MONTANA ADMINISTRATIVE REGISTER

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ISSUE NO. 9

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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BEFORE THE FINANCIAL DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of a rule pertaining to dollar amounts to which consumer loan rates are to be applied	))))	NOTICE OF PROPOSED AMENDMENT OF 8.80.307 DOLLAR AMOUNTS TO WHICH CONSUMER LOAN RATES ARE TO BE APPLIED

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On July 1, 1992, the Financial Division proposes to amend the above-stated rule.

2. The proposed amendment of 8.80.307 will read as follows: (new matter underlined, deleted matter interlined)

8.80.307 DOLLAR AMOUNTS TO WHICH CONSUMER LOAN RATES ARE TO BE APPLIED (1) The dollar amounts in the following statutory sections are changed to the new designated amounts as follows:

Authority	Stated Amount	Changed Designated Amount	
Section 32-5-201(4)	$1,000.00	~~$1,400.00~~	$1,500.00
Section 32-5-302(3)	$ 300.00	~~$ 420.00~~	$ 450.00
	$1,000.00	~~$1,400.00~~	$1,500.00
	$2,500.00	~~$3,500.00~~	$3,750.00
Section 32-5-306(7)	$ 300.00	~~$ 420.00~~	$ 450.00

Auth: Sec. 32-5-104, MCA; IMP, Sec. 32-5-104, MCA

REASON: These amendments are needed because section 32-5-104, MCA, mandates that certain dollar amounts in Title 32, chapter 5 be changed from time to time in response to changes in one of the U.S. Consumer Price Indexes, and that the dollar amount changes are to be announced by rule. The reference Consumer Price Index has changed a sufficient amount to require amendments to ARM 8.80.307.

3. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Financial Division, 1520 East 6th, Room 50, Helena, Montana 59620, and must be received no later than June 11, 1992.

4. If a person who is directly affected by the proposed amendment wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request with any comments he has to the Financial Division, 1520 East 6th, Room 50, Helena, Montana 59620, to be received no later than June 11, 1992.

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

by the proposed amendment, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 2 based on the 17 licensees in Montana.

FINANCIAL DIVISION
CHUCK BROOKE, DIRECTOR
DEPARTMENT OF COMMERCE

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, May 4, 1992.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the proposed amendment and repeal of rules relating to vo-ed weighted cost funding	NOTICE OF THE PROPOSED AMENDMENT AND REPEAL OF RULES RELATING TO VO-ED WEIGHTED COST FUNDING

NO PUBLIC HEARING CONTEMPLATED

To: All interested persons

1. On June 13, 1992, the Superintendent of Public Instruction proposes to amend and repeal rules pertaining to secondary vocational education weighted cost funding.

2. The rules, as proposed to be amended, new material underlined, deleted material interlined, provide as follows. Full text of the rules is found at pages 10-593 through 10-596, ARM.

10.44.102 DEFINITION OF TERMS (1) "Additional ~~or excess~~ cost items" are ~~as follows~~ those costs which exceed the average costs of classroom courses and include the following:

(a) remains the same.

(b) stipends to vocational teachers for supervision of vocational student ~~groups~~ organizations (DECA, FHA/HERO, FFA, ~~OEA~~ Business Professionals of America, Technology Students Association, and VICA),

(c) - (d) remains the same.

(e) instructional-related travel expense for an approved program or vocational student organization,

(f) remains the same

(2) "Average number belonging (ANB) for secondary vocational education and industrial arts programs" is the tenth day count of pupil enrollment in the courses in the vocational and industrial arts and technology programs in the year immediately preceding the year for which the funding is requested.

(~~2~~3) "Approved secondary vocational programs"+ are high school vocational ~~education~~ programs ~~for persons in high school~~ which ~~have been designated as meeting~~ K-12 vocational education standards authorized by section 20-7-303, MCA, and ~~are~~ receive approved~~al~~ by the superintendent of public instruction.

(4) "Local ANB value" is the district per ANB foundation program schedule amount from section 20-9-319, MCA, received in the year prior to the year for which the funding is requested.

(~~3~~5) "Secondary vocational education programs "+ are high school programs which are directly related to the preparation of individuals for paid or unpaid employment and advanced training.

~~(4) "School district": a district organized for the purpose of providing educational services for grades nine through 12, as defined in 20-6-101, MCA; the term does not include postsecondary vocational education centers.~~

~~(5) "Superintendent of public instruction": this term~~

~~includes both the superintendent of public instruction and the administrator of the department of vocational and occupational services in the office of public instruction.~~

(6) ~~"Secondary vocational program": vocational education for persons in high school (span of grades usually beginning with grade nine and ending with grade 12).~~"Vo Ed weight factor" is the weight assigned to five categories of vocational programs, based on the cost of the programs, which is used in the calculation of state vocational education funding for costs which may exceed the average costs of classroom courses.

(7) "Industrial arts programs"~~:~~ are those industrial arts and technology education programs:

(a) which pertain to the body of related subject matter, or related courses, organized for the development of understanding ~~about~~ all aspects of industry and technology, such as experimenting, designing, constructing, evaluating and using tools, machines, materials and processes; and

(b) which emphasize a concern with technical means, their evolution, utilization and significance with industry, the organization, personnel, systems, techniques, resources and products, and their social and cultural impact; and

~~(b)~~ Remains the same but will be renumbered (c).

(8) "Cooperative vocational education programs"~~:~~ are ~~a program of~~ vocational ~~education~~ programs for persons who, through written cooperative arrangements between the school and employers, receive instruction, including required academic courses and related vocational instruction, by alternation of study in school with a job in any occupational field. These two experiences must be planned and supervised by the school and employers so that each contributes to the student's education and ~~to his or her~~ employability. Work periods and school attendance may be ~~on alternate half days, full days, weeks, or other periods of time in~~ flexibly arranged to fulfill~~ing~~ the cooperative program.

(AUTH: 20-7-301, MCA; IMP: 20-7-303 MCA)

10.44.103 ELIGIBILITY REQUIREMENTS FOR STATE VOCATIONAL EDUCATION ~~EXCESS COSTS FUNDING~~ (1) Each program must meet the K-12 vocational education standards for an approved secondary vocational education or industrial arts and technology education program to be eligible for state vocational education funding.

(2) A school district must have operated an approved secondary vocational education or industrial arts and technology education program ~~on an approved basis for~~ in the immediate preceding year to be eligible for state vocational education funding. ~~Each approved program must meet the standards for an approved secondary vocational or industrial arts program.~~

(AUTH: 20-7-301, MCA; IMP: 20-7-303, 20-7-305, MCA)

10.44.104 PROCEDURES FOR APPLYING TO RECEIVE STATE VOCATIONAL EDUCATION FUNDING (1) ~~To apply, s~~School districts must ~~submit~~ apply to the superintendent of public instruction to receive state funding for the additional vocational program costs, using forms provided by the office of public instruction.

Each district must submit the following:

~~(1) A Local Plan for Vocational Education (Form VE 0379). This is a summary of all vocational programs for five fiscal years. School districts which have submitted a five year plan need not resubmit.~~

(~~2~~a) A Pproposal for ~~a New Vocational Education Program (Form VE 0203).~~ approval Ffor each new vocational program categorized by a classification of instructional program code (CIP) for which the school district is requesting funding.~~, a separate proposal must be submitted.~~

(~~3~~b) A Pproposal for Rrenewal of approval for each on-going or previously approved~~a~~ Ssecondary Vvocational Pprogram ~~(Form VE 1083). For each vocational program~~ categorized by a classification of instructional program code (CIP) ~~that is ongoing (previously approved), this application form must be used~~.

(~~4~~c) An Aaddendum for Eeach Ccooperative Vvocational Eeducation ~~Program (Form VE 1203). For each~~ program utilizing the cooperative method of instruction~~, a separate addendum must be~~ attached to a ~~the~~ Pproposal for approval or renewal of approval of Vvocational Eeducation Pprogram ~~(Form VE0203 or VE 1083)~~.

(d) A student enrollment report submitted for each approved vocational program which will be used in the funding formula.

~~(5) A Certified Expenditure Report (Form VE 0503). All school district receiving funds for secondary vocational and industrial arts programs must certify the expenditures made by the district for each secondary vocational and industrial arts program.~~

(AUTH: 20-7-301, MCA; IMP: 20-7-303 MCA)

10.44.105 FUNDING FORMULA (1) The following procedure shall ~~govern the allocation and distribution of~~ be used to allocate state vocational education ~~excess~~ additional cost funds to school districts:

(~~1~~a) ~~Only p~~Programs which meet~~ing~~ the ~~eligibility~~ requirements of ~~rule~~ ARM 10.44.103 and 10.44.104 ~~above~~ and are approved by the superintendent of public instruction shall be eligible to receive a supplemental vocational education allocation.

(~~2~~b) All approved vocational programs shall be placed into one of five categories ~~according to~~ based on the relative additional cost of the program. The assignment of programs to categories is subject to annual review and adjustment for cost changes. A list of programs and the assigned categories will be distributed annually to school districts along with program applications. ~~(Form VE 0203). Each category may carry a weight factor on the the order of the following:~~

~~Category~~	~~Weight~~
~~I~~	~~.41~~
~~II~~	~~.28~~
~~III~~	~~.18~~
~~IV~~	~~.10~~
~~V~~	~~.03~~

(~~3~~c) Industrial ~~A~~arts and Technology Education programs shall be funded at 50 percent of the assigned category.

(~~4~~d) Funding shall be based upon the average number belonging (ANB) ~~to~~ for secondary vocational and industrial arts and technology programs in the year immediately preceding the year for which funding is requested, separately. ~~The ANB shall be~~ computed for each ~~separate~~ secondary vocational and industrial arts and technology education program. The following formula shall be used to compute the funding for each separate program:

~~Aggregated Days Belonging~~ ~~those students attending~~ in the vocational program ~~180 days~~	x	No. Vo Ed Periods ~~No. Periods in school day~~	x	Vo Ed Weight Factor	x	Local ANB Value	=	State Vo Ed Funds

Tenth day count of class enrollment

(2) The figures derived from th~~is~~e formula in subsection (1) will be ~~adjusted~~ prorated to reflect the legislative appropriation.

~~(5) Student Enrollment Report (Form VM 0303). This form shall be submitted for each approved program to be used in the above formula.~~

(AUTH: 20-7-301, MCA; IMP: 20-7-303 MCA)

10.44.106 ACCOUNTING AND REPORTING ~~A school district receiving funds from the appropriation shall account for such funds in a sub-fund of the miscellaneous program fund established by 20.9.507, MCA. These funds shall be expended within the fiscal year. Excess funds received by formula application for a vocational program must be expended in that approved vocational program.~~ (1) Each school district receiving funds for secondary vocational education and industrial arts and technology programs must deposit those funds and record the expenditures in miscellaneous fund 15 as vocational program expenditures pursuant to the vocational program expenditure section of the Montana Finance Manual.

(a) If at year end, school district expenditures for additional cost items of vocational programs in miscellaneous fund 15 are less than the amount of the state vocational program funding received in that year, as indicated by the annual trustees financial summary, the amount of the difference will be considered as the end-of-year vocational program fund balance. In the first year of a biennium the balance must be used to reduce the state vocational program payment due to the district in the ensuing year. In the second year of the biennium, or if a state vocational program payment is not due to that district in the ensuing year, the end-of-year vocational program fund balance must be refunded to the office of public instruction by July 15 of the ensuing fiscal year.

(AUTH: 20-7-301, MCA; IMP: 20-7-303 MCA)

3. **The proposed rules for repeal follow.** Full text is found at pages 10-593 through 10-596, ARM.

10.44.101 POLICY STATEMENT
(AUTH: 20-7-301, MCA; IMP: 20-7-303, MCA)

10.44.107 REPORTING
(AUTH: 20-7-301, MCA; IMP: 20-7-303 MCA)

4. **These rules were revised or clarified to comply with accounting practice changes resulting from S.B. 17, Ch. 767, 1991 Legislature and to provide consistency of rule with statute and practice.**

5. **Interested persons may submit their data, views or arguments concerning the proposed rule changes in writing to the Office of Public Instruction, Room 106, State Capitol, Helena, Montana 59620, no later than 5:00 p.m. on June 11, 1992.**

6. **If a person who is directly affected by the proposed changes wishes to express his/her data, views and arguments orally or in writing at a public hearing, s/he must make written request for a hearing and submit this request along with any written comments s/he may have to the Office of Public Instruction, Room 106, State Capitol, Helena, Montana 59620, no later than 5:00 p.m. on June 11, 1992.**

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

Beda J. Lovitt
Rule Reviewer

Nancy Keenan
Superintendent
Office of Public Instruction

Certified to the Secretary of State May 4, 1992.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of Student Assessment Rule	)))	NOTICE OF PROPOSED AMENDMENT OF ARM 10.56.101 STUDENT ASSESSMENT

NO PUBLIC HEARING
CONTEMPLATED

To: All Interested Persons

1. On June 25, 1992, the Board of Public Education proposes to amend ARM 10.56.101, Student Assessment.

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

10.56.101 STUDENT ASSESSMENT (1) through (2) (b) will remain the same.

(2)(c) using only parts of the approved norm-referenced test; have until July 1991 to comply with this subsection. The test will be administered to students in grades three, eight and eleven in reading, language arts, math, science, and social studies. A spring test will be given and the test date will be within the empirical norm date time frame for the selected test. If the spring test date falls outside the empirical norm date time frame, appropriate interpolated norms must be used. All scores will be sent to the office of public instruction ~~by June 30~~ with the annual fall report in a format specified by the office of public instruction and approved by the board of public education.

(3) through (6) remain the same.

AUTH: Sec. 20-2-121 IMP: Sec. 20-2-121

3. The Board proposes to amend this rule to address reporting concerns expressed by school districts. School districts have complained that the June reporting date does not give them enough time to receive the results from the testing agencies.

4. Interested parties may submit their data, views or arguments in writing to Bill Thomas, Chairperson of the Board of Public Education, 33 South Last Chance Gulch, Helena, MT 59620, no later than June 11, 1992.

5. If a person who is directly affected by the proposed amendment wishes to express their data, views or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Bill Thomas, Chairperson of the Board of Public Education, 33 S. Last Chance Gulch, Helena, MT 59620, no later than June 11, 1992.

6. If the Board receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 54 as there are 538 school districts presently in Montana.

Wayne Buchanan, Executive Secretary
Board of Public Education

Certified to the Secretary of State, 5/4/92.

BEFORE THE DEPARTMENT OF CORRECTIONS AND
HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the proposed amendment of Rule 20.7.1101 which sets forth conditions on probation or parole	NOTICE OF PROPOSED AMENDMENT OF RULE 20.7.1101 NO PUBLIC HEARING CONTEMPLATED

TO: ALL INTERESTED PERSONS

1. On June 15, 1992, the Department of Corrections and Human Services proposes to amend Rule 20.7.1101 to bring the rule into compliance with the 1987 U.S. Supreme Court decision on Griffin vs. Wisconsin.

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

20.7.1101 CONDITIONS ON PROBATION OR PAROLE

(1) through (6) remain the same.

(7) Search of person or property. ~~The probation or parolee while on probation or parole if so ordered by the sentencing court, shall submit to a search of his person, automobile, or place of residence by a probation or parole officer, at any time of the day or night, without a warrant upon reasonable cause as may be ascertained by a probation/parole officer.~~ Upon reasonable cause, the probation or parole client shall submit to a search of their person, vehicle or residence by a probation/parole officer at any time without a warrant.

(8) and (9) remain the same.

AUTH: 53-24-204, MCA IMP: 46-23-1021, 1101 MCA

3. The purpose of the rule revision is to bring the rule into compliance with the 1987 U.S. Supreme Court decision on Griffin vs. Wisconsin concluding a warranted search was acceptable on probationers if reasonable cause was determined.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendment in writing to the Legal Unit, Department of Corrections and Human Services, 1539 11th Avenue, Helena, Montana 59620, no later than June 14, 1992.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Legal Unit, Department of Corrections and Human Services, 1539 11th Avenue, Helena, Montana 59620, no later than June 11, 1992.

6. No public hearing is contemplated, but if the agency receives requests for a public hearing on the proposed amendment from either ten percent, or twenty-five persons, whichever is less of those persons who are directly affected by the proposed amendment, or from the administrative code committee; from a governmental agency or subdivision or from an association having no less than twenty-five members who will be directly affected, a public hearing will be held at a later date. Notice of such hearing will be published in the Montana administrative register. Ten percent of those persons directly affected has been determined to be 131 persons based on 1,200 inmates at Montana State Prison, 60 inmates at Women's Correctional Center and 54 inmates at Swan River Forest Camp.

CURT CHISHOLM, Director
Department of Corrections & Human Services

JAMES COIL
Rule Reviewer

Certified to the Secretary of State April 29th, 1992.

BEFORE THE DEPARTMENT OF CORRECTIONS
AND HUMAN SERVICES

In the matter of the proposed amendments, the proposed repeal, and the Adoption of New Rules pertaining to the application for voluntary admissions to the state hospital	))))))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 20.14.302, REPEAL OF RULES 20.14.303, 20.14.304, 20.14.305, 20.14.306 AND ADOPTION OF NEW RULES I AND II (VOLUNTARY ADMISSIONS TO MONTANA STATE HOSPITAL)

TO: ALL INTERESTED PERSONS

1. On June 11, 1992, at 10:00 a.m., the department will hold a public hearing in the Main Conference Room, Department of Corrections and Human Services, 1539 11th Ave., Helena, Montana, to consider amendment of Rule 20.14.302, repeal of Rules 20.14.303, 20.14.304, 20.14.305 and 20.14.306, application procedure for state hospital admissions, and adoption of new rules I and II, screening process and parameters for voluntary admissions to Montana State Hospital.

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

20.14.302 DEFINITIONS (1) Department means the department of ~~institutions~~ corrections and human services.

(2) through (9) remain the same.

(10) Community Support Program (CSP) employee means a center staff person whose primary work responsibilities involve the region's provision of support services, including but not limited to, day treatment, case management, residential, and crisis services to adults with severe disabling mental illness.

AUTH: 53-21-111 MCA IMP. 53-21-111 MCA

3. The rules as proposed to be repealed are 20.14.303, 20.14.304, 20.14.305 and 20.14.306 and can be found on Pages 20-205 through 20-209, Administrative Rules of Montana. Auth. and Imp. Sec. are:

AUTH: 53-21-111 MCA IMP. 53-21-111 MCA
53-1-203 MCA

4. The new rules will provide as follows:

I. SCREENING PROCESS (1) Each region shall have a minimum of six (6) voluntary admission screening designees to assure that an applicant's geographical location within the region does not prevent prompt completion of the screening process.

(a) The designees shall be appointed by the director and approved by the department;

(b) A list of authorized designees shall be provided to the hospital and to all professional persons within the region and the director shall keep the list current;

(c) The hospital shall maintain a current list of professional persons and a current list of authorized designees at appropriate locations within the hospital;

(2) The application for voluntary admission form and other forms used in the screening process will be developed and approved by the department.

(a) All necessary forms will be available through all community mental health centers including all satellite offices and service locations.

(b) The application for voluntary admission form must be completed by the applicant or by an interested person on behalf of the applicant and must be signed by the applicant in the presence of a witness.

(c) The witness shall attest to the fact that the applicant voluntarily signed the form.

(d) The mailing address of the witness shall be provided on the form to assure the authenticity of the applicant's signature.

(e) An applicant shall not be refused admission simply because the Application for Voluntary Admission form is not totally complete so long as the applicant's signature and the signature of the witness are affixed.

AUTH: 53-21-111 MCA IMP. 53-21-111 MCA

II. PARAMETERS FOR VOLUNTARY ADMISSION TO MONTANA STATE HOSPITAL (1) Voluntary admissions to Montana state hospital will be appropriate only when Montana state hospital is the least restrictive and most appropriate placement available.

(2) Montana state hospital will be considered the least restrictive and most appropriate placement for an individual who:

(a) Is violent and assaultive as a result of mental illness and is unable to be served in local inpatient facilities;

(b) Is so suicidal as to require 1:1 attention over extended periods of time and is unable to be served in mental health center programs or local inpatient facilities;

(c) Is so disorganized by mental illness that the individual is unable to appropriately care for a medical condition other than mental illness which places the individual in a life threatening situation, or;

(d) Is suffering from an acute exacerbation of mental illness which renders the individual unable, even with intensive supports, to maintain a level of functioning which is sufficiently high so as to allow the individual to remain in the community, and which would predictably require more than fourteen (14) days of inpatient care to stabilize.

(3) All community options including but not limited to case management, crisis response and local inpatient care must be considered and ruled out before an admission to Montana state hospital can be deemed appropriate.

(4) Symptoms or behavior related to or resulting from certain conditions, including but not limited to mental retardation, traumatic brain injury and alcohol/drug dependency shall not alone constitute the basis for a voluntary admission to Montana state hospital.

AUTH: 53-21-111 MCA IMP. 53-21-111 MCA

5. The purpose of the rule revisions is to assure that voluntary admissions to Montana State Hospital are consistent with the requirements of 53-21-111 M.C.A. and to prevent inappropriate admissions to Montana State Hospital.

6. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Legal Unit, Department of Corrections and Human Services, 1539 11th Avenue, Helena, Montana 59620, not later than June 12, 1992.

7. The Legal Unit, Department of Corrections and Human Services, has been designated to preside over and conduct the hearing.

CURT CHISHOLM, Director
Department of Corrections and
Human Services

JAMES OBIE
Rule Reviewer

Certified to the Secretary of State May 4th, 1992.

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

In the matter of the amendment of rules 46.12.501 and 46.12.502 pertaining to exclusion of medicaid coverage of infertility treatment services	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 46.12.501 AND 46.12.502 PERTAINING TO EXCLUSION OF MEDICAID COVERAGE OF INFERTILITY TREATMENT SERVICES

TO: All Interested Persons

1. On June 3, 1992, at 10:00 p.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of rules 46.12.501 and 46.12.502 pertaining to exclusion of medicaid coverage of infertility treatment services.

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

46.12.501 SERVICES PROVIDED Subsections (1) through (1)(aa) remain the same.

Subsections (1)(bb) through (1)(dd) remain the same in text but will be renumbered (1)(ab) through (1)(ad).

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-101, 53-6-103, 53-6-131 and 53-6-141 MCA

46.12.502 SERVICES NOT PROVIDED BY THE MEDICAID PROGRAM

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

(k) telephone service in home, remodeling of home, plumbing service, car repair and/or modification of automobile; ~~and~~

(l) delivery services not provided in a licensed health care facility unless as an emergency service. Delivery services means services necessary to protect the health and safety of the woman and fetus from the onset of labor through delivery. Emergency service is defined in ARM 46.12.102 (2)(e)(ii)~~.~~; and

(m) treatment services for infertility, including sterilization reversals.

Subsections (3) through (3)(d) remain the same.

AUTH: Sec. 53-2-201, 53-6-113 and 53-6-402 MCA
IMP: Sec. 53-6-101, 53-2-201, 53-6-103, 53-6-131, 53-6-141 and 53-6-402 MCA

3. Current medicaid rules allow coverage of medically necessary medical services for treatment of infertility. Prior to payment, the department requires review by a peer physician to determine whether such services are medically necessary. In all cases where such services have been reviewed, it has been determined that the services were not medically necessary. Treatment of infertility would generally consist of physician services, inpatient or outpatient hospital services, other covered services or a combination of services.

The Health Care Financing Administration (HCFA), which administers the medicaid program on the federal level, has clarified the federal policy regarding medicaid coverage of family planning services for treatment of infertility. HCFA policy, as stated in Regional Identical Letter 91-029, provides that states are not required to provide medicaid coverage for such services.

The department considers it inappropriate to use scarce public revenues to treat infertility and thereby encourage the birth and support of additional children at public expense. The department is responsible to carefully manage public resources to meet the serious medical concerns of the needy. The department does not believe that treatment of infertility is of sufficiently high priority to warrant expenditure of public funds.

Sections 53-6-101 and 53-6-113, MCA provide that the department must determine the amount, scope and duration of services, including the items and components constituting the services, in accordance with federal law. The proposed rule is necessary to implement the department's determination that family planning services for treatment of infertility will not be covered under the Montana medicaid program.

The proposed amendment to ARM 46.12.502 would exclude medicaid coverage of medical services provided for the purpose of treating infertility. Accordingly, medicaid reimbursement would not be available for services such as physician, inpatient hospital or outpatient hospital services when such services are provided for treatment of infertility.

The proposed amendment to ARM 46.12.501 is being made to correct an error in the lettering sequence only and is not a substantive change to the rule.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Russell E. Cater, Chief Legal Counsel, Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, no later than June 11, 1992.

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

Dawn Sloan
Rule Reviewer

Julia E. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State May 5, 1992.

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

In the matter of the amendment of rule 46.10.403 pertaining to AFDC standards of assistance	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.10.403 PERTAINING TO AFDC STANDARDS OF ASSISTANCE

TO: All Interested Persons

1. On June 3, 1992, at 11:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of rule 46.10.403 pertaining to AFDC standards of assistance.

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

46.10.403 TABLE OF ASSISTANCE STANDARDS (1) The tables of assistance standards contain the income and grant limits for assistance units according to the number of persons~~, the type of living arrangement,~~ and whether ~~shelter is~~ or ~~is~~ not ~~included~~ the assistance unit has a shelter obligation.

(2) Monthly gross income as defined in ARM 46.10.505 is tested against the gross monthly income standard and, after specified exclusions and disregards, the net monthly income standard. These tests are applied using income reasonably expected to be received in the first one or two benefit months. ~~However, if income is reported or discovered after the month of receipt, this income must be accounted for by applying the monthly income tests retroactively in the second month after receipt.~~ After the initial one or two benefit months, subsequent payments are computed retroactively based on income actually received in the budget month. Monthly net income is ~~to be~~ compared to the full standard for the size assistance unit even though the grant may only cover part of the month. If this net monthly income exceeds the benefit standard, the assistance unit is not eligible for any part of the benefit month. The assistance unit may be further ineligible as provided in ARM 46.10.403(3).

(a) Gross monthly income standards to be used when adults are included in the assistance unit are compared with the assistance unit's gross monthly income as defined in ARM 46.10.505.

GROSS MONTHLY INCOME STANDARDS TO BE USED WHEN ADULTS ARE INCLUDED IN THE ASSISTANCE UNIT

No. Of Persons in Household	With Shelter Obligation Per Month	Without Shelter Obligation Per Month
1	~~$ 527~~ $ 540	~~$ 189~~ $ 196
2	~~705~~ 731	~~305~~ 317
3	~~884~~ 919	~~416~~ 432
4	~~1,064~~ 1,108	~~529~~ 549
5	~~1,245~~ 1,297	~~633~~ 657
6	~~1,423~~ 1,486	~~731~~ 759
7	~~1,602~~ 1,676	~~829~~ 861
8	~~1,782~~ 1,865	~~919~~ 955
9	~~1,817~~ 1,954	~~1,005~~ 1,043
10	~~1,894~~ 2,041	~~1,088~~ 1,130
11	~~1,967~~ 2,118	~~1,162~~ 1,207
12	~~2,035~~ 2,196	~~1,236~~ 1,283
13	~~2,098~~ 2,263	~~1,301~~ 1,351
14	~~2,157~~ 2,327	~~1,363~~ 1,416
15	~~2,213~~ 2,388	~~1,423~~ 1,477
16	~~2,263~~ 2,442	~~1,474~~ 1,531

(b) Gross monthly income standards to be used when no adults are included in the assistance unit are compared with the assistance unit's gross monthly income as defined in ARM 46.10.505.

GROSS MONTHLY INCOME STANDARDS TO BE USED WHEN NO ADULTS ARE INCLUDED IN THE ASSISTANCE UNIT

No. of Persons in Household	With Shelter Obligation Per Month	Without Shelter Obligation Per Month
1	~~$ 189~~ 196	~~$ 72~~ 74
2	~~370~~ 385	~~189~~ 196
3	~~557~~ 577	~~305~~ 316
4	~~740~~ 768	~~416~~ 433
5	~~923~~ 958	~~527~~ 548
6	~~1,110~~ 1,153	~~636~~ 660
7	~~1,295~~ 1,345	~~742~~ 770
8	~~1,478~~ 1,534	~~845~~ 877
9	~~1,565~~ 1,624	~~931~~ 966
10	~~1,648~~ 1,711	~~1,014~~ 1,053
11	~~1,730~~ 1,796	~~1,097~~ 1,140
12	~~1,809~~ 1,878	~~1,173~~ 1,217
13	~~1,887~~ 1,959	~~1,252~~ 1,301
14	~~1,961~~ 2,035	~~1,326~~ 1,376
15	~~2,033~~ 2,111	~~1,399~~ 1,452
16	~~2,102~~ 2,181	~~1,467~~ 1,523

(c) Net monthly income standards to be used when adults are included in the assistance unit are compared with the assistance unit's net monthly income as defined in ARM 46.10.505.

NET MONTHLY INCOME STANDARDS TO BE USED WHEN ADULTS ARE INCLUDED IN THE ASSISTANCE UNIT

No. Of Persons in Household	With Shelter Obligation Per Month	Without Shelter Obligation Per Month
1	~~285~~ 292	~~102~~ 106
2	~~381~~ 395	~~165~~ 171
3	~~478~~ 497	~~225~~ 234
4	~~575~~ 599	~~286~~ 297
5	~~673~~ 701	~~342~~ 355
6	~~769~~ 803	~~395~~ 410
7	~~866~~ 906	~~448~~ 465
8	~~963~~ 1,008	~~497~~ 516
9	~~982~~ 1,056	~~543~~ 564
10	~~1,024~~ 1,103	~~588~~ 611
11	~~1,063~~ 1,145	~~628~~ 652
12	~~1,100~~ 1,187	~~668~~ 694
13	~~1,134~~ 1,223	~~703~~ 730
14	~~1,166~~ 1,258	~~737~~ 765
15	~~1,196~~ 1,291	~~769~~ 799
16	~~1,223~~ 1,320	797 828

(d) Net monthly income standards to be used when no adults are included in the assistance unit are compared with the assistance unit's net monthly income as defined in ARM 46.10.505.

NET MONTHLY INCOME STANDARDS TO BE USED WHEN NO ADULTS ARE INCLUDED IN THE ASSISTANCE UNIT

No. of Children in Household	With Shelter Obligation Per Month	Without Shelter Obligation Per Month
1	~~102~~ 106	~~39~~ 40
2	~~200~~ 208	~~102~~ 106
3	~~301~~ 312	~~165~~ 171
4	~~400~~ 415	~~225~~ 234
5	~~499~~ 518	~~285~~ 296
6	~~600~~ 623	~~344~~ 357
7	~~700~~ 727	~~401~~ 416
8	~~799~~ 829	~~457~~ 474
9	~~846~~ 878	~~503~~ 522
10	~~891~~ 925	~~548~~ 569

11	~~935~~	971	~~593~~	616
12	~~978~~	1,015	~~634~~	658
13	~~1,020~~	1,059	~~677~~	703
14	~~1,060~~	1,100	~~717~~	744
15	~~1,099~~	1,141	~~756~~	785
16	~~1,136~~	1,179	~~793~~	823

(3) When net monthly income exceeds the net monthly income standard because of receipt of a non-recurring lump sum payment, the assistance unit is ineligible for the number of months equal to the total amount of the net monthly income divided by the net monthly income standard for an assistance unit of that size. ~~The remainder which results~~ Any income remaining from this computation ~~will be treated as if it~~ is income ~~received and~~ available in the first month following the period of ineligibility. The period of ineligibility begins the month after receipt of the lump sum income.

(a) ~~If net monthly income~~ If receipt of a non-recurring lump sum in excess of the net monthly income standard is discovered after the month of receipt, the ineligibility period may begin as late as the corresponding payment month.

(b) The period of ineligibility will be recalculated with respect to the remaining months in any one or more of the following cases:

Subsections (3)(a)(i) through (3)(a)(iii) remain the same in text but are renumbered (3)(b)(i) through (3)(b)(iii).

(~~b~~c) If net monthly income in excess of the net monthly income standard is caused by a regular and periodic extra payment from a recurring income source, assistance will be suspended rather than terminated when ineligibility would be for only one benefit month.

Subsection (4) remains the same.

(a) Benefit standards to be used when adults are included in the assistance unit are compared with the assistance unit's net monthly income defined ~~as~~ in ARM 46.10.505.

BENEFIT STANDARDS TO BE USED WHEN ADULTS ARE INCLUDED IN THE ASSISTANCE UNIT

No. Of Persons in Household	With Shelter Obligation Per Month		With Shelter Obligation Per Day		Without Shelter Obligation Per Month		Without Shelter Obligation Per Day	
1	~~$232~~	238	~~$ 7.73~~	7.93	~~$ 83~~	86	~~$ 2.77~~	2.87
2	~~311~~	322	~~10.37~~	10.73	~~134~~	140	~~4.47~~	4.67
3	~~390~~	405	~~13.00~~	13.50	~~183~~	190	~~6.10~~	6.33
4	~~469~~	488	~~15.63~~	16.27	~~233~~	242	~~7.77~~	8.07
5	~~548~~	571	~~18.27~~	19.03	~~279~~	289	~~9.30~~	9.65
6	~~627~~	654	~~20.90~~	21.80	~~322~~	334	~~10.73~~	11.13
7	~~706~~	738	~~23.53~~	24.60	~~365~~	379	~~12.17~~	12.63
8	~~785~~	822	~~26.17~~	27.40	~~405~~	421	~~13.50~~	14.03
9	~~800~~	861	~~26.67~~	28.70	~~443~~	460	~~14.77~~	15.33
10	~~835~~	899	~~27.83~~	29.97	~~479~~	498	~~15.97~~	16.60

11	~~866~~	933	~~28.87~~	31.10	~~512~~	532	~~17.07~~	17.73
12	~~897~~	967	~~29.90~~	32.23	~~544~~	565	~~18.13~~	18.83
13	~~924~~	997	~~30.80~~	33.23	~~573~~	595	~~19.10~~	19.83
14	~~950~~	1,025	~~31.67~~	34.17	~~601~~	624	~~20.03~~	20.80
15	~~975~~	1,052	~~32.50~~	35.07	~~627~~	651	~~20.90~~	21.70
16	~~997~~	1,076	~~33.23~~	35.87	~~650~~	675	~~21.67~~	22.50

(b) Benefit standards to be used when no adults are included in the assistance unit are compared with the assistance unit's net monthly income as defined in ARM 46.10.505.

BENEFIT STANDARDS TO BE USED WHEN NO ADULTS ARE INCLUDED IN THE ASSISTANCE UNIT

No. Of Persons in Household	With Shelter Obligation Per Month	With Shelter Obligation Per Day	Without Shelter Obligation Per Month	Without Shelter Obligation Per Day
1	$ ~~83~~ 86	$ ~~2.77~~ 2.87	$ ~~32~~ 33	$ ~~1.07~~ 1.10
2	~~163~~ 170	~~5.43~~ 5.67	~~83~~ 86	~~2.27~~ 2.87
3	~~245~~ 254	~~8.17~~ 8.47	~~134~~ 139	~~4.47~~ 4.63
4	~~326~~ 338	~~10.87~~ 11.27	~~183~~ 191	~~6.10~~ 6.37
5	~~407~~ 422	~~13.57~~ 14.07	~~232~~ 241	~~7.73~~ 8.03
6	~~489~~ 508	~~16.30~~ 16.93	~~280~~ 291	~~9.33~~ 9.70
7	~~571~~ 593	~~19.03~~ 19.77	~~327~~ 339	~~10.90~~ 11.30
8	~~651~~ 676	~~21.70~~ 22.53	~~373~~ 386	~~12.40~~ 12.87
9	~~689~~ 716	~~23.97~~ 23.87	~~410~~ 425	~~13.67~~ 14.17
10	~~726~~ 754	~~24.20~~ 25.13	~~447~~ 464	~~14.90~~ 15.47
11	~~762~~ 791	~~25.40~~ 26.37	~~483~~ 502	~~16.10~~ 16.73
12	~~797~~ 827	~~26.57~~ 27.57	~~517~~ 536	~~17.23~~ 17.87
13	~~831~~ 863	~~27.70~~ 28.77	~~552~~ 573	~~18.40~~ 19.10
14	~~864~~ 897	~~28.80~~ 29.90	~~584~~ 606	~~19.47~~ 20.20
15	~~896~~ 930	~~29.87~~ 31.00	~~616~~ 640	~~20.53~~ 21.33
16	~~926~~ 961	~~30.87~~ 32.03	~~646~~ 671	~~21.53~~ 22.37

AUTH: Sec. 53-4-212 and 53-4-241 MCA
IMP: Sec. 53-4-211 and 53-4-241 MCA

3. ARM 46.10.403 sets forth the standards used to determine eligibility and benefit amounts for Aid to Families with Dependent Children (AFDC). The Department of Social and Rehabilitation Services (SRS) has been mandated by the General Appropriations Act of the 52nd Montana Legislature, House Bill 2, to compute AFDC benefit standards at 42% of the federal poverty index. Changes in the benefit standards in turn cause the net monthly income (NMI) standards and the gross monthly income (GMI) standards to change.

It is therefore necessary to amend this rule to increase the assistance standards as mandated by the legislature. The proposed changes in the standards for fiscal year 1993 are based on the calendar year 1992 federal poverty index.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written

data, views, or arguments may also be submitted to Russell E. Cater, Chief Legal Counsel, Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, no later than June 11, 1992.

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

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State May 4, 1992.

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

In the matter of the amendment of rules 46.12.570, 46.12.571, 46.12.572 and 46.12.573 pertaining to medicaid payments to mental health centers	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 46.12.570, 46.12.571, 46.12.572 AND 46.12.573 PERTAINING TO MEDICAID PAYMENTS TO MENTAL HEALTH CENTERS

TO: All Interested Persons

1. On June 3, 1992, at 3:00 p.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of rules 46.12.570, 46.12.571, 46.12.572 and 46.12.573 pertaining to medicaid payments to mental health centers.

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

46.12.570 CLINIC SERVICES, DEFINITIONS Subsections (1) through (4) remain the same.

(5) "Adolescent day treatment" means mental health day treatment services provided to persons who are enrolled as students in elementary or secondary schools.

Subsection (5) remains the same in text but will be renumbered (6).

(a) These criteria are included in contracts between the ~~department~~ state mental health authority and each mental health center.

Subsections (5)(b) and (c) remain the same in text but will be renumbered (6)(b) and (c).

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101 and 53-6-141 MCA

46.12.571 CLINIC SERVICES, REQUIREMENTS Subsections (1) through (5)(d) remain the same.

(6) Services specified in ARM 46.12.572(~~23~~) are provided by those individuals with clinical privileges except that day treatment is provided by or under the supervision of individuals with clinical privileges.

Subsections (7) through (13) remain the same.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101 and 53-6-141 MCA

46.12.572 CLINIC SERVICES, COVERED PROCEDURES
Subsections (1) through (3) remain the same.
(a) individual therapy including psychological testing and evaluation and family therapy;
(b) ~~family therapy~~ adolescent day treatment;
Subsections (3)(c) and (d) remain the same.
(e) adult day treatment.
Subsections (4) and (5) remain the same.

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

46.12.573 CLINIC SERVICES, REIMBURSEMENT Subsections (1) through (2) remain the same.
~~(3) Reimbursement for mental health center clinic services shall be by negotiated rate for each center.~~
~~(4) The negotiated rate for each mental health center shall be based on the allowable rate for each service for the state fiscal year 1985 established by the department of institutions plus four (4) per cent.~~
~~(a) The allowable rates per each fifteen (15) minute unit are:~~
~~(i) individual therapy -- $14.58;~~
~~(ii) day treatment -- $1.91;~~
~~(iii) group therapy and family therapy -- $3.66; and~~
~~(iv) emergency services -- $14.78.~~
~~(b) The negotiated rate for each center shall be the total allowable payments divided by the total allowable units. The total allowable units are the sum of the allowable units for each service specified in (4)(a) for the state fiscal year prior to the calendar year in which the rates are negotiated. The total allowable payments are the total of allowable units for each service specified in (4)(a) times the rate for the same service specified in (4)(a).~~
~~(c) The rates for mental health centers new to the medicaid program shall be the average of rates paid to participating mental health centers in the month when the mental health center becomes a Montana medicaid provider.~~
~~(i) The rate for newly participating mental health centers shall be in effect for at least twelve (12) months.~~
(3) Medicaid payment for mental health clinic services shall be the lowest of:
(a) the provider's actual (submitted) charge for the service;
(b) the amount allowed by medicare (for services covered by medicare); or
(c) the department's medicaid fee for the individual mental health clinic determined in accordance with subsections (4) or (5), as applicable.
(4) Effective July 1 of each year, the department will establish a new medicaid fee schedule for each mental health clinic which is participating in the medicaid program and which has filed with the department a cost report for the state fiscal year ending one year prior to the effective date

of the new fee schedule. For purposes of this section, such cost reporting year shall be known as the "base year." The fee schedule shall specify a per unit fee and shall apply to all services provided during the state fiscal year for which the fee schedule is effective. The fees established in accordance with this section shall not be subject to retrospective settlement.

(a) The fee schedule shall specify a fee per unit of service for each of the five services or groups of services listed in ARM 46.12.572(3)(a) through (e).

(i) For purposes of this section, a unit of service shall mean a 15 minute period of service.

(b) The fee for each service or group of services listed in ARM 46.12.572(3)(a) through (e) shall be determined by the department by dividing the base year allowable cost of providing the service or group of services by the number of units of that service or group of services provided during the base year.

(i) Each mental health clinic participating in the medicaid program must file annually with the department a cost report and a copy of an audited financial statement applicable to the cost reporting period. Cost reports and financial statements must be mailed or delivered to the Department of Social and Rehabilitation Services, Medicaid Services Division, P.O. Box 4210, Helena, MT 59604-4210.

(A) The cost report shall be in the form and shall contain the information required by the department, and shall be based on the mental health clinic's audited financial statement. The financial statement shall be prepared in accordance with generally accepted accounting principles as defined by the American institute of certified public accountants. The annual audit shall be prepared in accordance with generally accepted auditing standards as defined by the American institute of certified public accountants and the office of management and budget circular A-133, Audit of Institutions of Higher Education and Other Non-Profit Organizations. Forms or information regarding the required forms may be obtained by contacting the Department of Social and Rehabilitation Services, Medicaid Services Division, P.O. Box 4210, Helena, MT 59604-4210, (406) 444-4540.

(B) The cost report and audited financial statement must be filed with the department no later than the November 30 immediately following the end of the cost reporting period.

(C) Cost reports may be audited and are subject to verification by the department.

(ii) The allowable cost of providing the service or group of services shall be determined by the department for each provider based upon the cost report and financial statement filed by the provider with the department in accordance with subsection (i). The fee schedule for the state fiscal year beginning on July 1 shall be established based upon provider's base year cost report. For example, state fiscal year 1991 fee schedules shall be established using state fiscal year 1991 cost reports.

(iii) Reported costs are not allowable costs if the department, in its discretion, determines that the costs are not related to patient care or are not reasonable in amount. Unreasonable cost reporting allocations of indirect cost to a service or group of services shall be subject to review and redetermination by the department for purposes of establishing the provider's fee schedule.

(5) For new mental health clinics which have not filed a base year cost report, the department shall establish a fee schedule according to the methodology specified in subsection (4) based upon the provider's report of estimated allowable costs. The fees established in accordance with this section shall not be subject to retrospective settlement.

(a) The allowability of any estimated cost for purposes of establishing the provider's fee schedule shall be subject to the department's approval according to the provisions of subsection (4)(b)(ii).

(b) New mental health clinics which have not filed a base year cost report must file with the department a report of estimated allowable costs.

(i) The report must estimate the provider's allowable costs and units of service for the initial reporting period for each of the five services or groups of services listed in ARM 46.12.572(a) through (e).

(ii) The report must be filed by the provider within 90 days after the beginning of its initial cost reporting period. The report must be submitted in the form and detail required by the department. Forms or information regarding the required form may be obtained by contacting the Department of Social and Rehabilitation Services, Medicaid Services Division, P.O. Box 4210, Helena, MT 59604-4210, (406) 444-4540.

Subsections (5) through (6)(c) remain the same in text but will be renumbered (6) through (7)(c).

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

3. The proposed amendments are necessary to effectuate the purposes of section 53-6-101, MCA, which authorizes the department to set rates and provide mental health services in the medicaid program. Section 53-6-113, MCA requires the department to define the services provided under the medicaid program and to establish by rule reimbursement rates as determined necessary for the purposes of the program.

The current language of ARM 46.12.573 requires that mental health centers be reimbursed under a negotiated rate. The negotiated rate for each mental health center is based on the allowable rate for each service for state fiscal year 1985 established by the Department of Institutions (now known as the Department of Correction and Human Services) plus four percent.

The proposed rule is necessary to change the reimbursement methodology for mental health centers. The present reimbursement rate is determined by a complicated rate blending process. The blended rate does not relate to the cost of each service. Mental health centers are reimbursed the same unit rate for all services. This method of reimbursement encourages mental health centers to provide the less intensive services because they are less costly. Less intensive services tend to require the participant to remain in programs for longer periods of time. The current reimbursement methodology discourages providers from providing more intensive services which may be more costly, but which may be more appropriate for the recipient and which may more quickly eliminate the need for further services.

A study recently conducted by Mental Health Management of America (MHMA) for the department assessed patterns of medicaid utilization by mental health centers. The MHMA study recommended that reimbursement for mental health centers be changed to reflect a separate cost-related or value-related fee for each service area. The study indicated that such a reimbursement method would allow mental health centers to break out of their current service mix and develop other needed services without financial loss. The development of alternative community-based services is an important component in reducing the use of overly restrictive and expensive inpatient services.

The proposed amendment provides that the department will establish annually a new fee schedule for each participating mental health center. The department will establish the schedule based upon cost reports and financial statements filed annually by the centers. The fee will be established based upon the cost report for the period ending a year prior to the effective date of the new fee schedule, as such cost reports will be the most recent reports available at the time the fee schedule is established. New providers who have not filed a cost report must file a report of estimated costs, and a fee schedule will be established based upon this estimate.

The amendments to ARM 46.12.572(3) are necessary to define the services areas covered and to organize these service areas to correspond to the fee schedule. A separate fee will be established for each of five service areas: (1) individual therapy (including psychological testing and evaluation, and family therapy); (2) adolescent day treatment; (3) group therapy; (4) emergency services; and (5) adult day treatment. This amendment does not change the scope of mental health center services presently covered under the medicaid program.

The proposed amendments would provide a methodology whereby each provider's fee schedule will be established by the department according to the following steps:

(1) review of the provider's cost report information and financial statement or report of estimated allowable cost to determine whether all reported costs for each medicaid-reimbursable service area are reasonable and related to patient care and that indirect costs have been allocated by appropriate and reasonable methodologies;

(2) determination of the number of units of service in each service area for the cost reporting period or the period covered by the report of estimated allowable cost; and

(3) calculation of a fee per unit of service in each service area by dividing the allowable cost in each service area by the number of units for the service area.

The department believes that the proposed change in the reimbursement methodology will provide more equitable medicaid reimbursement to mental health centers. The new methodology will encourage development of appropriate community mental health programs. Reliable community mental health programs will encourage care and treatment for participants in the community rather than in more costly inpatient settings. The proposed amendment will benefit medicaid recipients and mental health centers, and is expected to reduce medicaid expenditures for inpatient services. The Medical Care Advisory Committee has been notified of the proposed change in reimbursement methodology.

The amendments to ARM 46.12.570 are necessary to define "adolescent day treatment," which is a new term added to ARM 46.12.572(3), and to clarify that state mental health authority provider and billing criteria are included in contracts with that authority rather than with SRS. The amendment to ARM 46.12.571 is necessary to correct an erroneous internal reference.

4. The proposed amendments will be effective retroactive to July 1, 1992, in order to implement the new rate methodology at the beginning of the new state fiscal year. The July 1 effective date will eliminate the need to calculate new rates under the old methodology to be effective for a period of approximately three weeks, and then to replace those rates with another new set of rates under the new methodology. The proposed amendments were prepared for timely filing for a prospective July 1 effective date, but additional necessary reviews of the proposal delayed filing by two weeks. The notice will have been published and a hearing held prior to the July 1 effective date..

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 June 11, 1992.

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

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State May 4, 1992.

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

In the matter of the adoption of Rules I through VIII pertaining to the passport to health program	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED RULES I THROUGH VIII PERTAINING TO THE PASSPORT TO HEALTH PROGRAM

TO: All Interested Persons

1. On June 4, 1992, at 10:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed Rules I through VIII pertaining to the passport to health program.

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

[RULE I] PASSPORT TO HEALTH PROGRAM: AUTHORITY

(1) The department has been granted by the United States department of health and human services (HHS), as provided in 42 U.S.C. 1396n(b), the authority to establish a primary care case management program for medicaid recipients.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-116 MCA

[RULE II] PASSPORT TO HEALTH PROGRAM: DEFINITIONS

(1) "Authorization" means providing the primary care provider's medicaid number or unique physician identifying number (UPIN) to another treating provider.

(2) "Case management" means directing and overseeing the delivery of certain services to an enrollee.

(3) "Clinic" means a federally-qualified health center, a rural health clinic, an Indian health service clinic on a reservation, or any other public health entity.

(4) "Enroll" means to choose a primary care provider.

(5) "Enrollee" means a medicaid recipient participating in the program and who is enrolled with a primary care provider under the program.

(6) "Medical care" means care provided to meet the medical and medically-related needs of a person.

(7) "Participate" means compliance with the requirements of the program.

(8) "Passport to Health program" or "the program" means the program of managed care for medicaid recipients.

(9) "Primary care" means medical care provided at a person's first point of contact with the health care system, except for emergencies. It includes treatment of illness and injury, health promotion, identification of persons at special

risk, early detection of serious disease and referral to specialists when appropriate.

(10) "Primary care case management" or "managed care" means promoting the access to, coordination of, quality of, and appropriate use of medical care, and containing the costs of medical care by having an enrollee obtain certain medical care from and through a designated provider.

(11) "Primary care provider" means a physician, nurse specialist, or clinic responsible by agreement with the department for providing primary care and case management to enrollees in the passport to health program.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-116 MCA

[RULE III] PASSPORT TO HEALTH PROGRAM: ELIGIBILITY

(1) The department may require a medicaid recipient in any of the following medicaid eligibility groups to enroll and participate in the passport to health program, unless exempted from participation as provided in (2):

(a) aid to families with dependent children (AFDC);

(b) AFDC-related;

(c) supplemental security income (SSI); or

(d) SSI-related.

(2) A medicaid recipient is exempt from the program if the recipient:

(a) is medically needy;

(b) is in the medicaid eligibility subgroup of subsidized adoption;

(c) has medicare in addition to medicaid;

(d) is residing in a nursing facility or an intermediate care facility for the mentally retarded (ICF/MR);

(e) has an eligibility period that is less than 3 months;

(f) lives in an area that is not covered by the program;

(g) has an eligibility period that is only retroactive;

(h) cannot find a primary care provider who is willing to provide case management to the recipient;

(i) is already enrolled in a managed care program under a private insurance program;

(j) is in a county in which there are not enough primary care providers in that county and adjacent counties to serve the medicaid population in that county required to participate in the program;

(k) is exempted by the department from participation because of hardship; or

(l) is receiving medicaid home and community services.

(3) At the department's discretion, medicaid recipients who are exempted from participation as provided in (2)(j) may elect to enroll by choosing a primary care provider from the nearest non-adjacent county that the program serves.

(4) Enrollment in the program is indicated by the appearance of the name and 24-hour telephone number of the primary care provider on the medicaid card.

(5) Participation in the program begins when an enrollee's medicaid card denotes the primary care provider for the enrollee.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-116 and 53-6-117 MCA

[RULE IV] PASSPORT TO HEALTH PROGRAM: ENROLLMENT IN THE PROGRAM (1) The department will notify a medicaid recipient required by [Rule III] to enroll in the managed care program that the recipient must enroll.

(2) The recipient required to enroll in the program must select a primary care provider within 30 days of being notified of the enrollment requirement. The department will send a second notice to a recipient who does not choose a primary care provider within 30 days stating that if the recipient does not make a selection, the department will choose a primary care provider for the recipient.

(3) If the recipient does not choose a provider within 60 days of the initial notification, the department may designate a primary care provider for the recipient.

(4) An enrolling recipient must choose a primary care provider from the list of primary care providers in the county of residence or an adjacent county. A recipient enrolling as provided in [Rule III(3)] must choose a primary care provider from the nearest non-adjacent county that the program serves.

(5) An enrollee may once a month choose a new primary care provider. The change is effective when the name of the new primary care provider appears on the enrollee's medicaid card.

(6) Each enrollee in a household may choose a different primary care provider.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-116 MCA

[RULE V] PASSPORT TO HEALTH PROGRAM: SERVICES (1) An enrollee must obtain the services in (a), except as provided in (b), directly from or through authorization by the enrollee's primary care provider:

(a) medicaid services requiring authorization:
(i) inpatient hospital services;
(ii) outpatient hospital services;
(iii) ambulatory surgical center services;
(iv) physician services;
(v) federally qualified health center services;
(vi) rural health clinic services;
(vii) nurse specialist services;
(viii) Indian health clinic services; and
(ix) the following EPSDT/kids count services for enrollees under 21 years of age:
(A) inpatient psychiatric treatment;
(B) screening services; and
(C) chiropractic services.

(b) aspects of services listed in (a) that do not require prior authorization:

(i) obstetrical services, both inpatient and outpatient;

(ii) outpatient mental health services;

(iii) family planning services;

(iv) anesthesiology services;

(v) radiology services;

(vi) pathology services; and

(vii) ophthalmology services.

(2) The primary care provider's authorization is not required for any medicaid services not listed in (1).

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-116 MCA

[RULE VI] PASSPORT TO HEALTH PROGRAM: PRIMARY CARE PROVIDERS REQUIREMENTS (1) A primary care provider, except for an Indian health clinic, must meet the following requirements:

(a) enroll as a medicaid provider;

(b) provide primary care;

(c) be a physician, nurse specialist or clinic; and

(d) sign an addendum for primary care case management to the medicaid enrollment agreement.

(2) An Indian health clinic, as a primary care provider, must meet the following requirements:

(a) provide primary care; and

(b) sign a contract with the program to provide primary care case management.

(3) A primary care provider may be subject to utilization review to determine that the care and services provided through the program are fulfilling the provisions of the primary care case management agreements with the program and are only those which are medically necessary or otherwise permissible.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-116 MCA

[RULE VII] PASSPORT TO HEALTH PROGRAM: REIMBURSEMENT (1) Reimbursement for primary care case management services is $3.00 a month for each enrollee.

(2) A primary care provider may be reimbursed for managed care for an enrollee for a month during which case management or medical care was not provided to the enrollee if the primary care provider is otherwise in compliance with the agreement with the program.

(3) Medicaid services authorized or provided by a primary care provider are reimbursed as provided in chapter 12 of ARM Title 46.

(4) Services listed in [Rule V(1)] provided to enrollees are not reimbursable unless provided or authorized by an enrollee's primary care provider.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-116 MCA

[RULE VIII] ADMINISTRATIVE RULE AND FAIR HEARING PROCEDURE (1) An enrollee or a provider has the right to appeal any departmental action in accordance with ARM 46.2.201, et seq.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-116 MCA

3. Through the federal medicaid program, as provided in 42 U.S.C. 1396n(b), a state may choose to implement with the approval of the United States Health Care Financing Administration (HCFA), a primary care case management program for medicaid recipients. The program allows a state to require that medicaid recipients enroll with medical providers who are to manage the receipt of medical services by the recipient. The provider is responsible for overseeing the recipient's access to and utilization of certain medicaid-funded services. The program helps to assure that the services utilized by the recipient are needed and appropriate.

The proposed set of rules are necessary for the implementation and conduct of the "Passport To Health" program (the primary care case management program). The proposed rules generally provide rules governing eligibility for the program, enrollment in the program, the services subject to case management, provider requirements, and provider reimbursement.

The proposed rule on eligibility is necessary to identify those groups of medicaid recipients that are required to participate in the program and to provide for voluntary participation in certain circumstances.

The proposed rule on enrollment is necessary to provide the procedures by which medicaid recipients enroll in the program and choose a provider.

The proposed rule on services is necessary to specify those services which are or are not subject to case management by the primary care provider.

The proposed rule on primary care provider requirements is necessary to specify the requirements for a provider to participate in the program and to subject the provider to utilization review requirements.

The proposed rule on reimbursement is necessary to specify the rate of reimbursement per participant that is paid to a provider and to provide direction on the manner of reimbursement to providers for medicaid services received by enrollees in the program.

The proposed rule on fair hearing is necessary to provide due process for the participants and providers in the program.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Russell E. Cater, Chief Legal Counsel, Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, no later than June 11, 1992.

5. 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

Director, Social and Rehabilitation Services

Certified to the Secretary of State May 4, 1992.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 2.21.619 and 2.21.620 relating to holidays	))))	NOTICE OF THE AMENDMENT OF ARM 2.21.619 AND 2.21.620 RELATING TO HOLIDAYS

TO: All Interested Persons.

1. On March 12, 1992, the Department of Administration published notice of the proposed amendment of ARM 2.21.619 and 2.21.620 relating to holidays at page 351 of the 1992 Montana Administrative Register, issue number 5.

2. The agency has amended the rules as proposed and will correct the history for the rules based on the comment received.

3. No testimony was received at the hearing. The following written comment was received.

COMMENT: In the rule notice the Department of Administration has cited 2-18-603, MCA, as providing authority to adopt the proposed amendments to ARM 2.21.619 and 2.21.620. This is not an appropriate authority section and should be deleted from the final notice and history for these rules.
RESPONSE: The department will make this change to the history for these rules.

BY: Bob Marks

Bob Marks, Director
Department of Administration

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Certified to the Secretary of State MAY 4 1992

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 2.21.803 and 2.21.810 relating to the Sick Leave Fund	))))	NOTICE OF THE AMENDMENT OF ARM 2.21.803 AND 2.21.810 RELATING TO THE SICK LEAVE FUND

TO: All Interested Persons.

1. On March 12, 1992, the Department of Administration published notice of the proposed amendment of ARM 2.21.803 and 2.21.810 concerning the sick leave fund at page 353 of the Montana Administrative Register, issue number 5.

2. The agency has amended the rules as proposed.

3. No comments or testimony were received.

Bob Marks, Director
Department of Administration

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Certified to the Secretary of State MAY 4, 1992

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

In the matter of the adoption of rules implementing the second tier of the limited offering exemption	))))	NOTICE OF ADOPTION OF RULES IMPLEMENTING SECTION 30-10-105(8)(b)

TO: All Interested Persons.

1. On March 12, 1992, the State Auditor and Commissioner of Securities, Montana securities department (department), published notice of the proposed adoption of ARM 6.10.128 through ARM 6.10.130 (RULE I through RULE III), regarding implementation of the second tier limited offering exemption, at page 354 of the 1992 Montana Administrative Register, issue number 5.

2. Oral comment was taken at a public hearing on April 1, 1992, at the Mitchell Building, Helena, Montana. Written comments were received through April 9, 1992. Comments to the proposed rules are summarized below.

3. The Montana securities department has adopted the rules as proposed with the following changes (new material is underlined; material to be deleted is interlined):

6.10.128 PURPOSE AND SCOPE (1) In accordance with 30-10-107(1), MCA, the commissioner of securities declares that these rules are necessary to carry out the provisions of 30-10-101, et seq., MCA.

(2) The purpose of the rules is to set forth procedures for use of the second tier of the limited offering exemption codified at 30-10-105(8)(b), MCA. This exemption is available for promoters making offers to ~~more than 10 but~~ not more than 25 persons.

AUTH: 30-10-107, MCA IMP: 30-10-105, MCA

6.10.129 AUTHORITY (1) These rules are issued pursuant to the authority vested in the commissioner of securities by 30-10-107(1).

AUTH: 30-10-107, MCA IMP: 30-10-105, MCA

6.10.130 SECOND TIER LIMITED OFFERING EXEMPTION

(1) Pursuant to 30-10-105(8)(b), MCA, securities offered or sold in accordance with all the conditions set forth in this rule are exempt from the requirements of 30-10-201 through 30-10-207, MCA. This exemption may be cited as the "second tier limited offering exemption."

(2) An issuer using the second tier limited offering exemption shall file with the commissioner of securities:

(a) an original, manually signed copy of the second tier limited offering exemption form;

(b) a filing fee of $50.00;

(c) a consent to service of process which is attached to and made part of the second tier limited offering exemption form;

(d) such other information as the commissioner of securities may require.

(3) Upon the entry of an order denying or revoking the approval ~~use~~ of this exemption, the commissioner of securities shall promptly notify the issuer of the securities that an order has been entered and of the reasons therefor and that, if requested by the issuer within 15 days after the receipt of the commissioner of securities' order, the matter will be promptly set down for hearing. If no hearing is requested within 15 days and none is ordered by the commissioner of securities, the order will remain in effect until it is modified or vacated by the commissioner of securities. If a hearing is requested or ordered, the commissioner of securities, after notice of and opportunity for hearing, may affirm, modify, or vacate the order.

AUTH: 30-10-107, MCA IMP: 30-10-105, MCA

4. At the public hearing which was held April 1, 1992, there was no testimony concerning the proposed adoption of these rules. One person provided written comment prior to the April 9, 1992, deadline. The department has considered all testimony and responds as follows:

One comment addressed the application of the second tier limited offering exemption to offers to 10 or fewer persons. Written approval for the exemption is required only if offers are made to more than 10 but not more than 25 persons. However, approval may be obtained when offers are made to 10 or fewer persons. Therefore, the words "more than 10 but" were eliminated from subsection (2) of Proposed Rule I.

Subsection (3) of Proposed Rule III was amended to reflect the fact that the commissioner may constrain approved, but, not unauthorized, use of the exemption.

Andrea "Andy" Bennett
State Auditor and
Commissioner of Securities

Susan C. Witte
Rules Reviewer

Certified to the Secretary of State this 1st day of May, 1992.

BEFORE THE BOARD OF OCCUPATIONAL THERAPY PRACTICE
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the adoption of a new rule pertaining to therapeutic devices	)))	NOTICE OF ADOPTION OF NEW RULE I (8.35.414) THERAPEUTIC DEVICES

TO: All Interested Persons:

1. On January 16, 1992, the Board of Occupational Therapy Practice published a notice of public hearing on the proposed adoption of the above-stated rule at page 1, 1992 Montana Administrative Register, issue number 1. The public hearing was held on February 6, 1992 at 9:00 a.m., in the downstairs conference room of the Department of Commerce building, 1424 - 9th Avenue.

2. The Board has adopted new rule I (8.35.414) as proposed but with the following changes, which were made in response to public comment:

"8.35.414 THERAPEUTIC DEVICES (1) The board of occupational therapy practice defines "therapeutic devices" as that term is used in section 37-24-103(4), MCA, to mean a tool or implement used to obtain curative relief, ~~or~~ accelerate healing OR MAXIMIZE RECOVERY. Furthermore, the board has determined that such therapeutic devices may be used by an occupational therapist in his or her treatment of the elbow, forearm and hand, once the individual occupational therapist has provided proof to the board that he or she has been taught the correct application of the device in occupational therapy school.

(2) An individual occupational therapist wishing to use therapeutic devices other than those specifically enumerated in section 37-24-103(4), MCA, must ~~provide a signed statement from a faculty member of the occupational therapy school that he or she attended verifying that the individual successfully completed a course of study in which the use, indications, and contraindications regarding that particular type of therapeutic treatment was taught.~~ SATISFY ONE OF THE FOLLOWING CRITERIA:

(a) PROVIDE TRANSCRIPTS DEMONSTRATING SUCCESSFUL COMPLETION OF COURSES IN OCCUPATIONAL THERAPY SCHOOL THAT INSTRUCT IN THE FOLLOWING AREAS:

(i) HUMAN ANATOMY;

(ii) PRINCIPLES OF CHEMISTRY AND PHYSICS RELATED TO SPECIFIC PROPERTIES OF LIGHT, WATER, TEMPERATURE, SOUND OR ELECTRICITY AS INDICATED BY THE SELECTED THERAPEUTIC DEVICE;

(iii) PHYSIOLOGICAL, NEUROPHYSIOLOGICAL AND ELECTROPHYSIOLOGICAL CHANGES THAT OCCUR AS A RESULT OF THE APPLICATION OF THE SELECTED THERAPEUTIC DEVICE;

(iv) RESPONSE OF NORMAL AND ABNORMAL TISSUE TO THE APPLICATION OF THE THERAPEUTIC DEVICE;

(v) INDICATIONS AND CONTRAINDICATIONS RELATED TO THE SELECTION AND APPLICATION OF THE THERAPEUTIC DEVICE;

(vi) GUIDELINES FOR TREATMENT AND ADMINISTRATION OF THE THERAPEUTIC DEVICE;

(vii) GUIDELINES FOR PREPARING THE PATIENT, INCLUDING EDUCATING THE PATIENT TO THE PROCESS AND THE POTENTIAL RISKS AND BENEFITS OF TREATMENT;

(viii) PRECAUTIONS RELATED TO ADMINISTRATIONS OF THE SELECTED THERAPEUTIC DEVICE;

(ix) METHODS FOR DOCUMENTING THE EFFECTIVENESS OF IMMEDIATE AND LONG-TERM EFFECTS OF TREATMENT;

(x) CHARACTERISTICS OF THE EQUIPMENT, INCLUDING ITS SAFE OPERATION, ADJUSTMENT, AND CARE AND INDICATIONS OF ITS MALFUNCTION; AND

(xi) SUPERVISED USE OF THE THERAPEUTIC DEVICE UNTIL COMPETENCY AND JUDGMENT IN SELECTION, MODIFICATION AND INTEGRATION INTO PRACTICE IS ENSURED; OR

(b) IN THE CASE OF THOSE INDIVIDUALS WHO WISH TO EMPLOY A THERAPEUTIC DEVICE INTRODUCED SINCE THE INDIVIDUAL GRADUATED FROM OCCUPATIONAL THERAPY SCHOOL, THE APPLICANT SHALL PROVIDE DOCUMENTATION OF ATTENDANCE AND COMPLETION OF POST-GRADUATE COURSES, IN-SERVICE TRAINING WORKSHOPS, OR CONTINUING EDUCATION COURSES REGARDING THAT SPECIFIC THERAPEUTIC DEVICE AND ITS SAFE AND APPROPRIATE APPLICATION PURSUANT TO SUBSECTION (2)(a). THE BOARD RETAINS THE DISCRETION, BASED ON THE DOCUMENTATION PROVIDED, TO REQUIRE ADDITIONAL DOCUMENTS TO SUPPORT OR DENY SUCH A REQUEST.

(3) will remain the same as proposed."

Auth: ~~This rule is advisory only, but may be a correct interpretation of the law,~~ Sec. 37-24-103, 37-24-201, MCA; IMP, Sec. 37-24-103, 37-24-202, MCA.

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

COMMENT: A number of individuals wrote the Board or spoke at the public hearing in opposition to its proposal that occupational therapists wishing to employ therapeutic devices other than those specifically enumerated in the enabling statute present proof from a faculty member at the occupational therapy school that the individual had completed coursework on therapeutic devices. Representatives of the Montana Physical Therapy Association asserted that this was not in compliance with the statutory requirement and urged the Board to adopt standards proposed by the American Occupational Therapy Association (AOTA) in February 1991 that set forth 11 criteria for establishing when occupational therapists are adequately prepared to employ therapeutic devices. Occupational therapists who responded opposed the proposal on the basis that it would require them to seek confirmation from former teachers, something they felt demeaned their professional, licensed status.

RESPONSE: The Board adopted the essence of a November 1991 AOTA draft, which superseded the February 1991 proposal and was adopted as a position paper of AOTA in March 1992. This material is included as (a)(i) through (xi) of subsection (2). The Board felt this satisfied the need for a standard. The Board further stated that applicants must demonstrate they were taught all elements of the various subjects cited in the

AOTA position paper to obtain approval to employ therapeutic devices other than those specifically listed in the enabling statute. As regards occupational therapists' concerns that they should not be singled out to demonstrate competency, the Board noted that the Legislature requires such a showing for occupational therapists to exercise therapeutic devices other than those treatments specifically authorized by the statute.

COMMENT: Occupational therapists expressed concern that the rule as proposed made no allowance for the fact that the field is constantly changing with new therapeutic devices constantly being introduced. Concerns were voiced that occupational therapists would be effectively denied the ability to use any therapeutic devices introduced since the occuaptional therapist graduated from school.

RESPONSE: The Board amended the rule to include an avenue for petitioning for approval to employ certain therapeutic devices after the occupational therapist has presented evidence of attending and completing post-graduate, continuing education, or in-service work on a specific device, and the individual meets the standards set forth in subsection (2)(a) dealing with the safe and proper application of the therapeutic device.

COMMENT: Opposition was received to the proposal's definition of the term "therapeutic devices." Physical therapists asserted that the proposed definition was too broad and suggested that the definition be revised to encompass only those techniques set forth in the statute. Occupational therapists believed the proposed definition to be unduly narrow because it spoke only to "tool(s) or implement(s) used to obtain curative relief or accelerate healing."

RESPONSE: The Board noted that no one offered a more specific definition of the term "therapeutic devices" and that medical dictionaries do not define such a term. The definition as proposed is derived from dictionary definitions of the terms "therapeutic" and "device". As such, it represents the common understanding of that compound term. The Board also decided that the term "therapeutic devices" as used in the statute was distinct and different from the statute's delineation of the term "treatment" as including only specific therapies such as superficial heat and cold. The Board believes that the treatments set forth in statute are the baseline available to all occupational therapists and felt the standards set forth in (2)(a), and referenced in (2)(b), would insure that those seeking to use other more advanced therapeutic devices have requisite knowledge to protect public health and safety. The Board concurred that there are instances where curative relief or acceleration of healing is not possible and thus is not the objective of such treatment. It therefore included the term "maximize healing" in the definition.

COMMENT: One physical therapist asserted the regulation was unneeded because the statute sunsets in 1992, unworkable because it would lead to a situation where some occupational

therapists might be allowed to employ therapeutic devices other occupational therapists cannot use, and inconsistent with the statute because it does not limit itself to those "treatments" specifically set forth in the statute.

RESPONSE: The commenter is mistaken as to the termination date; the statute terminates on July 1, 1993, the same day the rule will terminate. The Board believes it has the discretion to allow use of other forms of therapeutic devices so long as the individual meets the educational standards, requested by other commenters and imposed by the Board, to insure the safety and welfare of the public. If an incongruity develops as to which occupational therapists, because of their education, may employ which of the therapeutic devices beyond those listed in the statute, the Board feels that is secondary to imposing requisite educational standards to protect the public.

COMMENT: A letter was received from an occupational therapist enclosing a letter from the occupational therapy school at Colorado State University. The occupational therapist and the department head at Colorado State University objected to the need to obtain a letter from the occupational therapy school in order for the occupational therapist to employ therapeutic devices.

RESPONSE: The comment was negated by the Board's acceptance of the AOTA position paper on standards for use of therapeutic devices.

4. The Board noted that the regulation, as proposed, stated in its authority section that it was an advisory rule only. The Board wants all occupational therapists to realize they have no discretion in this matter and that they must satisfy the education requirement of this regulation before they may employ therapeutic devices other than those set forth in the statute. The Board therefore voted to delete the advisory language from the adoption notice.

BOARD OF OCCUPATIONAL
THERAPY PRACTICE
LEIGH ANN ROSEMORE, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, May 4, 1992.

BEFORE THE BOARD OF COUNTY PRINTING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to organization of board and official publications and legal advertising	))))	NOTICE OF AMENDMENT OF 8.91.101 ORGANIZATION OF BOARD AND 8.91.303 OFFICIAL PUBLICATIONS AND ADVERTISING

TO: All Interested Persons:

1. On February 13, 1992, the Board of County Printing published a notice of public hearing on the proposed amendment of the above-stated rules, at page 184, 1992 Montana Administrative Register, issue number 3. The hearing was held in the downstairs conference room of the Department of Commerce building in Helena.

2. The Board has amended ARM 8.91.101 exactly as proposed. The Board has amended ARM 8.91.303 as proposed but with the following changes:

"8.91.303 OFFICIAL PUBLICATIONS AND LEGAL ADVERTISING

(1) Rates ~~to be purchase at the higher of:~~

~~(a) A per folio method like the one currently used with every folio or fraction thereof paid for at~~ SHALL not BE more than $8 for the first FOLIO insertion and not more than $6 for each subsequent insertion~~;~~.

~~(b) The lowest classified advertising rate available to any other customer for a similar sized advertisement published the same number of times.~~

~~(c)~~ (2) ~~These s~~Subsection (1) will become effective on July 1, 1992.

(2) through (5) will remain the same as proposed but will be renumbered (3) through (6)."

Auth: Sec. 7-5-2404, MCA; IMP, Sec. 7-5-2411, MCA

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

COMMENT: David Niss, staff attorney for the Administrative Code Committee advised that the proposed language of 8.91.303(1)(a) "like the one currently used" needs to be clarified as to what is currently used.

RESPONSE: The Board accepted Mr. Niss's recommendation. The Board deleted the provision "like the one currently used" and clarified the rate provision.

COMMENT: Several county commissioners submitted comments in opposition to the proposed rate increase for official publication and legal advertising. Beverly Gibson, Assistant Director of the Montana Association of Counties testified to amend the proposed rule and remove the language "higher of" or to increase the folio schedule without the additional language referring to classified advertising rules.

RESPONSE: The Board amended the proposed rates to eliminate the language "higher of" in 8.91.303(1); and deleted 8.91.303(1)(b) to read that rates shall not be more than $8.00 for the first folio insertion and not more than $6.00 for each subsequent insertion.

COMMENT: Several newspaper publishers and the Executive Director of the Montana Newspaper Association reported that all aspects of the printing business have increased since the last rate increase of 1983. With increased costs of printing, distribution and production wages the newspapers feel justified in requesting an increase in legal advertising rates of Montana counties.

RESPONSE: The Board adopted an increase in folio insertions to $8.00 for the first insertion and $6.00 for each subsequent insertion.

BOARD OF COUNTY PRINTING
JANE LOPP, CHAIRPERSON

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


ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, May 4, 1992.

BEFORE THE BOARD OF INVESTMENTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules implementing HB 479 (Ch. 251, 1991 Laws of Montana) authorizing the Board of Investments to allow non-profit corporations to qualify for in-state investment of state funds, and adoption of a new rule implementing SB 26 (Ch. 589, 1991, Laws of Montana) authorizing an incentive to financial institutions for small business loan participation	) NOTICE OF AMENDMENT OF 8.97.1410 LOAN PROGRAMS FOR COMMERCIAL, MULTI-FAMILY AND NON-PROFIT CORPORATIONS - GENERAL REQUIREMENTS; 8.97.1411 LOAN PROGRAMS FOR COMMERCIAL, MULTI-FAMILY AND NON-PROFIT CORPORATIONS - TERMS AND LOAN LIMITS; 8.97.1412 LOAN PROGRAMS FOR COMMERCIAL, MULTI-FAMILY AND NON-PROFIT CORPORATIONS - OFFERING CHECKLIST; 8.97.1501 INVESTMENT POLICY, CRITERIA, AND PREFERENCES; 8.97.1502 INTEREST RATE REDUCTION FOR LOANS TO FOR-PROFIT BORROWERS FUNDED FROM THE COAL TAX TRUST; AND AMENDMENT OF 8.97.1303 FORWARD COMMITMENT FEES AND YIELD REQUIREMENTS FOR ALL LOANS

TO: All Interested Persons:

1. On December 26, 1991, the Board of Investments (Board) published a notice of public hearing to consider the proposed amendment and adoption of the above-referenced rules at page 2546, 1991 Montana Administrative Register, issue number 24, concerning the Board's allowing non-profit corporations to qualify for in-state investment of state funds, and authorizing incentives to financial institutions for small business loan participation. The hearing was held on January 17, 1992 in the conference room of the Board of Investments, Helena, Montana.

2. The Board has amended ARM 8.97.1501 and 8.97.1502 exactly as proposed. The Board has adopted the text of proposed new rule I exactly as proposed but is inserting that text as an amendment to 8.97.1303 as subsection (4). Section 17-6-315, MCA, has been deleted as an authority section for that amendment and 17-6-211, MCA, has been inserted in its place in the history note. The Board has amended ARM 8.97.1410, 8.97.1411 and 8.97.1412 as proposed but with the following changes:

"8.97.1410 LOAN PROGRAMS FOR COMMERCIAL, ~~AND~~ MULTI-FAMILY AND NON-PROFIT CORPORATIONS ~~LOAN PROGRAMS~~ - GENERAL REQUIREMENT (1) through (10) will remain the same as proposed.

(11) A loan for refinancing purposes will be considered in conjunction with~~, but not limited to,~~ a physical expansion and rehabilitation. For purposes of this rule, physical

expansion means at least 15 percent of the loan proceeds will be used for improvements to the property. ~~If a loan is made to a non-profit corporation for refinancing purposes, however, at least 15 percent of the loan proceeds must be used for improvements to the property.~~

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

Auth: Sec. 17-6-308, 17-6-324, MCA; IMP, Sec. 17-6-308, 17-6-324, MCA

"8.97.1411 LOAN PROGRAMS FOR COMMERCIAL, MULTI-FAMILY AND NON-PROFIT CORPORATIONS - TERMS AND LOAN LIMITS (1) and (2) will remain the same as proposed.

~~(3) In addition to (2)(a) through (i) above, for each $35,000 loan made to a non-profit corporation purchased by the board, one new private sector job related to economic development must be created. This new private sector job must pay at least 100 percent of the average wage as determined by the quarterly statistical report published by the Montana department of labor.~~

~~(a) If the job pays more than the average wage, job credit will be allowed for each 25 percent increment above the average wage to a maximum of two jobs; and~~

~~(b) If the job pays less than the average wage, job credit will be allowed for each 25 percent increment below the average wage.~~

~~(c) In order to qualify for this program, a job created by the borrower by use of loan proceeds, must be for a salary or wage that is equal to or greater than the minimum wage provided for in section 39-3-409.~~"

Auth: 17-6-308, 17-6-324, MCA; IMP, Sec. 17-6-308, 17-6-324, MCA

"8.97.1412 LOAN PROGRAMS FOR COMMERCIAL, MULTI-FAMILY AND NON-PROFIT CORPORATIONS ~~LOAN PROGRAMS~~ - OFFERING CHECKLIST

(1) will remain the same as proposed.

(a) through (q) will remain the same as proposed.

(r) OTHER PERTINENT INFORMATION AS REQUIRED.. ~~the title, description, and annual salary of the new private sector job related to economic development;~~

~~(s) other pertinent information as required.~~

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

Auth: Sec. 17-6-308, 17-6-324, MCA; IMP, Sec. 17-6-304, 17-6-305, 17-6-308, 17-6-314, 17-6-324, MCA

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

COMMENT: As to 8.97.1410(11), representatives from Horizon Lodge in Conrad testified that they believed a distinction between for-profits and non-profits, should not be made in the refinancing area. Board staff also commented in writing on this rule and stated that a distinction in the refinancing area should not be made.

RESPONSE: The Board concluded that the comments had merit and amended the rule accordingly.

COMMENT: As to 8.97.1411 and 8.97.1412, Horizon representatives testified that they felt the "one new job per $35,000 Board loan to non-profits" would still unduly limit access of the Board's programs to non-profits; and that non-profits should be held to the same standards as for-profits on the issue of access to the Board's program

RESPONSE: The Board concluded that the comments had merit and amended the rules accordingly.

COMMENT: As to 8.97.1502, Horizon representatives testified that non-profits should also be allowed to receive an interest rate reduction on their Board loan equivalent to that received by for-profits.

RESPONSE: The Board overruled those comments because non-profits do not pay corporate, real, and personal property taxes comparable to those paid by for-profits; and because the enabling legislation (HB 479, Ch. 251, 1991, Laws of Montana), authorizes the Board to recognize differences between non-profits and for-profits in it's rulemaking actions.

COMMENT: A comment was received by the sponsor of HB 497, generally supporting non-profit participation in this Board program.

RESPONSE: The Board acknowledges the comment.

4. No other comments or testimony were received.

5. The full history of the rules is set forth under each rule and corrected where necessary.

BOARD OF INVESTMENTS
WARREN VAUGHAN, CHAIRMAN

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

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, May 4, 1992.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS AND THE DEPARTMENT OF LIVESTOCK OF THE STATE OF MONTANA

In the Matter of the Repeal of 12.6.1502 through 12.6.1505 adoption of new rules 12.6.1502A through 12.6.1504A and 12.6.1507 through 12.6.1519 and the amendment of 12.6.1506	) NOTICE OF REPEAL OF RULES 12.6.1502 through 12.6.1505) AND ADOPTION OF NEW RULES 12.6.1502A THROUGH 12.6.1504A) AND 12.6.1507 THROUGH 12.6.1519 AND THE AMENDMENT OF) 12.6.1506 PERTAINING TO GAME) FARMS

TO: All Interested Persons

1. On March 12, 1992, the Department of Fish, Wildlife and Parks published notice at page 367 of the Montana Administrative Register, Issue No. 5, to consider the amendment, adoption and repeal of the above captioned rules.

2. Oral comments were received at six hearings throughout the state. Tapes of these six hearings as well as the hearings examiner's report are on file with the department of fish, wildlife and parks. Written comments were received through April 10, 1992.

3. Rules 12.6.1502, 12.6.1503, 12.6.1504, and 12.6.1505 are repealed as proposed.

4. After consideration of comments received on the proposed rules, the Department of Fish, Wildlife and Parks and the Department of Livestock adopt the rules as proposed with the following changes (new material is underlined; material to be deleted is interlined):

RULE I 12.6.1502 A BILL OF SALE/TRANSPORTATION (1) Game farm animals to be moved, transferred, bought or sold must be inspected by a department of livestock brand inspector prior to the transaction.

(~~1~~) (2) The four copies of the bill of sale/transportation completed upon inspection of game farm animals must be dispensed as follows:

(a) original to the department of livestock;

(b) second copy to department of ~~livestock~~ fish, wildlife and parks;

(c) third copy to purchaser or transferee, which must also accompany the animals to their destination; and

(d) fourth copy retained by the game farm operator at origin.

~~(2) The copies of the bill of sale/transportation required by the department (Helena office) and the department of livestock must be submitted within ten days of the sale and/or movement.~~

~~(3) The bill of sale/transportation forms must be used in numeric order.~~

~~(4) No bill of sale/transportation forms may be discarded. The first three copies of voided bill of~~

~~sale/transportation must be sent to the department, Helena office, within ten days.~~

(5)(3) The licensee must account for all bill of sale/transportation receipts.

(6)(4) Transactions must be recorded ~~in the game farm record book within twenty-four hours~~ in the record book(s) of the affected game farm licensee(s) within five days of the transaction.

AUTH: Sec. 81-3-202, 87-4-422, MCA IMP: Secs. 87-4-~~417~~ 415, 81-3-210(1) and 87-4-422, MCA

Comment: Ward Swanser criticized the proposed rule as being properly subject to regulation by the department of livestock (DL) rather than the department of fish, wildlife and parks (FWP). He suggested, therefore, that the rule be either deleted or transferred to that department for its consideration, review and, if needed, promulgation.

Response: In response to the claim of DL jurisdiction, and in view of the fact that both departments have jurisdiction in game farm matters, these rules are being jointly adopted by both the department of livestock and the department of fish, wildlife and parks. The rule has been amended to conform to department of livestock forms and procedures.

Comment: Dan Weppler agreed with provisions of this rule provided that the form prescribed would coincide with the standard form used by the livestock industry that subsection 2 be replaced by the use of brand inspectors.

Response: The rule was revised to utilize DL brand inspectors and the DL bill of sale/transportation form.

Comment: Several game farmers proposed that the 24 hour requirement for recording transactions in the game farm record book be extended.

Response: This requirement was changed to 5 days to conform to the time period that brand inspectors are required to submit their copies of the bill of sale/transportation to the DL office in Helena.

Comment: Don Ferlicka, DVM (DL), supported enactment of prompt submission of documents to enable the DL Animal Health Division the ability to monitor movements of game farm animals and determine their compliance with any existing health requirements.

Response: As revised, this rule should provide both DL and FWP a reliable means to document and to trace change of ownership and movements of game farm animals.

Comment: It was proposed that a dual system be used (using DL brand inspectors as well as the currently used FWP bill of sale book) with the rationale that it would provide two sets of records for cross-checking.

Response: The departments believe as a matter of principle that it is desirable to avoid duplication of effort and paperwork and have, therefore, opted to use the brand inspection system currently in place under DL.

RULE II 12.6.1503A FENCING REQUIREMENTS (1) ~~Fencing of all game farms must meet the following requirements within one year of the effective date of these regulations.~~ After May 15, 1992, applicants for a game farm license must comply with the following fencing standards:

(a) Conventional perimeter fences must be, at a minimum, eight feet above ground level for their entire length. The bottom six feet must be mesh of sufficient size to prevent wild animals from entering and game farm animals from escaping ~~(maximum size 10" x 7").~~ ~~The remaining two feet~~ Supplemental wire required to attain a height of 8 feet may be smooth, barbed, or woven wire (at least 12 1/2 gauge) with strands spaced not more than six inches apart. ~~High tensile fences must be at least eight feet above ground level.~~

(b) Perimeter fences constructed of high tensile wire must be supported by a post or a stay at minimum intervals of 8 feet.

(~~b~~)(c) Conventional perimeter fences must be at least 12 1/2 gauge woven wire, 14 1/2 gauge high-tensile woven wire, chain link, non-climbable woven fence, or other ~~department approved~~ fence approved by the department of fish, wildlife and parks.

~~(i) Any exterior boundary or quarantine fencing material must be secured to the inside of the fence posts.~~

~~(ii) If full eight foot wire is not used, wire must be overlapped one row and securely fastened at every other vertical row. If additional height is required to attain eight feet, single strand wire of at least 12 1/2 gauge may be used. Single strands may be no more than six inches apart.~~

(i) If the wire used is not a full 8 feet in height, it must be overlapped one row and securely fastened at every other vertical row or woven together with cable.

(d) Electric fencing materials may be used on perimeter fences only as a supplement to conventional fencing materials.

(e)(e) All gates ~~on animal holding facilities~~ in the perimeter fence must be self-closing, ~~and locking or have double locking mechanisms. Gates may be installed only in locations which have been approved for gate installation by the department. Double gates may be required at game farm entry points that are frequently traveled, i.e., logging and construction traffic.~~ equipped with two locking devices and installed in locations that have been approved by the department of fish, wildlife and parks. Double gates may be required at points in the perimeter fence subject to frequent

vehicle traffic that is not related to operation of the game farm.

(d)(f) Posts used in the perimeter fence must be:

(i) ~~wood, 6 inch minimum diameter~~ of material of sufficient strength to keep game farm animals securely contained and wild animals from entering;

(ii) ~~studded steel posts~~ extended at least 8 feet above ground level;

(iii) spaced no more than ~~twenty~~ 24 feet apart with stays or supports at 8 foot intervals between the posts;

(iv) ~~at least eight feet above ground level~~ braced with wood or with suitable metal material properly set in concrete, at all corners.~~;~~

~~(v) corners braced with wood;~~

~~(vi) corner posts must be a minimum, eight inches in diameter.~~

~~(e) Existing high-tensile smooth wire fences must be modified with stays spaced at minimum intervals of eight feet.~~

(2) Game farm perimeter fences in place as of May 15, 1992 that comply with the previously existing 7 1/2 foot height requirement and have been found to be adequate are not subject to the requirements of this rule (1)(a) through (f).

(a) If fences do not comply with the previously existing 7 1/2 foot height requirement or when reconstruction or replacement of existing 7 1/2 perimeter fences becomes necessary, they shall be constructed to meet the fencing standards outlined in (1).

(2) (3) All ~~facilities~~ open topped enclosures holding game farm carnivores must meet the following requirements ~~within one year of the effective date of these rules~~:

(a) ~~Fence must be a minimum of eight feet above ground level and extend a minimum of three feet below ground.~~ A perimeter fence at least 8 feet in height constructed of at least 9 gauge woven wire chain link or solid material that cannot be destroyed by the species contained therein;

(b) ~~Fence must be constructed of solid material or at least nine gauge woven wire. Solid fence must be of material that cannot be destroyed by the species contained therein.~~ The perimeter barrier must be supported by a post or a stay at 10 foot intervals;

(d)(c) ~~Fences must have a post or stay every ten feet.~~ An overhang of barbed wire or electric wire installed at the top of the perimeter fence or other configuration that precludes escape.

(d) Buried mesh wire (minimum 11 gauge) extending laterally 3 feet to the inside of the enclosure for the length of the perimeter fence (to prevent carnivores from digging under the fence and escaping).

(e)any trees or obstacles that would allow carnivores to exit or enter the enclosure must be removed.

(4) All cages holding game farm carnivores must be of sufficient size (height, length and width) to prevent overcrowding and allow exercise and must meet the following requirements:

(e) (a) ~~Cage tops must be solid or constructed of at least nine gauge woven wire.~~ A cage top constructed of at least 11 gauge woven wire or chain link;

(b) A floor made of cement or concrete at least 3 inches thick into which metal fence posts are permanently secured or a floor that consists of chain link or similar material that will preclude the animal digging through the floor to escape.

(e)(5) Gates on carnivore enclosures and cages must ~~have double locks or~~ be self-closing and have double locks.

~~(f) Enclosures which are too large to enclose cage tops must meet the following requirements:~~

~~(i) a three-foot, 45 degree angle, Y framework at the top of each post;~~

~~(ii) at least nine-gauge woven wire attached to both forks of the Y framework;~~

~~(g) any trees or obstacles which would allow carnivores to exit or enter the enclosure must be removed.~~

(3)(6) ~~Game farms must not share a fence in common with any other game farm. Fences must be a minimum of five feet apart. Existing game farms will have one year from effective date of these rules to comply with this requirement.~~ Gates are prohibited in fences that are shared in common by neighboring game farms.

(4) ~~Fence right-of-way must be cleared of all dead timber of a height over eight feet within eight feet of both sides of the fence.~~

(5)(7) The fence must be maintained in a game-proof condition at all times to prevent animals from escaping from or entering the ~~enclosure~~ game farm premises. If game farm animals or wild animals do pass through, under, or over the fence ~~because of any topographic feature or other conditions,~~ for any reason the licensee must supplement the fence to prevent continued passage.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-409 and 87-4-422, MCA

Comment: Ward Swanser criticized this rule as a violation of existing law, lacking legal authority, constituting an impairment of legal rights, being arbitrary and capricious and in violation of legislative intent. He also commented that FWP has jurisdiction only over parameter (sic) fences and that design specifications should be only recommendations. Swanser and others requested that the eight foot height requirement be applied only to new fences.

Swanser and others commented that FWP should not determine location of the gates.

Swanser and others protested the prohibition of a common fence for separate game farms.

Swanser and others stated that the eight foot right of way requirement would be impossible if the eight feet is on the neighbor's property.

Response: The request that the requirement for eight foot high fences be amended to grandfather existing fences is accepted, and language has been changed to reflect the comments. However, under the final rule, new fences and replacement fences must meet the eight foot high requirement. In addition, fences that do not meet existing rule requirements (seven and one-half feet) must meet the requirements of this rule when they are reconstructed.

The departments do not accept Swanser's claims that the rule is legally defective.

Regarding the location of gates, the experience of FWP reveals that gates have in some instances been located and designed to facilitate capture of wild animals for incorporation into game farm operations. The departments believe that approval of gate location is consistent with the intent of the statutes that wild animals be kept outside game farm boundaries.

The comment regarding the prohibition against common fences is accepted; the prohibition has been deleted. However, as suggested by one commentor, gates are prohibited in fences that are shared in common by neighboring game farms.

The departments agree with comments regarding the eight foot right of way requirement; the requirement has been deleted.

Comment: Many game farmers stated that proposed fencing requirements are too restrictive (height and post size); that there are types of fencing materials other than those proposed that are or could be successful; and that rules concerning fence construction should be more flexible. Several game farmers noted that steel and concrete configurations work well for fence corner; several advocated use of electric fencing; and one offered very specific standards for electric fence stating that most electric fences that have failed were not properly installed.

Response: Proposed fencing standards were revised with emphasis on performance standards rather than construction standards, allowing game farmers to design fences that best conform to local conditions. Based on past and current problems with electric fences (in other states as well as in Montana), this rule specifies that electric fencing may be used only to supplement conventional fencing material.

Comment: Several game farmers maintained that fencing requirements should vary according to the game farm species being confined (i.e., fallow deer and elk do not require as high a fence as other species of deer). Several also complained that excessive fencing requirements are the result of an incorrect assumption on the part of FWP that game farm animals are like wild animals (i.e., they try to escape). Several game farmers objected to the requirement that fencing material be secured to the inside of the fence posts.

Response: The departments maintain that in the case of game farms, fence construction must be designed to keep wild animals out as well as to keep captive animals confined. This position is due to the statutory requirements and to the fact that any mingling between wild and game farm animals increases the risk of disease transmission to wildlife and in the case of some species, the potential for hybridization. Any disease transmitted to wildlife from game farm animals would in turn, become a threat to domestic livestock. In some locations, pressure on the fence may increase substantially during the breeding season. An adequate fence designed to prevent both ingress and egress is therefore a necessary and responsible approach to minimizing and managing animal health risks. The requirement that fencing material be secured to the inside of the fence post has been deleted.

Comment: Several game farmers objected to the requirement that fences used to confine carnivores extend three feet below ground level, noting that a coyote or wolf can dig under such a fence and escape. Several game farmers also advocated use of concrete floors that would preclude escape by digging.

Response: The language in the rule was clarified as to the installation of wire to prevent digging out of enclosures and provisions for a concrete floor were added.

Comment: Several game farmers indicated that they had spent a lot of money to build fences that comply with existing rules, but not the proposed new rules; that these requirements should be considered only for new game farms; and that existing game farms should be grandfathered. It was suggested that game farmers whose fences passed a statewide game farm inspection in March should be exempted, including those who had fixed any problems that were discovered during the inspection.

Response: This rule was revised to exempt fences that meet the following conditions: in place as of May 15, 1992; meet the current 7 1/2 fence height requirement and have been found to be adequate by FWP.

Comment: Several game farmers complained that FWP approval of gate locations amounts to over-regulation. One game farmer maintained that restrictions on gate location could endanger her life in the event that she had to escape from a game farm animal.

Response: Due to the practice of locating and designing gates in a manner to accomplish capture of wild animals and the continuing economic incentives to do so, FWP believes that it must regulate this aspect of game farms to protect publicly owned wildlife resources. The rule has been revised to specify that FWP approval applies only to gates in the perimeter fence.

RULE III 12.6.1504A GAME FARM REPORTING (1) Reports must be ~~kept~~ recorded on the forms provided by the department of fish, wildlife and parks and must be filled out completely and accurately.

(2) No pages in the game farm record book may be discarded. Voided pages must be sent to the department of fish, wildlife and parks (Helena office).

(3) ~~Game farm reports must be submitted four times a year, no later than five days after the following dates:~~

~~April 1, July 1, October 1~~

~~One exception is: final annual report must be submitted by January 31, and not five days later.~~ The annual game farm report must be submitted to the department of fish, wildlife and parks (Helena office) by January 31.

(4) Renewal of a game farm license is contingent upon timely and accurate completion and submittal of required reports.

(5) Game farm record books and reports must be kept on the premises of the licensed game farm, residence of the game farm operator or manager or his/her principal place of business, so long as that location is within the state of Montana. The designated location of the game farm record books and reports must be declared to the department of fish, wildlife and parks (Helena office).

(6) Purchases, sales, escapes, recaptures, deaths and births must be reported in the game farm record book provided by the department of fish, wildlife and parks.

(7) Game farm operators are requested to notify the department of fish, wildlife and parks (regional warden captain), in advance of his/her annual animal census.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-417 and 87-4-422(2), MCA

Comment: Swanser suggested that no further rules are necessary, since the department "has made no effort to ever advise the licensee if there are any problems with his records. . .; If it's not broke, don't fix it."

Swanser expressed concern that the requirement that no pages be discarded and that voided pages be sent to the department would be looked on as possible illegal actions.

Swanser challenged the requirement that reports be made four times a year when the statute requires only an annual report.

Swanser complained about the provision making the renewal of a game farm license contingent upon accurate completion and submittal of required reports. He claimed that the provision violates 87-40412, MCA, which provides that the department shall renew the license upon payment of the renewal fee if the licensee has not violated any provisions under which the license was granted. Citing a letter from himself to Keith Kelly, he claimed the statutory provision was adopted as law

to insure that the license would be renewed unless the department has taken action to revoke a game farm operator's license.

Swanser and others requested that game farm records be allowed to be kept either at the home or the principal place of business of the game farm operator, as long as the department knows where they are kept.

Swanser agreed that reporting sales and purchases is fine; however, he objected to reporting escapes and recaptures, since there is already a separate record where the department is notified of any escape and recapture.

Response: Swanser's knowledge about problems with record keeping is incomplete; the FWP has, in fact, informed game farmers of problems that it has experienced. This experience demonstrates that there is a need for some changes.

The departments find that the fear that failure to follow the discarded and voided pages rule will result in charges of illegal action is not a basis for deleting the requirement. Game farmers are, of course, required to comply with statute and rules, and failure to do so may always result in a charge of illegal action. Inadvertent failure to comply can always be taken into consideration by the enforcement officer in charge of the case.

The departments do not agree that renewal being contingent on accurate completion and submittal of required forms is a violation of 87-4-412, MCA. Section 87-4-412, MCA states in relevant part, "The department shall renew the license upon payment of the renewal fee if the licensee has not violated any provision under which the license was granted." The departments interpret this language as allowing, and in fact, perhaps requiring renewal only if there is compliance with laws and regulations. The rule does not violate the provisions of 87-4-423, MCA that provides for correction of a violation; the department would read these statutes together in enforcing the provisions of this rule. The departments do not accept the letter from Swanser to Kelly as definitive legislative history, but rather as the interpretation of a representative of game farmers in the legislative process.

The departments accept the request that records may be kept at the home or the principal place of business of the game farm operator as long as the department knows where they are kept. Language has been added to reflect that change.

The departments do not accept the comment regarding escapes and recapture. Although Section 87-4-419, MCA, requires immediate notification when a game farm animal escapes, the intent of that requirement is to allow the FWP to recapture the animal, if necessary. The requirements for reporting of purchases, sales, escapes, and recaptures, as well as deaths and births in this rule is to allow the full documentation necessary to account for the number of animals on hand and to help assure that the statutory mandate that

animals on hand have not been illegally captured from the wild is implemented. (87-4-418, MCA)

Comment: Many game farmers voiced objections to the proposed quarterly reporting requirements and stated that they believe the current annual reporting requirement to be sufficient.

Response: The proposed quarterly reporting requirement was prompted by inadequacies of the current requirement to report only once a year. However, FWP has opted to maintain the current annual report due to unclear legal authority to implement reporting requirements as proposed.

Comment: Several game farmers stated that the current report form issued by FWP is inadequate and unclear. It was also suggested that if mistakes or violations are found in reports, FWP should give notice and a reasonable length of time to correct the problem.

Response: Staff of FWP has designed a new report form designed to facilitate full and accurate reporting of game farm transactions and minimize the potential for error in reporting.

12.6.1506 CLOVEN-HOOFED ANIMALS AS GAME FARM ANIMALS (1) All animals of the order Artiodactyla, except the families ~~suidae,~~ camelidae~~,~~ and hippopotamidae, are game farm animals under the definition described in section 87-4-406(4), MCA, provided that the following animals in the ~~family~~ families suidae and bovidae are not considered game farm animals under section 87-4-406(4), MCA: domestic pigs, domestic cows and yaks, domestic sheep, and domestic goats which are not naturally occurring in the wild in its country of origin, and bison.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-4~~1~~06, and 87-4-422(2) MCA

Comment: Swanser commented that it appeared that the yak was inadvertently left out of the rule, and stated that the yak should be considered a domestic animal like the bison. A game farmer that raises yak requested that yak be deleted from the definition of "game farm animal" since yaks are domestic in their countries of origin, pose no hybridization or disease risks and do not require an 8 foot fence for containment.

Response: The departments agree that this change is appropriate and have revised this rule accordingly.

RULE IV 12.6.1507 DEFINITIONS (1) "Bill of sale/transportation" is a form ~~supplied~~ utilized by brand inspectors of the department of livestock to document sale and movement of game farm animals.

~~(2) "Bred" means reproduction of game farm animals.~~

~~(3)~~(2) "Conventional fence" is the woven or welded wire fence used to enclose game farm animals.

~~(4) "Department" is the department of fish, wildlife, and parks. 87-4-406 (1), MCA.~~

~~(5)~~(3) "Disease, communicable" means a disease that can spread from one animal to another or to humans.

~~(6)~~(4) "Disease, dangerous" means a disease that can cause catastrophic animal loss or risk to human health.

~~(7) "Fence right of way" means a distance equal to the height of the conventional fence, on both sides of the fence.~~

~~(8)~~(6) "Game farm" means the enclosed land area upon which game farm animals may be kept. 87-4-406 (3), MCA.

~~(9)~~(7) "Handling facility" means an enclosure ~~which includes a squeeze chute for inspecting~~ that includes an animal restraining device (such as a squeeze chute) to facilitate inspection and handling of individual game farm animals.

~~(10)~~(8) "High tensile fence" means a fence eight feet above ground composed of wire capable of maximum stretching.

~~(11)~~(9) "Holding facility" means a fenced enclosure (used in conjunction with the handling facility) to hold game farm animals for individual inspection, marking or treatment.

~~(12)~~(10) "Immediate" means without delay.

~~(13)~~(11) "Mingling" means mixing game farm animals together with other animals.

~~(14)~~(13) "Quarantine area" means an approved enclosure ~~within the game farm~~ (separate from the holding and handling facilities) used to ~~house~~ isolate newly acquired or diseased game farm animals.

~~(15)~~(14) "Prohibited game farm animals" means animals that are prohibited from importation for purposes of game farming pursuant to section 87-4-424, MCA. ~~species and hybrids, thereof which, because of behavioral traits or biological considerations, pose a substantial threat to native wildlife populations.~~

~~(16) "Ear tag request form" means a form used to request ear tags for newly acquired game farm animals.~~

(15) "Restricted game farm animals" means animal species subject to specific importation restrictions.

(5) "Domestic" means those populations of animals which through long association with humans have been selectively bred to a degree that has resulted in genetic changes affecting the coloration, temperament, conformation or other attributes of the species to an extent that makes them unique and distinguishable from wild individuals of their species.

(10) "Hybrid" means an animal produced from a mating between two animals of different species or subspecies.

AUTH: Sec. 81-1-102(1), 81-3-202, 81-3-202 and 87-4-422, MCA IMP: Sec. 81-3-210(1), 81-2-102(1)(d), 81-2-102(1)(e), 87-4-415 87-4-422, MCA

Comment: Swanser commented that the definition of "bill of sale" is unnecessary and should be deleted. He stated that this is covered by statute and DL rules and statutes.

Response: The departments believe that this definition should be maintained to clarify provisions of rule 12.6.1502 A..

Comment: Swanser recommended deleting the definition of "bred" as unnecessary, since game farm licensees are authorized to breed captive game farm animals.

Response: The term "bred" has been eliminated from the list of definitions.

Comment: Swanser commented that the definition of "conventional fence" should be defined as a parameter (sic) fence only.

Response: The term "conventional fence" refers broadly to traditional fencing materials (in contrast to electric fencing) while the term "perimeter" refers to the location of a fence. Where the term "conventional fence" is used in the rules to apply specifically to perimeter fencing, the word "perimeter" has been inserted.

Comment: Swanser recommended that Nos. 3, 4, 6, 8, 9, 10, 11 and 16 be transferred to the DL.

Response: This comment is addressed by the joint adoption of these rules by both the FWP and the DL except for definition 16, which has been deleted.

Comment: Dan Weppler objected to No. 7, "fence right of way"

Response: This definition was deleted because it is no longer needed following revision of the language in rule 12.6.1503 A.

Comment: Weppler objected to the definition for No. 6 "handling facility" on the basis that it specifies a squeeze chute as an animal restraining device.

Response: The language of the rule was revised to reflect this comment.

Comment: Swanser commented that No. 12, "Prohibited game farm animals." is improper and in violation of 87-4-424, MCA, as well as being inconsistent with the proposed rules, while attempting to nullify the statute and establish new criteria. He also criticized it as vague and, therefore, impossible to determine what is meant by the definition. He recommended that the provision be deleted. Weppler objected to this definition on the basis that it is based on opinion rather than scientific proof.

Response: The language of the definition has been altered to clarify it and to reflect statutory language.

The prohibition of certain species is due to traits of these species that pose substantial risks to wildlife and/or domestic livestock threats that have not been found to be preventable or manageable. Such threats include behavioral traits (such as difficulty to contain or confine), threat of hybridization with native species (as with red deer or mouflon), disease threats - including introduction of exotic parasites - (such as members of the wildebeest family that carry malignant catarrhal fever) and other damage to wildlife resources, including wildlife habitats (in the case of wild boars). All of these threats are well documented in case histories supplied by wildlife managers and animal health experts in other states, provinces and countries as well as Montana who have had extensive experience with these animals; in published material in technical journals and other printed media; and as relayed by widely recognized researchers in the areas of animal health and wildlife biology. Every species classified as "prohibited" in Montana has been previously classified as "prohibited" in other states and provinces and, therefore, are the subject of regional or national concern rather than concerns unique to Montana.

RULE V 12.6.1508 GAME FARM DESCRIPTION (1) A game farm operator must provide a scaled drawing or map of the proposed exterior boundary, holding and handling facilities, location of quarantine area, and proposed location of all gates, at the time of application for a game farm license.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-409, MCA

Comment: Swanser commented that there is no problem with submitting a drawing if one is available. However, he recommended that the word "proposed" be inserted before "boundary" and "facilities", since the statute does not require that the fence and facilities be built at the time the license is obtained. He noted that this should also be part of the application form in 12.6.1501.

Response: Swanser's comments are accepted; changes have been made in the rule to reflect them.

Comment: Dan Weppler opposed this rule unless the provision for a quarantine area is stricken.

Response: The language of this rule has been modified to reflect revisions in the rule governing quarantine areas, which reflect Weppler's concerns.

~~RULE VI SIZE LIMITATIONS (1) A single game farm pen, pasture or enclosure may not exceed 640 acres. Game farms licensed prior to effective date of these rules are exempt from this limitation.~~

~~(2) The maximum acreage enclosed by a single game farm may not exceed 1,280 acres. Game farms licensed prior to the effective date of these rules are exempt from this limitation.~~
~~AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-409, MCA~~

Comment: Swanser claimed that the proposed rule is "clearly in violation of 87-4-409, MCA, and that FWP does not have any authority to impose size limitations. Many other game farmers voiced objections to this rule on the grounds that it violates private property rights or is unconstitutional.

Response: The size limitation has been deleted.

RULE VII 12.6.1509 HOLDING AND HANDLING FACILITIES (1) All game farm operators must have holding and handling facilities that enable handling, marking and individual identification ~~be able to handle, mark and individually identify~~ of all game farm animals on the premises. A permanent or portable handling facility must be on the game farm at all times.

AUTH: Sec. 87-4-422, and 81-1-102(1), 81-3-202, MCA
IMP: Sec. 87-4-406, 87-4-409, and 81-3-203, MCA

Comment: Swanser commented that this rule should be transferred to DL. He also suggested that proposals for holding facilities, handling facilities and quarantine areas be proposed by both FWP and DL. However, according to Swanser, these should be recommendations and not be mandatory, with flexibility being allowed. It was suggested that access to rented handling facilities would be adequate.

Response: The adoption of the rules by both departments addresses Swanser's comments relating to involvement by the DL. The suggestion that these requirements be in the form of recommendations is not adopted. The departments believe that basic mandatory criteria are necessary in order to carry out their regulatory responsibilities under the relevant statutes.

RULE VIII 12.6.1510 QUARANTINE AREA ~~(1) All game farms must have quarantine facilities designed to prevent mingling of animals in the quarantine facility with other game farm animals and with natural wildlife.~~

~~(2) The quarantine area must be within the exterior boundary of the game farm, situated downhill, downstream and downwind of the main facility.~~

~~(3) The quarantine area must be enclosed by a double or solid fence. If double fencing is used, there must be a minimum of five feet between each fence. Double fencing must be the same standard and quality as the exterior boundary fence.~~ (1) Every game farm must have an approved quarantine facility within its exterior boundary or submit an action plan to the department of livestock that guarantees access to an approved quarantine facility within the state of Montana.

(a) An approved quarantine facility is one that meets criteria set by the state veterinarian of the department of livestock.

(b) The quarantine area must meet the tests of isolation, separate feed and water, escape security, and allowances for the humane holding and care of its occupants for extended periods of time.

(2) Should the imposition of a quarantine become necessary, the game farm owner must provide an on-site quarantine facility or make arrangements at his or her own expense to transport the animals to the approved quarantine facility named in the quarantine action plan.

AUTH: Sec. ~~87-4-422,~~ 81-2-103, MCA IMP: Sec. 81-2-102(1)(e) MCA

Comment: Swanser's comment on the rule governing holding and handling facilities also applied to the rule governing quarantine areas.

Response: The response to Swanser's comments on the rule governing holding and handling facilities also apply to the rule governing quarantine areas.

Comment: Game farmers made the following recommendations regarding quarantine facilities: that the rules should require best fencing standards and should allow game farmers to build quarantine facilities to their own standards; rules should require only minimum quarantine standards since animals can be infected from insects; rules on a quarantine area should be a recommendation only - not mandatory; that there is no need for quarantine areas for people whose animals have tested clean; that a quarantine area should be optional because it is needed only if ordered by the DL; standards for a quarantine area should be left to DL; and that more flexibility is needed in this rule. Specific language that was objected to included requirements that the facility be located "downhill, downstream and downwind" and the use of "solid fence".

Response: In the context of the animal disease risks associated with game farming, the departments believe that the quarantine facility requirement must be mandatory in order for them to carry out their respective mandates with regard to protecting the health and well being of wildlife and domestic livestock. New language specifies that quarantine facilities must meet criteria set by the state veterinarian of the DL. Flexibility was built into the language of the rule to allow a game farmer the option of designating a quarantine facility elsewhere in the state to which he or she has been guaranteed access if needed.

Comment: Don Perlicka, DVM (DL) stated that pre-entry quarantine is a sound disease control principle; that an

industry standard for quarantine facilities is desirable; and that designated adequate quarantine facilities have to be available due to the fact that most Montana game farmers are importers. He also reiterated several situations where absence of a suitable quarantine facility presented difficulties in accomplishing necessary disease testing. Several citizens emphasized that disease control is a key game farm issue and that the state can't be too careful with regard to disease control and quarantine requirements to protect wildlife and livestock.

Response: The elevated role of the DL in approving quarantine facilities is evident in revision of this rule, in language developed in large part by DL staff.

RULE IX 12.6.1511 LICENSING LIMITATION (1) ~~The department may deny a license or limit the species or area to be enclosed in order to protect the state's wildlife resources from detrimental impacts. Impacts that will be considered for limitation or denial, include but are not limited to:~~

~~(a) habitat competition, damage, or destruction;~~

~~(b) disruption of migration, breeding, or rearing areas and survival of young;~~

~~(c) predation;~~

~~(d) danger to humans or domestic livestock property; or~~

~~(e) disease.~~

~~(2) If the applicant disagrees with the department's determination, he/she may appeal the decision to the fish, wildlife and parks commission, if notice is given within ten days of the denial.~~

~~(3) Game farm animals must be identified and approved by the department before placement on a game farm.~~

~~(4) New construction or additions to an existing game farm facility must be approved by the department before it may be used for any game farm activity.~~

(1) Expansion of existing game farm facilities (construction of buildings or new pastures) outside the confines of a currently approved perimeter fence must be approved by the department of fish, wildlife and parks prior to use for any game farm activity.

(2) Game farm license applications or expansions are subject to public notification and a public comment process prior to a decision on the application.

AUTH: Sec. 87-4-422, MCA
IMP: 87-4-409, and 87-4-424, MCA

Comment: Swanser claims that this Rule "is clearly in violation of Section 87-4-409, MCA." He goes on to state that there is no authority to deny an application for a license so long as you are a "qualified applicant" and that a license cannot be denied to limit either the species or the area enclosed to protect state wildlife resources from detrimental impacts. He also believes the rule is "so unconstitutionally

vague it is impossible to determine what is meant." He concludes with the statement, "Here again, we see an attempt by the Department to kill game farms and/or to deny them a license without statutory authorization. No authority exists to even consider the criteria proposed in Subsections (a) through (c). Other game farmers agreed that this rule "goes too far". It was also stated that denial of a license is not necessary and that FWP should mitigate any problems that might create a hazard.

Response: The departments do not accept the accusation that they are trying to kill game farms. Section 87-4-409, MCA states only that a game farm license shall be issued only to "a responsible applicant" who owns or leases the premises on which the operations are to be conducted and who has fenced the area. The statute does not define "responsible applicant", and the departments interpret that very general description as being ripe for interpretation by a rule such as the rule for licensing limitation. Specific criteria designed to protect public interests related to wildlife resources have been replaced with a public notification/hearing provision that provides the public an opportunity to air any public concerns prior to issuance of a game farm license by FWP.

Comment: Swanser complains that since the "underlying statute is illegal and without statutory authorization" any reference to an appeal should be deleted as well."

Response: The departments interpret this comment as criticizing the rule rather than the statute, as stated. Although they do not agree with the assumption of the comment, the departments do agree that the commission is not an appropriate appellate body and therefore reference to an appeal process has been deleted.

Comment: Swanser criticizes subsection (3) as already being covered by the importation and transportation requirements.

Response: Subsection (3) has been deleted.

Comment: Swanser suggests that subsection (4) should be deleted or limited to construction outside the existing facilities, or amended to refer only to an expansion of an existing game farm where new lands are enclosed.

Response: The language of this rule has been amended to reflect this comment.

Comment: It was suggested that revision of this rule should address some kind of public notification or hearing before a new game farm license is issued (such as the process required for activities in the floodplain with specific notice sent to the board of county commission and city councils). Included with this suggestion was an example of a game farm which had

a detrimental effect on adjacent landowners. It was pointed out that adjacent landowners should have had an opportunity to comment before a license is issued.

Response: This suggestion was incorporated in revising of the rule and replaced specific criteria that would have been used by the department of fish, wildlife and parks to assess potential detrimental impacts to public wildlife resources.

RULE X 12.6.1512 NEW SPECIES (1) To add a new game farm animal species to an existing game farm, the licensee must submit a new application listing the species desired. The new species may not be acquired or possessed until the department approves the new application, and inspects and approves the facility for occupancy by the new species.

(2) The game farm licensee must obtain, purchase, board, or lease game farm animals from properly licensed or legal sources.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-409, MCA

Comment: Swanser commented that the proposed rule violates 87-4-414, MCA, which classifies game farm animals as private property and gives the owner the right to acquire, grow and dispose of those animals as long as it is done in compliance with this act. It was his opinion that as long as the animal is a permitted animal under the act, no new application should be required. In addition, he stated that there is no statutory authorization prohibiting him from acquiring or possessing a new animal at any time. He stated that the only legitimate concern would be if the fencing was inadequate for the new species, and that this could be handled by appropriate changes to the proposed rule. He did not propose specific changes.

Response: The departments do not believe the requirement of submitting a separate application for a new species violates the owner's private property rights. The departments believe that the requirement is consistent with 87-4-409, MCA, which requires that the species to be kept constitutes an essential part of an application. Contrary to Swanser's claim that there is no authorization prohibiting him from acquiring or possessing a new animal at any time, under the game farm statutes, such acquisition or possession is only legal if all requirements of statutes and rule are met. The factual situation Swanser pointed out is indeed one of the situations that gives rise to a need for this rule; since he did not offer alternate language, the departments find that the situation can be appropriately handled by the rule as originally drafted. As Swanser is aware, the rule formalizes a practice of FWP that has been going on for some time. To date, there have been no complaints about it or the way in which it has been administered.

Comment: A game farmer objected to the rule on the ground that it precludes him from acquiring animals that may be offered at auctions. He proposed instead that a person be allowed to buy the animal and then keep it in quarantine until there is a determination whether or not he can keep it.

Response: The previous response applies to this comment.

RULE XI 12.6.1513 GAME FARM ANIMAL IDENTIFICATION: CLOVEN HOOFED UNGULATES (1) Game farm animals owned by or transferred to any game farm within the state of Montana must be individually identified by the method prescribed by the department of fish, wildlife and parks and the department of livestock.

(2) ~~Only metal tags may be used unless another method of identification is approved by the department. Tags must be placed on the lower edge of the left ear as close to the head as possible.~~ Every game farm animal must be marked with a tattoo registered to the game farm licensee (original owner) by the department of livestock. The tattoo must be placed on the left ear of the animal.

(3) Every game farm animal must in addition be marked with an ear tag issued by the department of fish, wildlife and parks. Ear tags must be placed in a location specified by the department of fish, wildlife and parks.

(~~3~~)(4) Tags or identification numbers must be requested from the department of fish, wildlife and parks, enforcement division, Helena 444-2452, during business hours. Licensee must state the number and sex of animals to be marked. A department of fish, wildlife and parks representative will deliver the tags/identification to the game farm operator.

(5) Game farms that maintain animals for the primary purpose of photography or filming have the option of using another form of individual identification as an alternative to the designated ear tag. The proposed manner in which such animals will be individually identified must be submitted by the owner to the department of fish, wildlife and parks for approval.

(~~8~~)(6) ~~If a tag is lost,~~ When loss of an animal identification tag is discovered, the licensee must notify the department of fish, wildlife and parks immediately. ~~within 72 hours of when the loss is discovered.~~ The animal must be re-tagged with approved identification ~~within ten days of notifying the department of loss.~~ as soon as possible; but in no case later than January 31 of the year following the loss.

(~~4~~)(7) Identification assigned to ~~each~~ an individual game farm animal may not be transferred to any other animal. ~~or game farm operation.~~

(~~5~~)(8) ~~Any tag/identification that has become detached from the animal must be returned to the department immediately.~~ Any individual identification marker issued by the department of fish, wildlife and parks that is found to have become detached from the animal for which it was issued

must be returned to the department of fish, wildlife and parks (Helena office) immediately.

(6)(9) All newborn game farm animals must be ~~tagged~~ individually marked by October 1 or prior to removal of the animal from the game farm premises, whichever is earlier.

~~(a) within 15 days of birth or~~

~~(b) prior to the removal of the animal from the game farm facility.~~

~~(7) Game farm animals boarded, leased, or held at a licensed game farm for more than ten days must be tagged in accordance with these rules, if the owner's licensing state does not require individual identification.~~

(a) Carnivores must be identified with the proper tattooing method as required by 87-1-231, MCA, ARM Rules 12.6.1901 et seq. Tattoo numbers must be requested from the department, enforcement division, Helena, 444-2452, during business hours.

(10) Game farm animals acquired from another state/province must be marked with a Montana ear tag within 30 days of importation.

AUTH: Sec. 81-3-202, 87-4-422, MCA IMP: Sec. 81-3-203, 87-4-414, 87-4-415 and 87-4-422(2), MCA

Comment: Swanser and other game farmers commented that this rule should be under the DL.

Response: The decision to issue these rules from both the departments of livestock and fish, wildlife and parks addresses the comment. It should be noted that both agencies have statutory authority to concern themselves with identification. The department believes that joint rules address this area of overlapping jurisdiction.

Comment: Swanser suggested that consideration should be given various kinds of identification and that a grandfather clause should be added approving all existing identification techniques. Several game farmers maintained that the type of animal identification to be used should be left to the individual game farmer. It was also suggested that exotic animals be subject to a different marking system than native wildlife species.

Response: It is the experience of the departments that an industry standard featuring permanent markers establishing both ownership and individual identification of game farm animals is a prerequisite to carrying out their responsibilities to address animal health and wildlife management issues. Provisions have been made for a reasonable period of time for game farmers and for both departments to implement new marking and animal inspection requirements for game farm animals.

Comment: Several game farmers objected to the requirement that calves/fawns be marked by the time they are 15 days old

for the following reasons: they are hidden and hard to find; they may be injured or killed through handling or abandoned by their mothers; their mothers will attack; tags are easily lost when put on animals less than 6 months old; there aren't any real good marking systems - tags are too often lost; ear tags are unsightly; and handling and marking "free-roaming" game farm animals would damage their health. Several game farmers objected to the requirement that lost ear tags should be returned to the department on the basis that they often cannot be found. They also requested that the timing of marking or remarking game farm animals be left to the game farmer - as is the case with TB testing - and that certain periods of time that animal handling must be avoided include the period that antlers are in velvet, and when cows are pregnant and that placement of ear tags should take place when animals have to be handled for other reasons.

Response: The language in this rule was revised to require marking of young of the year by October 1 or removal of the animal from the game farm facility. Rule language was also revised to facilitate remarking of animals that have lost their identification markers "as soon as possible" - but no later than January 31 in the year following loss (the date that the annual report is due).

Comment: Several game farmers pointed out that metal ear tags are unacceptable for operations that maintain animals for the purpose of photography and filming and that an alternative marking method should be allowable for such operations.

Response: This comment was accepted and is reflected in the rule revision.

RULE XII 12.6.1514 TRANSPORTATION (1) Game farm licensee must verbally notify the department of livestock ~~no less than 72 hours~~ prior to import, transport, transfer or disposal of any game farm animal.

(2) ~~Game farm licensee must send the bill of sale/transportation to the department within 10 days of any of the above transactions. Copy of the bill of sale/transportation must accompany the import, transport, transfer or disposal of game farm animals.~~ The third copy (to purchaser or transferee) of the bill of sale/transportation must accompany the import, transport, transfer or disposal of game farm animals (both live and dead).

(3) Game farm animals may be transported from out of state through Montana if:

(a) ~~animals remain in Montana no longer than 72 hours~~ animals proceed directly through Montana with no intent to unload;

(~~b~~)(c) animals are not sold, bartered, traded, or otherwise transferred while in the state. (Transfer does not include moving animals to another transport vehicle);

(c)(b) an official health certificate is obtained from the state of origin to show destination, origin, and proof of ownership of any game farm animals being transported;

~~(d) a game farm licensee requests an extension of time from the department (phone: 444-2452, business hours) if animals are to remain in the state for more than 72 hours (An extension may be granted for good cause shown);~~

(e)(d) in emergencies, game farm animals in transit are unloaded and temporarily held with prior approval and in compliance with quarantine rules promulgated by the department of fish, wildlife and parks and the department of livestock.

(4) All game farm animals transported within the state must be marked with identification approved by the department of ~~livestock~~ fish, wildlife and parks and the department of livestock, and accompanied by a copy of the bill of sale~~/transportation~~ and tattoo inspection certificate.

(5) Game farm animal gametes (ova & ~~sperm~~ semen) must be handled, purchased, sold or transferred under the same rules and laws as game farm animals.

AUTH: Sec. 81-3-202, 81-2-707, 87-4-422, MCA IMP: Sec. 81-3-203, 81-3-210, 81-2-703, 87-4-415 and 87-4-422(2), MCA

Comment: Swanser and other game farmers suggested that this rule be transferred to DL. Several game farmers suggested that the transportation procedures already in place for domestic livestock (inspection by brand inspectors and use of the DL bill of sale/transportation form) be applied to all movements of game farm animals.

Response: This suggestion was adopted through joint issuance of these rules and changes in the rule that replace use of the game farmer's invoice book with the requirement that all movements of game farm animals be inspected by DL brand inspectors.

Comment: Several game farmers objected to requirement of 72-hour notice to FWP for movement of game farm animals. The 72-hour requirement posed particular difficulties for photography/filming operations, prompting the request that such operations be exempted or have an alternative method of tracking animal movements.

Response: The 72-hour advance notification requirement has been replaced by the requirement that animals to be moved shall be inspected by DL brand inspectors. The brand inspector may issue a seasonal travel permit for ungulates owned by photography/filming enterprises. In the case of non-ungulates (including carnivores), the operator will be requested to keep a travel log listing all animal movements which would then be available for viewing anytime between required reports.

Comment: Don Ferlicka, DVM (DL) maintained that the 72 hours allowed for animal(s) to be transported through Montana is too long.

Response: This provision was replaced with the requirement that game farm animals in transit through Montana proceed directly through the state with no intent to unload.

RULE XIII 12.6.1515 IMPORTATION (1) A game farm licensee may import animals into Montana only after obtaining the following: (a) an importation permit from the animal health division, department of livestock, 406-444-2976;

(b) a game farm license from the department of fish, wildlife and parks that ~~which~~ is valid for the species to be imported;

(c) an examination by an accredited veterinarian accompanied by an approved health certificate. ~~certifying that the animals are disease free.~~ Minimum specific disease test results and health statements that must be included on a health certificate~~s are~~ for game farm animal(s) include:

(i) all game farm animals in the shipment tested negative for tuberculosis, brucellosis and other diseases as prescribed by the department of livestock and

(ii) the following statement signed by an accredited veterinarian in the state/province of origin: "To the best of my knowledge, animals listed herein are not infected with paratuberculosis (Johnes Disease) and have not been exposed to animals infected with paratuberculosis. ~~All animals and facilities occupied by animals during the preceding 24 months are free from disease.~~" To the best of my knowledge, the premises of origin have not been the site of a significant disease outbreak in the previous 24 months that was not contained and extirpated using recognized disease control standards."

(2) Additional disease testing may be required by written notification from the department of fish, wildlife and parks or the state veterinarian prior to importation if there is reason to believe other diseases, parasites or other health risks are present (i.e. a recent outbreak of a disease not listed in this section).

(3) All elk (Cervus elaphus) must be tested prior to importation for evidence of red deer hybridization. Any animal testing positive for red deer hybridization ~~may~~ shall not be brought into the state. Any health certificate required by Title 81, chapter 2, MCA, to accompany imported elk found to be negative for red deer hybridization must include a certification by an accredited veterinarian that every elk in the shipment has tested negative for red deer hybridization.

(4) Imported animals must be isolated from other animals ~~on the licensee's premises~~ at an approved quarantine facility for at least 30 consecutive days after entry into the state. ~~Animals obtained from free ranging wild stock by state or federal agencies are exempt from this isolation requirement.~~

(5) The department of fish, wildlife and parks finds that the following species, hybrids, or viable gametes (ova and semen), are detrimental to existing wildlife and their habitats through genetic dilution, parasites, disease, habitat degradation or competition. Possession of the following prohibited species, hybrids or viable gametes is prohibited except as authorized by the department of fish, wildlife and parks in writing:

(a) ~~(i)~~ In the family Bovidae, all members of the following genera and hybrids thereof:

Subfamily Caprinae
- Rudicapra (chamois)
- Hemitragus (tahr)
- Capra (goats, ibexes--except domestic goat, Capra hircus)
- Ammotragus (Barbary sheep or Aoudad)
- Ovis (only the mouflon species, Ovis musimon)

Subfamily Hippotraginae
- Oryx (oryx and gemsbok)
- Addax (addax)

Subfamily Reduncinae
- Redunca (reedbucks)

Subfamily Alcelaphnae
- Connochaetes (wildebeests)
- Alcelaphus (hartebeests)
- Damaliscus (sassabies: blesbok, bontebok, topi)

(b) ~~(ii)~~ In the family Cervidae, all of the following species and hybrids thereof:

~~White-tailed deer (Odocoileus virginianus)~~
Moose (Alces alces)
All red deer (Cervus elaphus elaphus), and all hybrids with North American elk (C. elaphus canadensis, roosevelti, manitobensis, nannodes and nelsonil.
Axis deer (Axis axis)
Rusa deer (Cervus timorensis)
Sambar deer (Cervus unicolor
Sika deer (Cervus nippon)
~~Caribou (reindeer) (Rangifer sp.)~~
Roe deer (Capreolus capreolus and Capreolus pygarus)

(c) ~~(iii)~~ All wild species in the family Suidae (Russian boar, European boar) and hybrids thereof.

(d) ~~(iv)~~ In the family Tayassuidae, the collared peccary (javelina) (Tayassu tajacu) and hybrids thereof.

(6) These prohibited species may not be bred, released, imported, transported, sold, bartered or traded within the state except as authorized in writing by the department of

fish, wildlife and parks. The prohibited animals may be transported out of the state in compliance with the game farm rules of the receiving state and federal laws.

(7) Persons with proof of possession prior to effective date of these rules may possess prohibited species for the life of the animals.

(8) The departments of fish, wildlife and parks and livestock have designated the following game farm animals as "restricted species", on the basis of specific animal health risks that they pose to wildlife and/or domestic livestock: white-tailed deer (Odocoileus virginianus) and reindeer (caribou) (Rangifer sp.).

(a) Importation of white-tailed deer into Montana is allowed only for game farms currently licensed for white-tailed deer and which currently legally possess white-tailed deer. The only white-tailed deer that may be permitted entry are those originating from states west of the 100th meridian where meningeal worm is not endemic and which meet the following criteria:

(i) All animals in the shipment are certified free of meningeal worm parasites and dorsal spined larvae as determined by the currently recognized Baerman fecal flotation protocol whereby fecal samples are collected from each animal in the shipment at 30 day intervals for a total of six samplings per animal while the shipment is held in strict 180 day isolation at origin in the absence of any anthelmintic therapy; and the fecal samples are analyzed for dorsal spined larvae at an approved laboratory promptly after each collection. If any animal in the shipment is found positive on any of the six tests the entire shipment shall be rejected for importation; or

(ii) All animals in the shipment are certified free of meningeal worm parasites and dorsal spined larvae using new technology recognized capable of certifying cervids free of meningeal worm.

(b) Importation of reindeer (Rangifer sp.) into Montana is prohibited except under the following conditions:

(i) All animals in the shipment originate in a herd located south of the Canada/U.S. border that is certified brucellosis (B. suis and B. abortus) and tuberculosis free as determined by whole herd testing; and

(ii) The destination of these animals is not located west of the continental divide.

(8)(9) ~~Removal of any prohibited species named in part (5)~~ Reclassification of any species listed as prohibited in part (5) or restricted in part (8) is contingent on compelling scientific information indicating that risks posed by these species to native wildlife populations and/or domestic livestock can be eliminated or managed effectively through application of new diagnostic or management technologies.

~~(9) Any prohibited animal that is released or escapes from a game farm may be captured or destroyed by the owner or by the department at the owner's expense.~~

~~(10)~~(10) Any diseased, prohibited or restricted animal determined by the department of fish, wildlife and parks or state veterinarian to pose a significant threat to the state's wildlife resources, domestic animals or human health may be destroyed or held in quarantine at the owner's expense until disposition is determined. Possession or transfer of such animals is prohibited if contrary to the determination of department of fish, wildlife and parks or department of livestock~~'s determination~~.

AUTH: Sec. 81-2-707, 87-4-422, MCA IMP: Secs. 81-2-703, 87-4-415, 87-4-422(2), and 87-4-424, MCA

Comment: A game farmer maintained that subsection 5 is flawed because rules concerning diseases should be based on scientific fact, not vague possibilities. It was also stated that: FWP is ignorant about diseases; FWP needs to work more closely with veterinarians; disease concerns should be covered by the department of livestock or a state vet; TB is the only game farm disease problem and the game farmers are trying to do the right thing with testing; and there really is no disease problem with game farms because all the major diseases of concern for wildlife are already in cattle, and game farms don't present a threat anyway since game farm animals are confined behind fences.

Response: Species have been designated as prohibited in Montana following consultation with wildlife management agencies in other states and provinces; animal health experts in other states and provinces, as well as in Montana, and review of recent research published in technical journals. Designation of prohibited species is thus based on the best information available and also based on the "track record" of certain species and diseases elsewhere. Involvement of staff of the DL in consultation concerning animal health issues and joint adoption of these rules may address long-term concerns regarding availability and consultation using animal health experts in development and implementation of these rules.

Comment: Don Ferlicka, DVM (DL) and Owen James, DVM (DL) suggested alternative language for section (1)(c) and (1)(c)(ii) pertaining to disease-free status and the signed statement required from an accredited veterinarian.

Response: The rule was revised to incorporate these suggestions.

Comment: Individual game farmers requested that moose, caribou and white-tailed deer be removed from the list of prohibited species.

Response: White-tailed deer and caribou were removed from the "prohibited" species list and redesignated as "restricted", which imposes specific restrictions designed to minimize

occurrences of animal health risks associated with both species. The specific importation restrictions imposed are based on recommendations of recognized animal health experts.

Comment: A game farmer argued that habitat degradation is not a threat to Montana wildlife because when animals escape they can't eat that much grass before they are captured again.

Response: The issue of habitat degradation is of regional and national concern and are the result of the propensity of certain species to establish feral populations when they escape, as well as the difficulty or impossibility of eradicating or controlling certain species after they become feral. Several other western states are currently conducting very expensive eradication programs directed at feral game farm animals which pose either a hybridization risk, a habitat degradation or competition problem, or both. Due to the uniqueness and high public value of the state's resources, the state can neither afford to repeat mistakes that have proven elsewhere to be detrimental or the expense of conducting eradication/control measures.

Comment: Game farmers generally agreed that red deer and red deer hybrids should be banned from Montana. Several commentors also endorsed the importation ban on mouflon.

Response: The departments believe that hybridization of Montana's world renowned Rocky Mountain elk population would be an irretrievable and irreparable loss of our unique and valuable wildlife heritage. Although the Rocky Mountain elk and European red deer are closely related, the uniqueness of our wapiti (size, antler confirmation, behavior, vocalization) is what makes it so highly valued and admired by Montana citizens and people around the world. The department will make every effort to see that Montana's elk populations are not degraded through genetic pollution.

Comment: Swanser recommended that subsections of the proposed rule "either be deleted in their entirety by the FWP or transferred to the DL for their consideration, review, and if need be, promulgation."

Response: This comment is addressed by the joint adoption of these rules by both FWP and DL.

RULE XIV 12.6.1516 DUTY TO REPORT CONTAGIOUS DISEASES (1) Any person, including a game farm licensee who has reason to believe that game farm animals have or have been exposed to a dangerous or communicable disease, must give notice to the department of livestock immediately.

(2) The department of livestock will determine when destruction of animals, a quarantine or disinfection is required at any commercial game farm. If the department of livestock determines that destruction, quarantine or

disinfection is required, a written order will be issued to the licensee describing the procedure to be followed. Required disinfection of holding facilities must be completed at the owner's expense. If the owner disagrees with the department's determination, he or she has the right to appeal the decision to the board of livestock, provided notice of such appeal is given within 48 hours of receipt of the order.

AUTH: Sec. 81-2-103, ~~87-4-422,~~ MCA IMP: Sec. ~~87-2-107~~ 81-2-107, MCA

Comment: Don Ferlicka, DVM, stated that this rule is right out of DL statutes and that he found it reasonable.

Response: No revisions were made to this rule.

Comment: Swanser recommended that this rule be transferred to DL.

Response: This comment is addressed by the joint adoption of these rules by both FWP and DL.

RULE XV 12.6.1517 ESCAPED GAME FARM ANIMALS (1) The department or any peace officer may seize, capture, or destroy game farm animals that have escaped the possessor's control, and which are determined to be detrimental to native wildlife, habitat or other wildlife resources by threat of predation, spread of disease or parasites, habitat competition, interbreeding with native wildlife, or other significant damage.

~~(2) Escaped game farm animals will be considered a public nuisance. The licensee is responsible for costs incurred by the department in recovering, maintaining, or disposing of such animals, as well as any damage to the state's wildlife resources.~~

(~~3~~)(2) Escapes must be reported immediately to the department of fish, wildlife and parks.

(4)(3) The licensee must recapture or destroy the animals within ten days.

(~~5~~)(4) If the licensee is unable to recapture the animals within ten days, the department of fish, wildlife and parks may ~~recapture or~~ destroy them. ~~the animal at the owner's expense.~~

(6)(5) The licensee must notify the department of fish, wildlife and parks immediately of the recapture or death of an escaped animal.

(~~7~~)(6) The department of fish, wildlife and parks may inspect a recaptured animal before it is returned to the game farm.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-419 MCA

Comments: Swanser commented that the proposed rule is already addressed under existing Rule 12.6.1505, Recovery of Escaped

Animals. He went on to criticize various aspects of the proposed rule as not complying with the relevant statute. Another game farmer objected to the fact that the rule designates escaped animals as a public nuisance even if the escape occurred through no fault of the game farmer.

Response: Swanser's comment is accepted. The previous rule is being deleted and wording in the rule as adopted reflects those comments. The reference to "public nuisance" is deleted.

Comment: A game farmer proposed that game farmers be allowed 30 days to recapture animals before FWP can destroy them. One game farmer noted that one of his bulls was out for 23 days before he recaptured it.

Response: The departments consider 10 days a reasonable period of time for recapture of escaped animals. Due to the potential for disease or hybridization risks associated with escaped animals, the rule was not amended to allow more time for game farmers to recapture escaped animals.

Comment: The question was asked whether or not this rule applies to wolves, and if so, shouldn't it include wolf hybrids as well?

Response: These rules apply only to "game farm animals" as defined in statute (87-4-406) and in rule 12.6.1506. Wolves and wolf hybrids are not classified as game farm animals in Montana law. The only non-ungulates classified as game farm animals in the current definition are black bear and mountain lion.

~~RULE XVI GAME FARM SHOOTING LICENCE (1) Game farm shooting tags are valid for thirty days from date of issue.~~

~~(2) All unused game farm shooting tags must be returned to the department.~~

~~(3) Ear tags from dead game farm animals must be returned to the department within ten days after death.~~

~~(4) Licensees who possess a game farm shooting license may not release animals outside the boundary of the licensed game farm.~~

~~AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-421, MCA~~

Comment: Swanser objected to the thirty day limitation, on the grounds that 87-4-421, MCA, speaks of issuance on an annual basis and that the thirty days is unreasonable and too restrictive.

Response: The departments agree that the statute implies (though does not specify) an annual permit. The proposed rule has been deleted.

~~RULE XVII WELFARE OF ANIMALS (1) A game farm operator may not remove a game farm animal from the existing licensed facility except as provided by statute and rules.~~

~~(2) A game farm operator may not display or house any game farm animals in such a manner as to endanger the health and safety of the public or the game farm animals.~~

~~(3) Transfer or transportation of any game farm animals from a game farm to any other location for display, filming or photographing must be approved by the department 72 hours before the transaction.~~

~~AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-422, MCA~~

Comment: Swanser advocated that this rule be under DL. As to subsection (1), he stated there was no objection limiting removal of game farm animals to movements that are allowed under DL's rules. Swanser objected to subsection (2) on the ground that there is no authority for this provision. He objected to subsection (3), claiming the limitations constitute a violation of private property rights.

Response: Although 87-4-422, MCA explicitly anticipates rules governing the transportation and care and maintenance of game farm animals, the departments concluded that the concerns prompting the rule can be dealt with through other means, especially state laws addressing humane treatment of animals, including 45-8-211 and 27-1-222, MCA. Therefore, the rule has been deleted.

Comment: This rule is wholly inadequate and provides no means for determination as to whether or not the health and safety of the animal is being protected and should be expanded to include specific standards for care and housing of different species. In addition to physical health, the welfare of animals depends on psychological health (being allowed to engage in normal patterns of behavior to the greatest extent possible). This rule provides no means of enforcing the welfare provision.

Response: See the response immediately preceding the above comment.

RULE XVIII 12.6.1518 CONFISCATION PROCEDURES (1) The department of fish, wildlife and parks may confiscate or seize any unlawfully possessed game farm animals.

(2) The costs of any confiscations or seizures of game farm animals ~~will~~ may be charged to the owner of the animals.

(3) Any game farm licensee whose license is revoked must lawfully dispose of game farm animals in his or her possession within a period designated by the department of fish, wildlife and parks. Failure to comply with this time limit will result in confiscation of the game farm animals by the department and/or citations for criminal conduct.

AUTH: Sec. 87-4-422, MCA IMP: Secs. 84-4-418, 87-4-424, 87-4-422 and 87-4-423(4), MCA

Comment: Swanser commented that he had no objection to the rule if confiscation took place after compliance with 87-4-423, MCA; however, if done without notice of violation with an opportunity to correct within thirty days there would be a violation of the statute. He also noted that any unauthorized confiscation would violate private property rights unless for the purpose of preventing disease or for quarantine under department of livestock law. In response to subsection (3), he stated that the department must follow the revocation provisions of 87-4-423, MCA, and that if animals are confiscated or disposed of "the state will incur some liability, therefore a reasonable time must be allowed to remove the animals."

Response: Swanser's comments constitute legal argument and suggestions about how to implement the rule, and contain no suggestions about changing the rule; therefore, no changes have been made in response to the comments.

RULE 12.6.1519 WAIVER (1) The departments may waive any rule they find will constitute an undue hardship to an individual game farm operator. A game farm operator wishing to receive a waiver of any rule must make application to both departments, stating with specificity why he or she has a compelling need to have a rule waived and showing that the grant of a waiver will not threaten or adversely affect any domestic or wild animal. The departments, in their discretion, may waive any rule.

AUTH: Secs. 81-102(1), 81-3-202, 87-4-415 and 87-4-422, MCA IMP: Secs. 81-3-210(1), 81-2-102(1)(d), 81-2-102(1)(e), 87-4-422, MCA

Comment: Several persons recommended that the rules be more flexible than they appeared as proposed.

Response: In addition to changing several specific rules to make them more flexible, the departments believe that the specific provision of a rule allowing waiver will enhance the flexibility of the rules. Game farm operators are cautioned, however, that any application for a waiver will be carefully scrutinized for strong evidence that a waiver is necessary and reasonable and that it will not damage the purposes of the statutory scheme for game farm regulation. Such considerations as substantial compliance and good faith efforts to comply will be taken into consideration in the departments' considerations.

SUGGESTED NEW PROVISION

Comment: Swanser suggested that a new rule be adopted providing that all rules be reviewed on an annual basis and that a permanent committee of the departments and the game farm operators be established to review any proposed rules or changes in the law or the rules.

Response: The departments do not believe that it would be an efficient use of resources to arbitrarily establish in advance an annual review procedure. Should the game farmers or others wish to pursue changes to the rules, 2-4-315, MCA, provides a means to do so. The departments do not at this time believe that a permanent committee as proposed by Swanser is necessary. However, should a committee be deemed worthwhile in the future, the departments wish to point out that constitutional and statutory provisions regarding public participation would probably require advance notice of all meetings and involvement by more than just the regulating agencies and the regulated industry. If such a committee were established in the future, including all interested parties, it would be subject to 2-4-304, MCA.

GENERAL COMMENTS:

Comment: Game farm animals are domestic livestock (as opposed to wildlife) and game farms should therefore be regulated by the department of livestock rather than the department of fish, wildlife and parks.

Response: Game farm animals, as defined in Rule 12.6.1506 includes many species of animals that would more appropriately be defined as "captive wildlife" as opposed to "domestic livestock" (refer to the definition of "domestic" in Rule IV). Section 87-4-408(1) states: "The department [of fish, wildlife, and parks] has primary jurisdiction over game farms."

Comment: Game Farm rules have been developed too quickly without adequate participation by the game farm industry; these rules should be tossed out and the FWP should start over; the rule-making process should be postponed until the next legislative session.

Response: The compressed time frame for development of these rules was prompted by importation of red deer/elk hybrids into Montana in August/September of 1991. This event necessitated implementation of "emergency rules" to prevent importation of additional hybrid animals. Since existing emergency rules must be supplanted by permanent rules, it was necessary to develop permanent rules within the 240 day time frame covered by emergency rules. The rule making process could have been conducted over a much longer period of time had importation of red deer/elk not taken place.

Comment: Game farmers have the perception that the department of fish, wildlife and parks is embarked on an effort to destroy the game farming industry and that proposed rules are adversarial and represent over-control.

Response: The department of fish, wildlife and parks has no intention to destroy the game farm industry, nor is it even within its authority to do so. New game farm rules are intended to fulfill the agency's statutory responsibilities to regulate the game farm industry and will undoubtedly improve the agency's capability to carry out regulatory responsibilities.

Comment: Several people commented that they were glad to see FWP and DL trying to get on top of game farm problems but expressed lack of confidence in state agencies to adequately enforce the proposed rules. It was also stated that inadequate enforcement (due to lack of money or lack of public pressure) is to blame for the problems being faced today.

Response: The department of fish, wildlife and parks acknowledges that regulation of the game farm industry has not been a high priority in past years. In addition, outdated and inadequate rules have hampered this agency's ability to fulfil its regulatory responsibilities. We fully anticipate that regulation of the game farming industry will improve markedly upon implementation of these new rules and with increased involvement by department of livestock in their implementation and enforcement.

Comment: Several commentors suggested that the rules should include penalties for rule violations and that those penalties should be substantial enough to serve as a deterrent.

Response: Penalties are set by law rather than through agency rule-making.

General comments in opposition to game farm rules: Potential damage to the huge economic potential of game farming, which could contribute to Montana's economy and reduce our Asian trade deficit; difficulties for the game farmers in coping with jurisdiction by multiple agencies (FWP, DL and USDA); new rules take away rights acquired in the 1983 legislative session; new business ventures will be destroyed or hampered; it's in Montana's best interest to promote the game farm industry to keep our younger generation in our state.

General comments in support of game farm rules: The importance of protecting Montana's outstanding wildlife legacy, its human health, the domestic livestock industry and the economic value of public hunting recreation; well documented problems with game farming that have occurred in other states and provinces that have been detrimental to wildlife resources; concern that game farming is dangerous to

wildlife because escape is inevitable, and, therefore, so are disease problems and genetic pollution; opposition to use of game farm animals and wildlife for animal parts (de-antlering and gall bladders) and the confinement and cruelty associated with such practices; concern for detrimental impacts to Montana's livestock industry (disease issues); potential costs of problems if they are allowed to occur in Montana; concern that poaching will escalate as a result of commercialization of wildlife (and animal parts); objections to the expenses associated with regulating the game farm industry and the opinion that such costs should be borne by those that receive the financial benefits of the business; opposition to game farming because of numerous violations by operators in the past; construction of types of fencing that inhibits migration of wildlife; suggestion that game farms either be phased out within 5 years and made illegal or 2) implement the rules and add a requirement of not less than $1 million bond to be forfeited if needed to correct any damages to native wildlife and habitat.

The foregoing game farm rules are the product of a coordinated effort by the Department of Fish, Wildlife and Parks and the Department of Livestock. The Department of Fish, Wildlife and Parks believes that these rules fulfill the direction and legislative intent outlined in HB 556; our statutory role in the regulation of the game farm industry; and our public trust responsibilities to protect, perpetuate and manage the state's wildlife resources for the benefit of current and future generations. The partnership formed by the Departments of Fish, Wildlife and Parks and Livestock during development of joint rules will improve regulation of and services provided to the game farm industry.

5. No other comments or testimony were received.

K.L. Cool, Director
Department of Fish, Wildlife and Parks

The Montana Board of Livestock and Department of Livestock recognize that HB556 mandates the Department of Fish, Wildlife and Parks and Livestock to work cooperatively and jointly in the enforcement of this legislation. To that end the Department of Livestock jointly sponsors these prepared rules insofar as they deal with marking, inspection, transportation and health.

William S. Fraser, Executive Secretary
Board of Livestock

Rule Reviewer
Department of Fish, Wildlife and Parks

Rule Reviewer
Board of Livestock

Certified to the Secretary of State May 4, 1992.

VOLUME NO. 44 OPINION NO. 31

BONDS - Authority of county to issue general obligation bonds to fund demolition of abandoned county building;
COUNTIES - Authority to issue general obligation bonds to fund demolition of abandoned county building;
COUNTY GOVERNMENT - Authority to issue general obligation bonds to fund demolition of abandoned county building;
PUBLIC BUILDINGS - Authority of county to issue general obligation bonds to fund demolition of abandoned county building;
MONTANA CODE ANNOTATED - Sections 7-1-2103(4), 7-5-2101(1), 7-5-2101(2), 7-7-2201(3), 7-8-2102, 7-8-2201.

HELD: The board of county commissioners may issue general obligation bonds to fund demolition of a county-owned building that has been abandoned and poses a threat to the safety and welfare of the community.

May 1, 1992

Merle Raph
Toole County Attorney
P.O. Box 518
Shelby MT 59474-0518

Dear Mr. Raph:

You have requested my opinion concerning the following question:

> May a county issue general obligation bonds for the purpose of removing asbestos from and demolishing an abandoned hospital building if the electors vote to demolish rather than remodel the building?

Your question arises because the county wants to demolish an old abandoned hospital building. You have informed me that the county abandoned the building in 1981 when it was replaced by a new county hospital. Numerous attempts to sell, lease or auction off the building have failed. The building has rapidly deteriorated since it was abandoned. You state that the building is a potential threat to the safety of the community because children can break windows and enter the building virtually unseen. In 1990 the severe deterioration was noted by an inspector from the Department of Health and Environmental Sciences.

An additional concern is the presence of asbestos. Because of the requirements of federal and state regulations and the extreme deterioration, it is financially impossible for the county to proceed with remodeling or demolition without issuing general obligation bonds. See §§ 75-2-501 to 514, MCA. Recent estimates of the cost for renovation and asbestos removal were

over $3 million, while estimates for demolition and asbestos removal were close to $600,000.

A county is vested with the express authority to "make such orders for the disposition or use of its property as its inhabitants require." § 7-1-2103(4), MCA. Similarly, the board of county commissioners has the express authority to care for and manage county property. §§ 7-5-2101(1), 7-8-2201, MCA. The board of county commissioners further has the express authority to erect, furnish and maintain county buildings, including hospital buildings. § 7-8-2102, MCA.

While the provisions describing a county's authority over its property do not expressly state that a county may demolish abandoned, dilapidated, and potentially hazardous property, such authority is clearly included within the obligation to care for, manage and maintain county property. It is a general rule that public authorities may, as a valid exercise of the police power, destroy a building that is a public health hazard. See 13 Am. Jur. 2d Buildings § 45 (1964); 7 A. McQuillin, Municipal Corporations § 24.561 (1989). Under section 7-5-2101(2), MCA, the board of county commissioners may perform whatever acts are necessary for the full discharge of its duties. See Cosby v. County Commissioners of Randall County, 712 S.W.2d 246, 248 (Tex. Ct. App. 1986) (authority to manage property includes discretion to replace and demolish existing structure as well as construct new building). Moreover, the demolition of buildings that pose asbestos dangers is contemplated by sections 50-64-101 to 107, MCA, as well as by sections 75-2-501 to 514, MCA. See § 75-2-501(4), MCA. Here, given the building's potential threat to the health and welfare of the community, the commissioners have the authority to demolish the hospital building as part of their general duty to manage county property.

The question then is whether the county, under its general duty to care for and maintain its property, also has the attendant authority to issue general obligation bonds for the demolition of the property with elector approval. Generally, the financing for construction and operation of a county hospital is governed by section 7-6-2512, MCA, which authorizes a mill levy for support of a county hospital, and sections 7-34-2401 to 2418, MCA, which provide the specific methods for financing construction of a new hospital. These provisions are not applicable here, however, because the general financing measures for an existing, revenue-producing hospital or for the issuance of bonds to construct a new hospital do not address the general problem of disposing of the old abandoned hospital.

Under section 7-7-2201(3), MCA, a county may issue general obligation bonds for

> constructing, erecting, or acquiring by purchase necessary public buildings within the county, under

> its control and authorized by law; making additions to and repairing buildings; and furnishing and equipping the same[.]

While this section does not expressly authorize the issuance of bonds for the demolition of a county building, such authority may be implied when issuance of bonds is an absolute necessity to carry out other powers expressly conferred upon a county. 15 McQuillin, § 43.19. Thus, when the authority is essential to accomplish other express powers, then bonds may issue. See also Pennobscot, Inc. v. Board of County Commissioners, 642 P.2d 915, 918 (Colo. 1982); Dietrich v. Deer Lodge, 124 Mont. 8, 218 P.2d 708, 711 (1950); Kruesel v. Collin, 17 P.2d 854 (Wash. 1933) (county may issue bonds to accomplish mandatory duty to care for indigent). Here, given the extraordinary cost of demolishing the building and the building's potential as a health hazard, the authority to issue bonds to demolish the building may be implied because such authority is essential for the county to accomplish its duty to care for and manage its property.

THEREFORE, IT IS MY OPINION:

> The board of county commissioners may issue general obligation bonds to fund demolition of a county-owned building that has been abandoned and poses a threat to the safety and welfare of the community.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 44 OPINION NO. 32

COUNTY OFFICERS AND EMPLOYEES - Public disclosure of county time records showing hours of work and claims for pay by employee;
EMPLOYEES, PUBLIC - Public disclosure of county time records showing hours of work and claims for pay by employee;
PRIVACY - Public disclosure of county time records showing hours of work and claims for pay by employee;
RIGHT TO KNOW - Public disclosure of county time records showing hours of work and claims for pay by employee;
MONTANA CONSTITUTION - Article II, sections 9, 10;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 6 (1989), 38 Op. Att'y Gen. No. 109 (1980).

HELD: County time records which show an employee's name, the department for which the employee works, and the hours worked, including claims for vacation, holiday, or sick leave pay, are subject to public disclosure.

May 1, 1992

Robert Slomski
Sanders County Attorney
P.O. Box 519
Thompson Falls MT 59873-0519

Dear Mr. Slomski:

You have requested my opinion on the following issue:

> Are monthly time sheets, which show hours worked by a county employee and claims for vacation, holiday, or sick leave pay, subject to public disclosure?

Sanders County employees are required to fill out and submit a "time card" by the 25th day of each month. The form consists of various spaces for recording hours worked, and designations of hours as regular, overtime, vacation, sick, holiday, compensatory, military/jury duty, or leave without pay. The form is generally similar to other public employee time records and provides spaces for an employee's name, an employee number, and the department for which he or she works. It must be signed by the employee and a department head or supervisor.

Your request arose when Sanders County was requested to produce time records of specific employees. Resolution of the issue requires application of a balancing test which considers whether or not individual privacy rights outweigh the merits of public disclosure of the information.

Article II, section 9 of the Montana Constitution provides:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

The right to privacy afforded all Montanans is set out in Article II, section 10 of the Montana Constitution, which states:

> The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

When faced with issues similar to yours, the Montana Attorney General has consistently applied a test to determine whether a conflict between these two rights exists and, if so, whether the right to individual privacy exceeds the right to know. As stated in 43 Op. Att'y Gen. No. 6 at 14 (1989), the analysis consists of:

> (1) [D]etermining whether a matter of individual privacy is involved, (2) determining the demands of that privacy and the merits of publicly disclosing the information at issue, and (3) deciding whether the demand of individual privacy clearly outweighs the demand of public disclosure. [Emphasis in original.]

Thus, it is necessary to review the information on the time records to determine whether it involves matters of individual privacy. The records show an employee's record of hours worked or claimed for pay and charge nonwork hours to specific categories, e.g., vacation or sick leave. Generally speaking, the information shown does not reveal any personal aspects of a public employee's life. The most personal aspect involved would be a claim for nonwork pay. But even the disclosure of an employee's claim for vacation or sick leave pay does not entail disclosure of the particular circumstances associated with the claim.

The Montana Attorney General has previously concluded that a state employee's title, dates and duration of employment, and salary are public information. 38 Op. Att'y Gen. No. 109 at 375 (1980). In so concluding, the Attorney General found no demand for individual privacy with regard to an employee's title, as the information relates only to the employee's role as a public employee and not to any personal aspect of the individual's life. With regard to an employee's dates of employment and salary, a slight demand for individual privacy was recognized. When balanced against the public's right to know information regarding the payment and work of public employees, there was no question that the right to know required disclosure.

Like a state worker's dates of employment and salary, a county employee's hours of work and claims for pay or credit are information involving only a slight intrusion into individual privacy. This conclusion is consistent with the decisions of the Montana Supreme Court requiring a reasonable expectation of privacy regarding the information sought. See Belth v. Bennett, 227 Mont. 341, 740 P.2d 638 (1987); Missoulian v. Board of Regents, 207 Mont. 513, 675 P.2d 962 (1983); Montana Human Rights Division v. City of Billings, 199 Mont. 434, 649 P.2d 1283 (1982). Considering all relevant circumstances, it is apparent that public employees making claims for public pay could not have a reasonable expectation of privacy in records showing hours of work.

On the other hand, the public has a substantial interest in having access to a public employee's record of hours worked and hours claimed for pay. Allowing such access is very important to a system of public employment. "Disclosing such information increases public confidence in its government, and consequently increases government's ability to serve the public." 38 Op. Att'y Gen. No. 109 at 375, 379 (1980). The public interest definitely outweighs the demand of individual privacy.

A county employee's name, the department for which he works, and his hours worked (in designated categories of pay) must, however, be distinguished from a number that is unique to an employee and that is shown on such records. It is arguable that such a number, like a social security number, is protected from disclosure by a high demand of individual privacy, and is of little interest to the public. 43 Op. Att'y Gen. No. 6 at 14 (1989).

THEREFORE, IT IS MY OPINION:

> County time records which show an employee's name, the department for which the employee works, and the hours worked, including claims for vacation, holiday, or sick leave pay, are subject to public disclosure.

Sincerely,

MARC RACICOT
Attorney General

VOLUME NO. 44 OPINION NO. 33

EMPLOYEES, PUBLIC - Use of sick or annual leave while on workers' compensation;
LABOR RELATIONS - Collective bargaining agreements conflicting with statutes on leave and workers' compensation benefits;
STATE AGENCIES - Payment of sick or annual leave as supplementation to workers' compensation;
WORKERS' COMPENSATION - Supplementation of workers' compensation benefits by sick or annual leave;
MONTANA CODE ANNOTATED - Sections 2-18-618, 39-71-123(1)(a), 39-71-701, 39-71-736;
MONTANA CONSTITUTION - Article II, section 31;
MONTANA LAWS OF 1987 - Chapter 464, section 30;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 34 (1989), 42 Op. Att'y Gen. No. 69 (1988), 42 Op. Att'y Gen. No. 37 (1987), 38 Op. Att'y Gen. No. 116 (1980), 37 Op. Att'y Gen. No. 113 (1978);
UNITED STATES CONSTITUTION - Article 1, section 10, clause 1.

HELD: 1. Section 39-71-736(2), MCA, precludes a state agency from complying with a collective bargaining agreement which provides for the supplementation of workers' compensation wage loss benefits with sick leave, where the entitlement to such compensation arose on or after July 1, 1987.

2. A state agency may not supplement workers' compensation wage loss benefits with annual leave upon the request of an employee.

May 4, 1992

John Rothwell, Director
Department of Transportation
2701 Prospect Avenue
Helena MT 59620-9726

Dear Mr. Rothwell:

You have requested my opinion concerning questions which I have rephrased as follows:

1. Does section 39-71-736(2), MCA, preclude a state agency from complying with a collective bargaining agreement which provides for the supplementation of workers' compensation wage loss benefits with sick leave?

2. May a state agency supplement workers' compensation wage loss benefits with annual leave upon the request of an employee?

You have informed me that in the 1970's the Department of Highways, now the Department of Transportation, began a practice of allowing employees who were receiving wage loss benefits from workers' compensation to supplement those benefits by using sick or annual leave payments. The amount of leave was calculated so that the employee's pay for the leave plus the workers' compensation benefits did not exceed the employee's normal net earnings. The purpose of the arrangement was to cover the employee and state shares of group health insurance. The practice of supplementation by sick leave has been incorporated in the current collective bargaining agreement:

> In the event an employee is receiving workers' compensation benefits in an amount that is less than the net pay he/she was receiving when he/she was injured, the Employer will supplement those benefits with sick leave benefits. The amount of sick leave benefits the Employer will pay will be an amount that, when added to the workers' compensation benefits being received by the employee, will be equal to the net pay the employee was receiving when he/she was injured. The Employer's obligation under this provision is limited to the amount of sick leave time that the employee has accumulated.

Agreement Between the State of Montana and the Public Employees Craft Council, Highway Maintenance 1991-1993, Art. 12, sec. 2, at 13. The current collective bargaining agreement does not have a comparable provision concerning the use of annual leave benefits.

With regard to the use of sick leave, the Montana statutes contain a specific limitation:

> For the purpose of this section, an injured worker is not considered to be entitled to compensation benefits if the worker is receiving sick leave benefits, except that each day for which the worker elects to receive sick leave counts 1 day toward the 6-day waiting period.

§ 39-71-736(2), MCA. The worker may receive sick leave benefits from his employer for six days, and then begin receiving workers' compensation benefits on the seventh day. § 39-71-736(1)(a), (2), MCA. Section 39-71-736(2), MCA, was enacted by the 1987 Legislature as a part of a comprehensive revision of the workers' compensation laws, and became effective on July 1, 1987. 1987 Mont. Laws, ch. 464, § 30. No discussion of subsection 2 appears in the legislative history.

Thus, on the question of supplementation by sick leave, the current collective bargaining agreement conflicts with a statute which has been in force since 1987. Numerous prior opinions have dealt with similar situations, e.g., 43 Op. Att'y Gen. No.

34 at 102 (1989), 42 Op. Att'y Gen. No. 37 at 150 (1987), 38 Op. Att'y Gen. No. 116 at 408 (1980), 37 Op. Att'y Gen. No. 113 at 486 (1978). The general rule is "that, when a particular employment condition for public employees has been legislatively set, it may not be modified through collective bargaining without statutory authorization." 42 Op. Att'y Gen. No. 37 at 151. The requirements for eligibility for workers' compensation have been legislatively set since the inception of the system in 1915 in Montana. A public employer does not have authority to deviate from the mandatory conditions set forth by the workers' compensation laws. The consequence of making payment of accrued sick leave benefits to an employee is that the employee's eligibility for workers' compensation benefits is forfeited under section 39-71-736(2), MCA. The collective bargaining agreement is unenforceable to the extent that it requires supplementation of worker's compensation benefits by the use of sick leave benefits from the seventh day after the injury, since payment of the latter prevents payment of the former.

It should be noted that this situation is distinguishable from that presented in 42 Op. Att'y. Gen. No. 69 at 271 (1988), wherein a statute required first- and second-class cities to provide compensation in addition to workers' compensation benefits to police officers injured on the job. § 7-32-4132, MCA. Attorney General Greely concluded that nothing in the 1987 amendments to the workers' compensation laws should be construed as altering the statute which specifically concerned police officers. The Legislature is presumed to enact legislation with full knowledge of existing legislation. Thiel v. Taurus Drilling Ltd., 218 Mont. 201, 710 P.2d 33 (1985). A contract, on the other hand, is governed by laws existing at the time of its execution. Neel v. First Federal Savings and Loan Association, 207 Mont. 376, 388, 675 P.2d 96, 103 (1984); Gagnon v. City of Butte, 75 Mont. 279, 289, 243 P. 1085, 1088 (1926). Therefore, as to collective bargaining agreements entered into after July 1, 1987, there can be no impairment of contract issue under either Article 1, section 10, clause 1 of the United States Constitution or Article II, section 31 of the Montana Constitution. See 43 Op. Att'y. Gen. No. 34 at 102 (1989).

Local No. 8 International Association of Firefighters v. City of Great Falls, 174 Mont. 53, 568 P.2d 541 (1977), does not compel a contrary conclusion. That case held that an implied contract was created by a resolution which induced longer service by providing for longevity pay upon completion of 20 years' service. Repeal of the resolution impaired the contracts of those firefighters who had acquired vested rights during the operative life of the resolution. It is important to note that the repeal of the resolution was effective, except as applied to those particular employees. See also Wage Appeal v. Board of Personnel Appeals, 208 Mont. 33, 42, 676 P.2d 194 (1984) (legislature may alter compensation prospectively, prior to vesting of rights). In the instant situation, an argument

perhaps can be made that an employee receiving workers' compensation based upon a benefit entitlement determined by statutes in effect prior to July 1, 1987, may receive both such compensation and supplemental sick leave. See Buckman v. Montana Deaconess Hospital, 224 Mont. 318, 730 P.2d 380, 382 (1986) (workers' compensation benefits are determined by statutes in effect on date of injury); Carmichael v. Workers' Compensation Court, 234 Mont. 410, 415, 763 P.2d 1122, 1124 (1988) (right to workers' compensation benefits accrues upon injury). Nevertheless, it is unknown whether this particular scenario exists, and therefore this opinion does not determine the rights of any such employee.

Your second question concerns whether the Department may supplement workers' compensation benefits with payment of accrued annual leave at the request of the employee. Section 39-71-736, MCA, does not address the receipt of annual leave. However, section 39-71-701, MCA, provides that a worker is eligible for temporary total disability benefits when he or she suffers a total loss of wages. Wages are defined in section 39-71-123(1)(a), MCA, to specifically include "remuneration at the regular hourly rate for ... vacations[] and sickness periods." It stands to reason that if annual leave benefits are paid, then the employee is not suffering a total loss of wages and is not eligible for workers' compensation benefits pursuant to section 39-71-701, MCA. Therefore, supplementation of workers' compensation benefits by annual leave payments would not be consistent with the statute.

THEREFORE, IT IS MY OPINION:

1. Section 39-71-736(2), MCA, precludes a state agency from complying with a collective bargaining agreement which provides for the supplementation of workers' compensation wage loss benefits with sick leave, where the entitlement to such compensation arose on or after July 1, 1987.

2. A state agency may not supplement workers' compensation wage loss benefits with annual leave upon the request of an employee.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

BEFORE THE BOARD OF NURSING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the petition for declaratory ruling on receipt and transcription of telephone orders by licensed practical nurses	))))	NOTICE OF PETITION FOR DECLARATORY RULING

1. On May 28, 1992, at 9:00 a.m., in the Rimini Room of the Park Plaza Hotel, 22 N. Last Chance Gulch, Helena, Montana, the Board of Nursing will consider a petition for declaratory ruling on the authority of licensed practical nurses to receive and transcribe telephone orders from physicians, dentists, osteopaths or podiatrists authorized to prescribe medications and treatments.

2. The Petitioner is The Montana Licensed Practical Nursing Association, Marion H. Nelson, Executive Director, P.O. Box 6964, Great Falls, Montana 59406.

3. The Petitioner is an association of licensed practical nurses practicing in the state of Montana. In the course of their practice, some of the members of the association are or may be requested to receive and transcribe telephone orders from physicians, dentists, osteopaths or podiatrists. An informal opinion of the Board dated November 21, 1985 indicated that such activities are beyond the scope of practice of a licensed practical nurse. The members of the Association believe that informal statement is in error and that such activities are within the scope of practice of a licensed practical nurse.

4. The statute as to which the Petitioner requests a ruling is section 37-8-102(3)(b), MCA, which provides:

> "Practice of practical nursing" means the performance for compensation of services requiring basic knowledge of the biological, physical, behavioral, psychological, and sociological sciences and of nursing procedures. Practical nursing practice utilizes standardized procedures in the observation and care of the ill, injured, and infirm; in the maintenance of health; in action to safeguard life and health; and in the administration of medications and treatments prescribed by a physician, dentist, osteopath, or podiatrist authorized by state law to prescribe medications and treatments. These services are performed under the supervision of a registered nurse or a physician, dentist, osteopath, or podiatrist authorized by state law to prescribe medications and treatments."

5. The question presented for declaratory ruling by the agency is whether it is within the scope of practice of a licensed practical nurse to receive and transcribe telephone

orders from physicians, dentists, osteopaths or podiatrists authorized to prescribe medications and treatments.

6. The Petitioner contends that the described activity is within the scope of permissible functions of a licensed practical nurse under 37-8-102(3)(b), MCA. The Petitioner notes that the statute has been amended since the Board's informal statement in 1985 deleting the language upon which the statement was based.

7. The Petitioner noted the following to be interested parties:

Laurel Kline, LPN
President MLPNA
1712 First Avenue South
Great Falls, MT 59401

Marian H. Nelson, R.N.
Executive Director MLPNA
P.O. Box 6964
Great Falls, MT 59406

Rose Hughes
MT Long Term Care Assoc.
36 S. Last Chance Gulch, Suite A
Helena, MT 59601

Administrators of Montana long term care facilities

The Board also notes that hospitals, physicians, registered nurses, and the Montana Nurses Association may be interested in this matter.

BOARD OF NURSING
E.L. CAMPO, PRESIDENT

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

Ann M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, May 4, 1992.

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

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

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

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

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

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

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

Use of the Administrative Rules of Montana (ARM):

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

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 1992. This table includes those rules adopted during the period April 1, 1992 through June 30, 1992 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 1992, this table and the table of contents of this issue of the MAR.

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