution of intention to do so.
>
> (2) The resolution shall designate:
>
> (a) the proposed name of such district;
>
> (b) the necessity for the proposed district;
>
> (c) a general description of the territory or lands of said district, giving the boundaries thereof;
>
> (d) the general character of the collection service;
>
> (e) the proposed fees to be charged for the service; and
>
> (f) the powers to be delegated to the board and the powers to be exercised only with the approval of the county commissioners. [Emphasis added.]

Under section 7-13-204(2)(f), MCA, the county commissioners retain the authority to decide which powers will be delegated to the board and which are to be "exercised only with the approval of the county commissioners." Although the Legislature amended section 7-13-215, MCA, to grant greater powers to the board, those powers may still be left under the supervisory control of the commissioners. § 7-13-204(2)(f), MCA. With respect to the specific factual situation which gave rise to your opinion request, the resolution of intention to create a solid waste management district left control over the district with the county commissioners.

Even if the resolution of intention did convey full powers and duties to the solid waste management district board, a number of other code sections demonstrate the control the county commissioners have over the actions of the solid waste management district board. Under section 7-13-231, MCA, the board cannot establish a service fee without the approval of the county commissioners. Furthermore, the rates for those service charges are subject to the approval of the board of county commissioners. § 7-13-232, MCA. Similarly, the board must certify to the county commissioners the "service charge needed for the current fiscal year, the due but unpaid service charges, and a description of the property against which the service charges are to be levied." § 7-13-233(2), MCA.

The county commissioners also control the board's ability to raise money through revenue bonds and general obligation bonds. §§ 7-13-236, 7-13-237, MCA. Section 7-13-236(1), MCA, specifically states: "The commissioners may issue revenue bonds, including refunding bonds, or borrow money for the acquisition of property, construction of improvements, or purchase of equipment or to pay costs related to planning, designing, and financing a solid waste management system." [Emphasis added.] Section 7-13-202, MCA, defines the word "commissioners" as the board of county commissioners. Similarly, before the solid waste management district may issue general obligation bonds, it must receive approval by the board of county commissioners. § 7-13-237, MCA.

Clearly, the solid waste management district is not governed by an independent board autonomous from the supervisory control of county commissioners. Accordingly, I conclude that solid waste management districts are not political subdivisions for purposes of the MFCA.

Your second question is whether a solid waste management district may impose a service fee on all properties within the district in order to repay revenue bonds and loans under section 7-13-236, MCA, even though some of the property owners do not avail themselves of the services provided by the solid waste management district.

Part of your question has been previously answered in 40 Op. Att'y Gen. No. 22 at 85 (1983). In that opinion, Attorney General Greely held that a refuse disposal district could impose a service fee under section 7-13-231, MCA, on all properties within the district even though some of the property owners did not use the services provided by the district. Attorney General Greely explained that although some of the property owners did not use the facilities of the district, their property was benefitted by the availability of the services. 40 Att'y Gen. Op. No. 22 at 86. It was noted that the link between the services and the benefit to the property was "underscored by the fact that unpaid service charge fees become a lien on the property under the provision of section 7-13-233, MCA." 40 Op. Att'y Gen. No. 22 at 87.

Although the 1991 Legislature amended sections 7-13-231 and 7-13-233, MCA, through the passage of Senate Bill 189, the provisions of those sections, interpreted in 40 Op. Att'y Gen. No. 22, remain essentially unchanged. Accordingly, the holding in 40 Op. Att'y Gen. No. 22 remains unaffected by the actions of the 1991 Legislature. I conclude, in accordance with the reasoning expressed in 40 Op. Att'y Gen. No. 22, that a solid waste management district can impose a service fee under section 7-13-231, MCA, on all properties within the district even though some of the property owners may choose not to use the services provided by the district.

Your next concern is whether those service charges imposed on all properties within the solid waste management districts could be utilized to repay loans and revenue bonds issued pursuant to section 7-13-236, MCA. Section 7-13-236, MCA, is a new code section created by Senate Bill 189. Under this section, revenue bonds issued by the county commissioners or loans undertaken by the county commissioners may be repaid from "service charges authorized in 7-13-233 that are collected other than through tax notices and a lien upon property." § 7-13-236(3)(a), MCA. The language used by the Legislature in the above section is restrictive in nature. The fundamental rule of statutory construction is that the intention of the Legislature controls. § 1-2-102, MCA; Missoula County v. American Asphalt, Inc., 216 Mont. 423, 426, 701 P.2d 990, 992 (1985). The intention of the Legislature must first be determined from the plain meaning of the words used. Missoula County, 701 P.2d at 992. I conclude that an examination of section 7-13-236(3)(a), MCA, reveals that the Legislature clearly intended that service charges may be used to repay revenue bonds and loans as long as those service charges "are collected other than through tax notices and a lien upon property." This conclusion is supported by my recent holding in 44 Op. Att'y Gen. No. 19 (1991), concerning a joint solid waste management district's ability to use services charges to pay off revenue bonds. In that opinion, I reviewed a statute parallel to section 7-13-236, MCA, and concluded that under section 7-13-308, MCA, "[a] joint solid waste management district may not issue revenue bonds payable from service

charges placed on property tax notices to property owners and collected with property taxes." (Emphasis added.) 44 Op. Att'y Gen. No. 19.

In summary, section 7-13-236(3)(a), MCA, prohibits payment of revenue bonds and loans by service charges that are collected through tax notices and liens upon property. However, section 7-13-233(4), MCA, authorizes waste management districts to collect service charges by means other than placing the service charges on property tax notices. 44 Op. Att'y Gen. No. 19. Furthermore, section 7-13-233(5), MCA, states that if those charges are not paid, "the service charge becomes delinquent and becomes a lien on the property, subject to the same penalties and the same rate of interest as property taxes." 44 Op. Att'y Gen. No. 19. Accordingly, under section 7-13-236, MCA, the county commissioners may repay revenue bonds and loans from service charges that are collected by means other than placing those service charges on property tax notices. 44 Op. Att'y Gen. No. 19.

THEREFORE, IT IS MY OPINION:

1. A solid waste management district is not a political subdivision for purposes of the Municipal Finance Consolidation Act.

2. A solid waste management district may impose service charges on all property within the district to repay loans and revenue bonds issued pursuant to section 7-13-236, MCA, as long as those service charges are not collected through tax notices and a lien upon property.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 44 OPINION NO. 29

ATTORNEYS GENERAL - Supervisory power over county attorneys;
COUNTY ATTORNEYS - Employment status of county attorney under Montana Comprehensive State Insurance Plan and Tort Claims Act;
COUNTY COMMISSIONERS - Employment status of county attorney under Montana Comprehensive State Insurance Plan and Tort Claims Act;
COUNTY COMMISSIONERS - Supervisory power over county officers;
COUNTY OFFICERS AND EMPLOYEES - Employment status of county attorney under Montana Comprehensive State Insurance Plan and Tort Claims Act;
MONTANA CODE ANNOTATED - Sections 2-9-101, 2-9-305, 2-9-318, 2-15-501(4), 7-3-432, 7-4-2110, 7-4-2203, 7-4-2502(2)(a), 7-4-2702, 7-4-2711, 7-4-2712, 7-4-2716, 15-8-102;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 84 (1988), 40 Op. Att'y Gen. No. 52 (1984), 38 Op. Att'y Gen. No. 85 (1980), 36 Op. Att'y Gen. No. 32 (1975), 17 Op. Att'y Gen. No. 196 (1937).

HELD: County attorneys are "employees" of the county for purposes of the Montana Comprehensive State Insurance Plan and Tort Claims Act, § 2-9-305, MCA, whenever a county attorney is named in a civil lawsuit for his actions regarding county administrative business, such as the hiring and firing of staff.

March 13, 1992

John S. Forsythe
Rosebud County Attorney
Rosebud County Courthouse
Forsyth MT 59327

Dear Mr. Forsythe:

You have requested my opinion on the following question:

> Is the county attorney a state employee for purposes of the Montana Comprehensive State Insurance Plan, §§ 2-9-101 to 318, MCA?

Your question concerns whether a county attorney is an employee of the county or the state for purposes of section 2-9-305, MCA, a part of the Montana Comprehensive State Insurance Plan and Tort Claims Act of 1973 (hereinafter Tort Claims Act). The underlying facts in the present situation involve a county employee who was discharged from employment in the county attorney's office. The employee subsequently filed a claim for wrongful termination against the county and the county attorney. The county attorney requested that the state defend him pursuant to the Tort Claims Act.

Section 2-9-305, MCA, provides in pertinent part:

> (2) In any noncriminal action brought against any employee of a state, county, city, town, or other governmental entity for a negligent act, error, or omission, including alleged violations of civil rights pursuant to 42 U.S.C. 1983, or other actionable conduct of the employee committed while acting within the course and scope of the employee's office or employment, the governmental entity employer ... shall defend the action on behalf of the employee and indemnify the employee. [Emphasis added.]
>
> ....
>
> (4) In any noncriminal action in which a governmental entity employee is a party defendant, the employee shall be indemnified by the employer for any money judgments or legal expenses, including attorney fees either incurred by the employee or awarded to the claimant, or both, to which the employee may be subject as a result of the suit[.]

Initially, it should be noted that under certain circumstances a county attorney is not liable for civil damages. A county attorney is a "quasi-judicial officer who enjoys common law immunity from civil liability for conduct within the scope of his duties." This allows him to use independent judgment in enforcing criminal laws. Ronek v. Gallatin County, 227 Mont. 514, 740 P.2d 1115, 1116, cert. denied, 485 U.S. 962 (1978) (emphasis added). Thus, for example, "[w]hen a prosecutor acts within the scope of his duties by filing and maintaining criminal charges he is absolutely immune from civil liability." State ex rel. Dept. of Justice v. District Court, 172 Mont. 88, 92, 560 P.2d 1328, 1330 (1977).

By contrast, the administrative business of running a county attorney's office, including the hiring and firing of staff, does not fall within those statutorily defined duties which are clearly prosecutorial in nature and to which prosecutorial immunity unquestionably applies. See § 7-4-2712, MCA. Cf. Mead v. McKittrick, 223 Mont. 428, 727 P.2d 517 (1986) (judicial immunity applied to firing of personal secretary of state district court judge because secretary's duties were intimately related to functioning of judicial process). Thus, when a suit involving the performance of administrative responsibilities is brought against a county attorney, it must be determined whether the county attorney is an "employee" of the state or the county so as to determine which governmental entity may be responsible for indemnification, if necessary.

Previous questions concerning a county attorney's employment status have been determined by reference to the relevant

statutes. With respect to employee benefits, the Montana Supreme Court, as well as former attorneys general, have examined the particular statutory language to determine who is a county officer's employer for purposes of administering benefits. Former Attorney General Woodahl concluded that a county attorney is considered to be jointly employed by the county and the state for social security purposes. 36 Op. Att'y Gen. No. 32 at 366, 368 (1975). The opinion, citing State ex rel. Barney v. Hawkins, 79 Mont. 506, 528, 257 P. 411 (1927), held that a county attorney is not technically an "employee" of either the state or the county. However, for the purpose of interpreting the Tort Claims Act, a county attorney must be considered an employee of either the state or a county.

More recently, former Attorney General Greely determined that for the purposes of participation in group health insurance programs, the Legislature intended to exclude county attorneys from the state group insurance plan. 40 Op. Att'y Gen. No. 52 at 212, 215 (1984).

With respect to the statutes which deal with a county attorney's compensation, a 1937 Attorney General's Opinion recognized that a county attorney, as a public officer, performs tasks for both the county and the state. 17 Op. Att'y Gen. No. 196 at 238 (1937). See also §§ 7-4-2711, 7-4-2712, 7-4-2716, MCA. As a result of the dual nature of the county attorney's duties, the Legislature required the state and the county to evenly split the county attorney's salary. § 7-4-2502(2)(a), MCA. Consequently, the statutes that define a county attorney's duties and address which governmental entity pays the salary do not clearly designate a county attorney as an employee of either the state or the county.

With specific reference to the statutes on indemnification of a public employee in a tort action, the Montana Supreme Court has relied upon the tenets of a "master-servant" relationship to assist in determining which governmental entity is responsible for an employee's conduct. See State v. District Court, 170 Mont. 15, 19-20, 550 P.2d 382, 384 (1976) (city, rather than state, may be held liable for conduct of city police within course and scope of their employment). The two factors the Court examined to determine the existence of a master-servant relationship in State v. District Court were: (1) which governmental entity had the exclusive power to hire and fire the employee, and (2) which governmental entity exercised direct, detailed or daily supervision over the employee, and therefore was in the best position to avoid or prevent negligent acts by the employee. Id. at 19-20, 550 P.2d at 384. In 42 Op. Att'y Gen. No. 84 at 333 (1988), former Attorney General Greely employed the Court's reasoning in State v. District Court to determine that a fire district rather than the county must indemnify fire district employees under the Act.

Applying the first of the two factors examined in State v. District Court, supra, to the instant case, it is significant that the local government statutes provide that the county attorney must be elected by county voters or appointed by the county commission or its chairman. See § 7-3-432, MCA. The state as a governmental entity does not participate in the selection of a county attorney. If vacated, the position of county attorney is filled by appointment of the county commissioners. § 7-4-2702, MCA.

With respect to the second factor examined by the court in State v. District Court, supra, section 7-4-2110, MCA, the statute that addresses supervision of county officers, must be reviewed.

> **Supervision of county and other officers.** The board of county commissioners has jurisdiction and power, under such limitations and restrictions as are prescribed by law, to:
>
> (1) supervise the official conduct of all county officers and officers of all districts and other subdivisions of the county charged with assessing, collecting, safekeeping, management, or disbursement of the public revenues;
>
> (2) see that they faithfully perform their duties;
>
> (3) direct prosecutions for delinquencies; and
>
> (4) when necessary, require them to renew their official bonds, make reports, and present their books and accounts for inspection.

Section 7-4-2110, MCA, has been construed by the Montana Supreme Court and by a former attorney general. In 1980 former Attorney General Greely concluded that the statute granted the board of county commissioners supervisory power over all of the county executive officers (including county attorneys) that are listed in section 7-4-2203, MCA, with the possible exception of justices of the peace. 38 Op. Att'y Gen. No. 85 at 294 (1980). The opinion holds that the "county commissioners, in the exercise of their statutory supervisory control over county officers, may assure that the officers fulfill their statutory duties, but may not assume control over the manner in which those duties are performed." Id. at 297.

The Montana Supreme Court has more recently addressed section 7-4-2110, MCA, in Cantwell v. Geiger, 228 Mont. 330, 742 P.2d 468 (1987). In Cantwell, the Court noted that section 7-4-2110, MCA, gave the county commissioners supervisory power over a county assessor "under such limitations and restrictions as are prescribed by law." The Court then held that section 15-8-102, MCA, a statute amended in 1973 to make county assessors agents of the Department of Revenue, is such a limitation as

prescribed by law. Cantwell, 228 Mont. at 333-34, 742 P.2d at 470. The circumstances in Cantwell are distinguishable from those present in this inquiry, since there is no statute comparable to section 15-8-102, MCA, that specifies that a county attorney is an agent of state government.

Section 2-15-501(4), MCA, which addresses the attorney general's supervisory powers over county attorneys, is also relevant to this discussion. It provides:

> General duties. It is the duty of the attorney general:
>
> ....
>
> (4) to exercise supervisory powers over county attorneys in all matters pertaining to the duties of their offices and from time to time require of them reports as to the condition of public business entrusted to their charge. The supervisory powers granted to the attorney general by this subsection include the power to order and direct county attorneys in all matters pertaining to the duties of their office. The county attorney shall, when ordered or directed by the attorney general, promptly institute and diligently prosecute in the proper court and in the name of the state of Montana any criminal or civil action or special proceeding.

Although under section 2-15-501(4), MCA, the attorney general has the power to direct county attorneys in all matters pertaining to the duties of their office, this authority does not extend to the exercise of daily supervision over the conduct of administrative affairs of a county attorney's office. The Montana Supreme Court in State v. District Court, supra, focused upon the question of which governmental entity exercises direct, detailed or daily supervision over employees and is therefore in a better position to avoid or prevent negligent acts by employees. Under the facts of the present inquiry, the alleged wrongful conduct involved administrative business of the county attorney's office, i.e., the termination of a county employee. It is more likely that the board of county commissioners would be aware of such matters and would be in a better position to avoid or prevent negligent acts by a county attorney regarding such administrative acts. Thus, in the context of the performance of discretionary administrative acts such as the hiring and firing of staff, the relationship between the county attorney and the board of county commissioners more closely resembles a master-servant relationship for the purposes of the Tort Claims Act.

THEREFORE, IT IS MY OPINION:

County attorneys are "employees" of the county for purposes of the Montana Comprehensive State Insurance Plan and Tort Claims Act, § 2-9-305, MCA, whenever a county attorney is named in a civil lawsuit for his actions regarding county administrative business, such as the hiring and firing of staff.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 44 OPINION NO. 30

HIGHWAYS - Department of Transportation employees: authority to enforce speed limit as condition of special permit;
MOTOR VEHICLES - Department of Transportation employees: authority to enforce speed limit as condition of special permit;
PEACE OFFICERS - Department of Transportation employees: authority to enforce speed limit as condition of special permit;
TRAFFIC - Department of Transportation employees: authority to enforce speed limit as condition of special permit;
TRANSPORTATION, DEPARTMENT OF - Department of Transportation employees: authority to enforce speed limit as condition of special permit;
MONTANA CODE ANNOTATED - Title 61, chapter 10, part 1; sections 61-10-101 to 61-10-109, 61-10-121, 61-10-122, 61-10-146, 61-12-201, 61-12-206.

HELD: Department of Transportation Motor Carrier Services Division compliance officers have authority to issue a citation for violation of a special permit condition when the special permit condition violated is a speed limit imposed upon the permitted vehicle.

March 16, 1992

John Rothwell, Director
Department of Transportation
2701 Prospect Avenue
Helena MT 59620-9726

Dear Mr. Rothwell:

You have requested my opinion on the following question:

> Do Department of Transportation Motor Carrier Services Division compliance officers have authority to issue a citation for violation of a special permit condition when the special permit condition violated is a speed limit imposed upon the permitted vehicle?

Sections 61-10-101 to 108, MCA, generally define the maximum size, weight and load specifications for vehicles operating on Montana highways. Section 61-10-109, MCA, provides that no vehicle may be operated in excess of these size, weight and load specifications without obtaining a special permit from the Department of Transportation or the Montana Highway Patrol. Section 61-10-121, MCA, specifically authorizes the issuance of such special permits.

Section 61-10-122, MCA, describes the discretionary nature of the process by which individual conditions are attached to these special permits. It provides in relevant part:

> The department of transportation or local authority may issue or withhold a special permit at its discretion or, if the permit is issued, limit the number of trips or establish seasonal or other time limitations within which the vehicle, combination of vehicles, load, object, or other thing described may be operated on the public highways indicated, or otherwise limit or prescribe conditions of operation of the vehicle, combination of vehicles, load, object, or other thing when necessary to assure against damage to the road foundation, surfaces, or structures or safety of traffic, and may require an undertaking or other security considered necessary to compensate for injury to a roadway or road structure. [Emphasis added.]

I understand that various speed limits, as dictated by the nature of the vehicle and the intended route of travel, are routinely made a condition of these special permits. Such a practice is consistent with the expressed intent of the statute that special permit conditions be designed to protect public safety and property. Section 61-10-146, MCA, makes the violation of any special permit condition a misdemeanor.

I also understand that this controversy has arisen because only recently have Department of Transportation Motor Carrier Services Division compliance officers placed extra emphasis on the enforcement of speed limit conditions attached to size, weight and load special permits. Previously, such enforcement was often left with the Highway Patrol and local law enforcement agencies.

Department of Transportation compliance officers are peace officers under section 61-12-201, MCA, and pursuant to section 61-12-206, MCA, have the power of arrest for violations of Title 61, chapter 10, part 1. There can thus be no doubt that such a compliance officer is acting within his or her statutory authority when issuing a citation under section 61-10-146, MCA, for the violation of a speed limit-related condition of a special permit. The fact that the permitted vehicle may also be subject to other statutory speed requirements does not diminish this explicit authority, although any issuance of more than one citation for the same criminalized conduct would certainly raise double jeopardy questions.

THEREFORE, IT IS MY OPINION:

> Department of Transportation Motor Carrier Services Division compliance officers have authority to issue a citation for violation of a special permit condition when

the special permit condition violated is a speed limit imposed upon the permitted vehicle.

Sincerely,

MARC RACICOT
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

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

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

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

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

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

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

Use of the Administrative Rules of Montana (ARM):

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

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 1991. This table includes those rules adopted during the period January 1, 1992 through March 31, 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 December 31, 1991, 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 February, 1992, are published. Vacancies scheduled to appear from April 1, 1992, through June 30, 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 March 5, 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: FEBRUARY, 1992

Appointee	Appointed by	Succeeds	Appointment/End Date
Board of Social Work Examiners & Professional Counselors (Commerce)			
Mr. Patrick Wolberd	Governor	Maybanks	2/13/1992
Billings			1/2/1993
Qualifications (if required): licensed social worker			
Children's Trust Fund Board (Family Services)			
Mr. Gary Acevedo	Governor	Dowen	2/24/1992
Pablo			1/1/1995
Qualifications (if required): public member			
Mr. Larry Epstein	Governor	Walls	2/24/1992
Cut Bank			1/1/1995
Qualifications (if required): public member			
Mr. Richard Kerstein	Governor	reappointed	2/24/1992
Billings			1/1/1995
Qualifications (if required): public member			
Mr. Randy Koutnik	Governor	reappointed	2/24/1992
Helena			1/1/1995
Qualifications (if required): public member			
Mr. Mike Males	Governor	reappointed	2/24/1992
Bozeman			1/1/1995
Qualifications (if required): public member			

BOARD AND COUNCIL APPOINTEES: FEBRUARY, 1992

Appointee	Appointed by	Succeeds	Appointment/End Date
Council for Montana's Future	(Governor)		
Mr. John Bailey Livingston Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992
Mr. Kurt Baltrusch Glendive Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992
Mr. Jerry Black Shelby Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992
Ms. Anne Boothe Malta Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992
Mr. Robert Brown Bozeman Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992
Mr. Tony Colter Deer Lodge Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992
Mr. Jim Crane Helena Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992
Ms. Carol Daly Kalispell Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992

BOARD AND COUNCIL APPOINTEES: FEBRUARY, 1992

Appointee	Appointed by	Succeeds	Appointment/End Date
Council for Montana's Future	(Governor) cont.		
Mr. Alan Elliott Billings Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992
Mr. Michael Grove White Sulphur Springs Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992
Ms. Constance Jones Sheridan Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992
Ms. Alyce Kuehn Sidney Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992
Ms. Debbie Leeds Havre Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992
Ms. Jane Lopp Kalispell Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992
Mr. Russ Ritter Helena Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992
Ms. Lynn Robson Bozeman Qualifications (if required): none specified	Governor	none listed	2/21/1992 9/15/1992

BOARD AND COUNCIL APPOINTEES: FEBRUARY, 1992

Appointee	Appointed by	Succeeds	Appointment/End Date
Council for Montana's Future	(Governor) cont.		
Ms. Valerie Running Fisher	Governor	none listed	2/21/1992
Missoula			9/15/1992
Qualifications (if required): none specified			
Mr. Daniel Smith	Governor	none listed	2/21/1992
Missoula			9/15/1992
Qualifications (if required): none specified			
Mr. Alan Solum	Governor	none listed	2/21/1992
Kalispell			9/15/1992
Qualifications (if required): none specified			
Mr. David Spencer	Governor	none listed	2/21/1992
Willow Creek			9/15/1992
Qualifications (if required): none specified			
Mr. Herman Wessell	Governor	none listed	2/21/1992
Billings			9/15/1992
Qualifications (if required): none specified			
Mr. Craig Wilson	Governor	none listed	2/21/1992
Billings			9/15/1992
Qualifications (if required): none specified			
Mr. Robert Wuttke, Jr.	Governor	none listed	2/21/1992
Missoula			9/15/1992
Qualifications (if required): none specified			

BOARD AND COUNCIL APPOINTEES: FEBRUARY, 1992

Appointee	Appointed by	Succeeds	Appointment/End Date
Developmental Disabilities Planning and Advisory Council (Social and Rehabilitation Services)			
Sen. Delwyn "Del" Gage Cut Bank Qualifications (if required): state senator	Governor	reappointed	2/13/1992 1/2/1993
Rep. Betty Lou Kasten Brockway Qualifications (if required): state representative	Governor	Whalen	2/13/1992 1/2/1993
Mrs. Othelia Schulz Butte Qualifications (if required): representative of Region IV	Governor	Kajin	2/13/1992 1/2/1993
Fort Peck-Montana Compact Board ()			
Ms. Karen Barclay Helena Qualifications (if required): none listed	Governor	Fasbender	2/12/1992 11/6/1997
Science and Technology Advisory Council (Commerce)			
Dr. John Brower Butte Qualifications (if required): none specified	Governor	none listed	2/24/1992 2/24/1994
Professor Walter Hill Missoula Qualifications (if required): none specified	Governor	none listed	2/24/1992 2/24/1994
Mr. Robert E. Ivy Hamilton Qualifications (if required): none specified	Governor	none listed	2/24/1992 2/24/1994

BOARD AND COUNCIL APPOINTEES: FEBRUARY, 1992

Appointee	Appointed by	Succeeds	Appointment/End Date
Science and Technology Advisory Council (Commerce) cont.			
Mr. Hartwig Moeller Great Falls Qualifications (if required): none specified	Governor	none listed	2/24/1992 2/24/1994
Mr. James B. Orser Billings Qualifications (if required): none specified	Governor	none listed	2/24/1992 2/24/1994
Mr. Richard K. Quisenberry Wilmington Qualifications (if required): none specified	Governor	none listed	2/24/1992 2/24/1994
Mr. Carl E. Russell Helena Qualifications (if required): none specified	Governor	none listed	2/24/1992 2/24/1994
Mr. Clarence Speer Bozeman Qualifications (if required): none specified	Governor	none listed	2/24/1992 2/24/1994
Mr. David Toppen Helena Qualifications (if required): none specified	Governor	none listed	2/24/1992 2/24/1994
Mr. Ken S. Walker Boise Qualifications (if required): none specified	Governor	none listed	2/24/1992 2/24/1994
Mr. Gerry Wheeler Bozeman Qualifications (if required): none specified	Governor	none listed	2/24/1992 2/24/1994

BOARD AND COUNCIL APPOINTEES: FEBRUARY, 1992

Appointee	Appointed by	Succeeds	Appointment/End Date
Tourism Advisory Council (Commerce)			
Mr. Tom Johnson	Governor	none listed	2/19/1992
Missoula			1/1/1993

Qualifications (if required): president of Montana Innkeepers Association

VACANCIES ON BOARDS AND COUNCILS -- April 1, 1992 through June 30, 1992

Board/current position holder	Appointed by	Term end
Board of Athletics (Commerce)		
Mr. Harry Atchison, Havre Qualifications (if required): none specified	Governor	4/25/1992
Dr. John R. Halseth, Great Falls Qualifications (if required): none specified	Governor	4/25/1992
Dr. Leonard Andrew Vandolah, Conrad Qualifications (if required): none specified	Governor	4/25/1992
Board of Hail Insurance (Agriculture)		
Mr. Louis Beirwagen, Big Sandy Qualifications (if required): none specified	Governor	4/18/1992
Board of Nursing Home Administrators (Commerce)		
Ms. Linda M. Smith, Missoula Qualifications (if required): none specified	Governor	5/28/1992
Board of Optometrists (Commerce)		
Mr. Larry J. Bonderud, Shelby Qualifications (if required): registered optometrist	Governor	4/3/1992
Board of Plumbers (Commerce)		
Mr. Thor A. Jackola, Kalispell Qualifications (if required): professional engineer qualified in mechanical engineering	Governor	5/4/1992
Board of Professional Engineers and Land Surveyors (Commerce)		
Mr. Robert T. Hafferman, Kalispell Qualifications (if required): none specified	Governor	4/23/1992
Dr. Fred E. Walter, Butte Qualifications (if required): mechanical engineer	Governor	4/23/1992

VACANCIES ON BOARDS AND COUNCILS -- April 1, 1992 through June 30, 1992

Board/current position holder	Appointed by	Term end
Board of Real Estate Appraisers (Commerce)		
Ms. Connie G. Clarke, Miles City	Governor	5/1/1992
Qualifications (if required): public member		
Ms. Janet M. Davis, Billings	Governor	5/1/1992
Qualifications (if required): appraiser represent American Institute Real Estate Appraiser		
Board of Realty Regulation (Commerce)		
Ms. Marcia J. Allen, Helena	Governor	5/9/1992
Qualifications (if required): licensed real estate broker active in real estate business		
Board of Veterans Affairs (Military Affairs)		
Mr. Dale G. Pawlowski, Circle	Governor	5/18/1992
Qualifications (if required): none specified		
Executive Board of Eastern Montana College (Education)		
Mr. Bill Tierney, Billings	Governor	4/20/1992
Qualifications (if required): none specified		
Executive Board of Western Montana College (Education)		
Ms. Pat Blade, Dillon	Governor	4/16/1992
Qualifications (if required): none specified		
Montana State University Executive Board (Education)		
Ms. Helen Johnson, Bozeman	Governor	4/17/1992
Qualifications (if required): none specified		
Public Employees Retirement Board (Administration)		
Mr. Robert L. Batista, Great Falls	Governor	4/1/1992
Qualifications (if required): none specified		

VACANCIES ON BOARDS AND COUNCILS -- April 1, 1992 through June 30, 1992

Board/current position holder	Appointed by	Term end
State Library Commission (Education)		
Ms. Mary Doggett, White Sulphur Springs Qualifications (if required): none specified	Governor	5/22/1992
Ms. Joanne V. Lerud, Butte Qualifications (if required): none specified	Commissioner	4/1/1992