RESERVE

MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 17

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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NOTICE SECTION

BEFORE THE PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA

In the matter of the amendment of permanent rules to implement the retirement incentive program provided by HB 517) NOTICE OF PUBLIC HEARING

TO: All Interested Persons.

1. On October 18, 1993 at 9:00 am in the Board Meeting Room of the Public Employees' Retirement Division, 1712 Ninth Avenue, Helena, Montana, a public hearing will be held to consider the amendment of rules adopted to implement the retirement incentive program authorized by HB 517 during the 1993 Legislature.

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

2.43.302 DEFINITIONS For the purposes of this chapter, the following definitions apply:

(1) through (3) remain the same.

(4) "employment" or "reemployment" means the performance of services for an employer by a person other than an independent contractor. If any of the four factors listed in (8) for determining freedom from control for independent contractors indicate lack of freedom from control or direction by the employer, an employment relationship exists.

(4) through (6) are renumbered (5) through (7).

(8) "independent contractor" means an individual who renders service in the course of an occupation and both:

(a) is engaged in an independently established trade, occupation, profession or business; and

(b) is at all times, under contract and in fact, free from control or direction over the performance of the services. Factors to be considered in determining freedom from control and direction include:

(i) right or exercise of control of the means by which the work is accomplished;

(ii) method of payment (time basis indicates employment);

(iii) furnishing of equipment; and

(iv) employer's right to fire.

Independent contractor status may only be established by a convincing accumulation of these factors indicating freedom from control or direction over performance of the services.

(7) through (17) are renumbered (9) through (19).

AUTH: 19-3-304, MCA
IMP: HB 517, 1993 Legislature

2.43.452 RETURN TO EMPLOYMENT WITHIN SAME JURISDICTION

(1) remains the same.

(2) A member who has taken advantage of the retirement incentive, and who returns to any type of employment within the same jurisdiction, must notify the retirement division within one week of employment. ~~A personal services contract entered~~

~~into between the member and the same jurisdiction~~ Service performed by a member for the same jurisdiction pursuant to a contract that fails the tests set out in 2.43.302 is considered ~~a return to~~ employment and is subject to the 600 hour limitation and reporting requirements.

(3) The employer of a member who has taken advantage of the retirement incentive must report all hours worked and all amounts paid to the member after return to ~~work~~ employment within the same jurisdiction. It is the employer's responsibility to accurately report each PERS member's active duty service or ~~service~~ employment after retirement to the retirement division. If a former employee is employed by an independent contractor (or becomes an independent contractor) engaged in business with the jurisdiction of the member's former employer, the employer will report this information to the retirement division as specified in 2.43.453.

(4) and (5) remain the same.

AUTH: 19-3-304, MCA
IMP: HB 517, 1993 Legislature

2.43.453 INFORMATION TO BE RETAINED BY EMPLOYERS (1) In order to respond to subsequent requests made by the board and the department of administration, state and university employers must document and retain the following information on each employee terminating under the retirement incentive program:

(a) through (i) remain the same.

(j) whether the previous duties of the terminating member(s) were subsequently performed by an independent contractor and, if so, the cost of the contract.

(k) whether an employee who terminated under the retirement incentive program provided services for the jurisdiction under an independent contract or as an employee of an independent contractor.

AUTH: 19-3-304, MCA
IMP: HB 517, 1993 Legislature

3. PERS members who have terminated employment during the window and received the incentive and who later return to employment within the same jurisdiction for more than 600 hours in any calendar year will forfeit the retirement incentive. The proposed amendments are necessary to clarify limitations on return to employment and to impose specific reporting requirements on both members and employers if members return to work within the same jurisdiction after taking advantage of the incentive.

Several potential retirees have commented that HB 517 restricts only "employment" and not work performed under a "personal service contract." This is only true if the services are provided by an "independent contractor." The Board intends to apply the 600 hour limitation only to employment situations, including services provided under "personal service" contracts which fail the independent contractor test. To clairfy the original meaning, the term "personal service contract" has been

dropped and the test for determining whether a true independent contractor relationship has been created is added. Whenever an employer/employee relationship exists under law, the 600 hour limitation on return to employment within the same jurisdiction will be in effect.

The amendment to 2.43.453 includes additional information which will be necessary for the department and the division to assess the full financial impact of the retirement incentive program on state and university system operations.

4. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted no later than October 18, 1993 to:

Mark Cress, Administrator
Public Employees' Retirement Division
1712 Ninth Avenue,
Helena, Montana 59620

5. Keith McCallum, administrative specialist for the Public Employees' Retirement Division, has been designated to preside over and conduct the hearing.

By: Terry Teichrow
Terry Teichrow, President
Public Employees' Retirement Board

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Certified to the Secretary of State on September 3, 1993.

BEFORE THE BOARD OF THE
STATE COMPENSATION INSURANCE FUND
OF THE STATE OF MONTANA

In the matter of the proposed adoption of new Rule I to establish criteria for assessing a premium surcharge) NOTICE OF PUBLIC HEARING

TO: All Interested Persons:

1. On October 6, 1993, the State Compensation Insurance Fund will hold a public hearing at 2:00 p.m., in Room 160 of the Mitchell Building, 125 Roberts, Helena, Montana, to consider the proposed adoption of new Rule I relating to a premium surcharge.

2. The State Compensation Insurance Fund will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you requst an accommodation, contact the State Fund no later than 5:00 p.m., September 29, 1993, to advise us of the nature of the accommodation that you need. Please contact the State Fund, Attn: Ms. Dwan Ford, P.O. Box 4759, Helena, MT 59604; telephone (406) 444-6480; TDD (406) 444-5971; fax (406) 444-6555.

3. The proposed new rule provides as follows:

RULE I. PREMIUM SURCHARGE (1) With board approval, the state fund will annually implement a surcharge of 20 percent on premium of a high loss policyholder. The surcharge is additional premium payable when regular premium payments are due and will be effective for one full fiscal year following notice to the policyholder. However, if implemented, the initial surcharge effective January 1, 1994 will be in place only until June 30, 1994, and is subject thereafter to annual reevaluation in accordance with these rules. Failure to pay the additional premium will result in cancellation of the policy.

(2) The current policy and any prior policies will be evaluated annually to identify a high loss policyholder for the next fiscal year, except the period January 1, 1994 through June 30, 1994, will be based on an evaluation of data pre-fiscal year 1993 and will occur in the first half of fiscal year 1994.

(3) A policyholder will be subject to the 20 percent additional premium if the policyholder:

(a) has coverage in all or a portion of any of the three most recent complete fiscal years; and

(b) has total earned premium in any of the three fiscal years which exceeds the established minimum premium amount for the respective years; and

(c) will not be assigned an experience modification factor in the future fiscal year (if implemented effective January 1, 1994, an experience modification factor will not be

assigned for the period January 1, 1994 through June 30, 1994); and

(d) one of the following criteria is met:

(i) A policyholder whose earned premium exceeds the minimum premium in all three fiscal years will be subject to 20 percent additional premium if the loss ratio in each of the three fiscal years exceeds a percentage of no less than 50 percent and the combined three year loss ratio exceeds a percentage of no less than 80 percent. The specific percentages to be approved by the board. If the policyholder meets the criteria in (i), the policyholder will not be subject to analysis in (ii) and (iii).

(ii) A policyholder whose earned premium exceeds the minimum premium in only two of any of the three fiscal years will be subject to the 20 percent additional premium if the loss ratio in each of the two fiscal years exceeds a percentage of no less than 100 percent. The specific percentage to be approved by the board. If the policyholder meets the criteria in (ii), the policyholder will not be subject to analysis in (i) or (iii).

(iii) A policyholder whose earned premium exceeds the minimum premium in only one of any of the three fiscal years will be subject to the 20 percent additional premium if the loss ratio in that year exceeds a percentage of no less than 125 percent. The specific percentage to be approved by the board. If the policyholder meets the criteria in (iii), the policyholder will not be subject to analysis in (i) or (ii).

AUTH: Sec. 39-71-2315 and 39-71-2316, MCA.

IMP: Sec. 39-71-2316 and 39-71-2341, MCA

4. This rule is being proposed to implement a 20 percent premium surcharge on high-loss employers as allowed by Senate Bill 163 enacted by the 1993 Legislature. The effective date of this portion of Senate Bill 163 is January 1, 1994. The legislation requires criteria for identifying high-loss employers be established by rule.

The proposed rule excludes from the surcharge identification analysis the experience of any year in which the earned premium of the employer was less than the minimum premium established for that year. This eliminates the impact of a surcharge on a small policyholder for which even one claim involving medical only could result in an excessive loss ratio. The proposed rule also excludes employers who will qualify for an experience modification factor in the future fiscal year as their losses are considered in the experience modification program.

The experience appropriate for identification of a high-loss employer is up to three of the most recent complete fiscal years which is the same time frame evaluated for ratemaking, variable pricing and experience modification. A full three years of experience establishes a meaningful historic pattern. The experience of an employer's active policy as well as any prior policies will be evaluated for the surcharge so as to fully acknowledge an employer's experience with the state fund.

The loss ratio thresholds for an employer with analyzed experience in all three years will be no less than 50 percent in each year and a combined ratio of no less than 80 percent. The higher combined percentage is to eliminate the impact of a surcharge on a policyholder who had one bad accident year but the remainder of the three years have indicated less severe losses. The 80 percent combined percentage is the same percentage which currently qualifies an employer for the equitable rate category.

The loss ratio threshold for an employer with analyzed experience in any two of the three years will be no less than 100 percent in each year. This percentage is higher than the three year percentages which acknowledges experience limited to two years.

The loss ratio threshold for an employer with analyzed experience in any one of the three years will be no less than 125 percent. This percentage is higher than the two year percentage which acknowledges experience limited to one year.

The intent of the rule is for the board to determine annually whether to implement the surcharge for the future fiscal year and if so to establish percentages for that year. The percentages for any year may exceed the thresholds set by the rule.

Since the surcharge rule will be effective for only the last six months of fiscal year 1994, the experience analyzed will be that of fiscal years 1990, 1991 and 1992 and employers assigned an experience modification factor for the last six months of fiscal year 1994 will be excluded from the analyzation process.

5. Interested persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written testimony may be submitted to state fund attorney Nancy Butler, Legal Department, State Compensation Insurance Fund, 5 South Last Chance Gulch, Helena, Montana 59604-4759, no later than 5:00 p.m., October 14, 1993.

6. The State Fund Legal and Underwriting Department Vice Presidents have been designated to preside over and conduct the hearing.

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Rick Hill
Chairman of the Board

Nancy Butler, General Counsel
Rule Reviewer

Certified to the Secretary of State September 3, 1993.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 4.10.206 dealing with licensing for pesticide operators	) NOTICE OF A PROPOSED AMENDMENT of ARM 4.10.206 relating to A Pesticide Operator's License

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On October 18, 1993, the department of agriculture proposes to amend the above mentioned ARM 4.10.206.

2. The rule, as proposed to be amended, appears as follows (new material is underlined, material to be deleted is interlined).

4.10.206 INDIVIDUALS REQUIRING A PESTICIDE OPERATOR'S LICENSE (1) remain the same.

(2) Licensed operators shall be allowed to use and apply only those pesticides that the licensed or certified-licensed applicator he is supervised by is qualified to use and apply. A licensed operator may use general or restricted use pesticides within one hundred (100) miles of the applicator when he is under the direct supervision of a licensed or certified-licensed applicator, respectively. Licensed operators may not apply general or restricted use pesticides beyond one hundred (100) miles of the applicator.

(3) remain the same.

(4) Applicator employees required to become licensed operators shall make application for license on a form approved by the department. The license fee shall be ~~ten~~ twenty-five dollars ~~($10)~~ ($25) per applicant, provided that only the first two operator applicants per applicator business shall have to pay the ~~ten~~ twenty-five dollars ~~($10)~~ ($25) licensing fee. Thereafter, the fee per additional applicant shall be ~~five~~ ten dollars ~~($5)~~ ($10).

Fifteen dollars of the fee for each of the first two operators and $5 of the fee for each additional operator shall be deposited in the state special revenue account as required by 80-8-205, (2), MCA.

(5) through (7) remain the same.

AUTH: 80-8-105, MCA IMP: 80-8-205, MCA

REASON: The proposed amendments are necessary in order to fund in part the waste pesticide and pesticide container collecting disposal and recycling program. The 1993 legislature approved this program and authorized increased fees for pesticide applicators, dealers and operators.

3. Interested persons may submit their written data, views, or arguments concerning these amendments to Gary Gingery, Department of Agriculture, Agricultural Science Division, P.O. Box 200201, Helena, MT 59620-0201, no later than October 15, 1993.

4. If a party 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 Gary Gingery, Department of Agriculture, P.O. Box 200201, Helena, MT 59620-0201, no later than October 15, 1993.

5. If the department receives requests for a public hearing under section 2-4-315, MCA, 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 fewer 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 151, based on the number of pesticide applicators in the state.

Leo A. Giacometto, Director
DEPARTMENT OF AGRICULTURE

Timothy J. Meloy, Attorney
Rule Reviewer
DEPARTMENT OF AGRICULTURE

Certified to the Secretary of State September 1, 1993

BEFORE THE BOARD OF CLINICAL LABORATORY SCIENCE PRACTITIONERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed adoption of new rules pertaining to clinical laboratory science practitioners	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF NEW RULES PERTAINING TO CLINICAL LABORATORY SCIENCE PRACTITIONERS

TO: All Interested Persons:

1. On October 19, 1993, at 9:00 a.m., a public hearing will be held in the conference room of the Professional and Occupational Licensing Bureau, Lower Level, Arcade Building, 111 North Jackson, Helena, Montana, to consider the proposed adoption of new rules pertaining to clinical laboratory science practitioners.

2. The proposed new rules will read as follows:

"I BOARD ORGANIZATION (1) The board of clinical laboratory science practitioners hereby adopts and incorporates the organizational rules of the department of commerce as listed in chapter 1 of this title."

Auth: Sec. 37-34-201, MCA; IMP, Sec. 2-4-201, MCA

"II PROCEDURAL RULES (1) The board of clinical laboratory science practitioners hereby adopts and incorporates the procedural rules of the department of commerce as listed in chapter 2 of this title."

Auth: Sec. 37-34-201, MCA; IMP, Sec. 2-4-201, MCA

"III PUBLIC PARTICIPATION RULES (1) The board of clinical laboratory science practitioners hereby adopts and incorporates by this reference the public participation rules of the department of commerce as listed in chapter 2 of this title."

Auth: Sec. 37-34-201, MCA; IMP, Sec. 2-3-103, MCA

"IV APPLICATIONS FOR LICENSE (1) An application for a license as a clinical laboratory science practitioner shall be submitted to the board office in Helena on application forms provided by the board. Completed applications shall be examined for compliance with the board's statutes and rules. The information requirements which appear on the application form generally include applicant's educational history, work experience, and verification of license in other states, if applicable.

(2) Every application shall be typed or written in ink, signed and accompanied by the appropriate application fee and by such evidence, statements or documents as therein required.

(3) Upon receipt of a completed application for licensure, the Board shall notify the applicant, in writing, of the results of the evaluation of his application within 30 days.

(4) Approved applications and all documents filed in support thereof shall be retained by the board with the provision that the board may permit such documents to be withdrawn upon substitution of a true copy.

(5) An incomplete application shall be returned to the applicant with a statement regarding incomplete portions. The applicant must correct any deficiencies and re-submit the application. Failure to re-submit the application shall be treated as a voluntary withdrawal of the application.

(6) The board may request such additional information or clarification of information provided in the application as it deems reasonably necessary."

Auth: Sec. 37-34-201, MCA; IMP, Sec. 37-34-201, 37-34-305, MCA

"V LICENSING BY RECIPROCITY (1) In addition to meeting the requirements of section 37-34-304, MCA, an applicant for licensure by reciprocity must comply with the following:

(a) The applicant must cause his original state, territory or country of licensure to provide the board with official written verification of current licensure on an official form; and

(b) the candidate must complete and file with the board a notarized application for licensure by reciprocity provided by the board, and the required application fee."

Auth: Sec. 37-34-201, MCA; IMP, Sec. 37-34-304, MCA

"VI FEES (1) Fees shall be transmitted by check payable to the board of clinical laboratory science practitioners. The board assumes no responsibility for loss in transit of such remittances. Applicants not submitting the proper fees will be notified by the department. Fees are non-refundable.

(2) The fees shall be as follows:

(a)	original application fee:	
(i)	clinical laboratory scientist	$90.00
(ii)	clinical laboratory specialist	90.00
(iii)	clinical laboratory technician	90.00
(b)	temporary license fee	100.00
(c)	renewal fee	30.00
(d)	late renewal fee (in addition to renewal fee)	30.00
(e)	reciprocity fee	75.00
(f)	duplicate license fee	15.00

Auth: Sec. 37-34-201, MCA; IMP, Sec.37-34-201, MCA;

"VII RENEWAL (1) All clinical laboratory science practitioners' licenses will expire on May 1 of each year, commencing in the year 1995. A renewal notice will be sent by the board to each license holder to the last address in the board's files. Failure to receive such notice shall not relieve the license holder of his obligation to pay renewal fees in such a manner that they are received by the department

on or before the renewal date. All licensees must submit the proper renewal fee and any other forms or documents required by the board.

(2) A renewed license shall be valid for one year following the expiration date of the previously held license/certificate.

(3) Any licensee who fails to pay renewal fees in such a manner that they are received by the department on or before the renewal date shall pay a late renewal fee. Any person failing to renew a license within 45 days of the expiration date will be considered to have forfeited the license. Thereafter, the individual shall be treated as a new applicant for licensure, and shall be required to comply with all statutes and rules relating to new applicants for a license."

Auth: Sec. 37-34-201, MCA; IMP, Sec. 37-34-305, MCA

"VIII MINIMUM STANDARDS FOR LICENSURE (1) In addition to the requirements of section 37-34-303, MCA, applicants for licensure shall meet the following additional qualifications:

(a) Applicants for a license as a clinical laboratory scientist must have graduated from an accredited college or university with a baccalaureate degree with at least 36 semester or 54 quarter hours in the physical and biological sciences. The applicant must also have passed a generalists examination offered by either the NCA (national certification agency for medical laboratory personnel) or the ASCP (American society of clinical pathologists).

(b) Applicants for a license as a clinical laboratory specialist must have graduated from an accredited college or university with a baccalaureate degree with at least 36 semester or 54 quarter hours in the physical and biological sciences. The applicant must also have passed a specialist examination offered by either the NCA (national certification agency for medical laboratory personnel), ASCP (American society of clinical pathologists) or the ASM (American society of microbiologists). The following are areas of clinical laboratory science for which the board will grant a specialist's license:

(i) clinical chemistry;
(ii) hematology;
(iii) microbiology;
(iv) cytology;
(v) immunohematology; and
(vi) cytogenetics.

(c) Applicants for a license as a clinical laboratory technician must have graduated with an associate degree or possess 60 semester or 90 quarter hours in a science-related discipline, or completed a military medical laboratory training program of at least 12 months in duration. The applicant must also have passed a technician examination offered by either the NCA (national certification agency for medical laboratory personnel), ASCP (American society of

clinical pathologists), or the AMT (American medical technologists)."

Auth: Sec. 37-34-201, MCA; IMP, Sec. 37-34-303, MCA

"IX UNPROFESSIONAL CONDUCT For the purpose of implementing the provisions of section 37-34-306, MCA, the board defines "unprofessional conduct" as follows:

(1) resorting to fraud, misrepresentation or deceit in obtaining a license;

(2) aiding, abetting, assisting, or hiring an individual to violate or circumvent any of the laws relating to licensure under Title 37, chapter 34, MCA.

(3) having a clinical laboratory science or related license denied, suspended, revoked, placed on probation, or voluntarily surrendered in another jurisdiction;

(4) pleading guilty to or having been found guilty of a crime that relates adversely to the licensee's practice of clinical laboratory science or to the ability of the licensee to practice clinical laboratory science;

(5) pleading guilty to or having been found guilty of a crime involving fraud, deceit, theft, or other deception;

(6) violation of a disciplinary order of the board;

(7) failure to report to the board facts known to the licensed individual regarding the unlicensed or otherwise illegal practice of clinical laboratory science in the state of Montana.

(8) failure to cooperate with an investigation by staff for the board;

(9) practice beyond the scope of practice encompassed by the license;

(10) failure by a licensed supervisor of a clinical laboratory technician to be accessible at all times that testing is being performed by the technician in order to provide on site, telephonic, or electronic consultation.

(11) assault or abuse of a patient;

(12) violating the confidentiality of information or knowledge concerning a patient;

(13) inaccurately recording, falsifying or otherwise altering any laboratory test."

Auth: Sec. 37-34-201, MCA; IMP, Sec. 37-34-306, MCA

REASON: These rules are being proposed pursuant to the newly enacted authority of 37-34-101, et seq., MCA, as mandated by the 1993 Legislature. The fees are being set commensurate with program area costs.

3. 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 Board of Clinical Laboratory Science Practitioners, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513, to be received no later than 5:00 p.m., October 18, 1993.

4. Lance L. Melton, attorney, has been designated to preside over and conduct the hearing.

BOARD OF CLINICAL LABORATORY
SCIENCE PRACTITIONERS
JoANN SCHNEIDER, CHAIRMAN

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

_____
ROBERT P. VERDON, RULE REVIEWER

Certified to the Secretary of State, September 3, 1993.

BEFORE THE BOARD OF OUTFITTERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of rules pertaining to outfitter operations plans and conduct of outfitters and guides, and the proposed adoption of a rule pertaining to unprofessional conduct	))))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT AND ADOPTION OF RULES PERTAINING TO THE OUTFITTING AND GUIDING INDUSTRY

TO: All Interested Persons:

1. On October 8, 1993, at 9:00 a.m., a public hearing will be held in the conference room of the Professional and Occupational Licensing Bureau, Lower Level, Arcade Building, 111 North Jackson, Helena, Montana, to consider the proposed amendment and adoption of rules pertaining to the outfitting and guiding industry.

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

"8.39.504 LICENSURE--APPROVED OUTFITTER OPERATIONS PLAN (1) through (2) will remain the same.

(3) In order to determine if the intended use will cause a conflict with existing use the board may serve notice to the public, the Montana department of fish, wildlife, and parks administrative offices, and federal and state land management agencies in the area of intended use for the purpose of soliciting comments. ~~The determination by the board shall be based on comments received.~~ The board shall consider any comments received in making a final determination on whether to approve an operations plan.

(4) through (13) will remain the same."

Auth: Sec. 37-1-131, 37-47-201, MCA; IMP, Sec. 37-47-201, 37-47-301, 37-47-302, 37-47-304, 37-47-307, 37-47-308, MCA

REASON: This amendment is being proposed so that the board can reclaim the authority of regulating the outfitters under this provision rather than delegating this authority to other agencies and to the public.

"8.39.701 CONDUCT--STANDARDS OF OUTFITTER AND PROFESSIONAL GUIDE (1) through (1)(g) will remain the same.

(h) shall certify ~~only those nonresidents he or she intends to provide the functions of an outfitter for, as defined in section 37-47-101(5), MCA, definition of outfitter, and from whom he or she has received a full deposit as listed in his or her outfitter's printed materials, as required by ARM 8.39.702(1)~~; a nonresident for a license only if:

(i) the outfitter intends and does direct the nonresident's hunting and advises the applicant of game and trespass laws of the state; and

(ii) the outfitter has individually received a full deposit from the nonresident as listed in his or her outfitter's printed materials, as required by ARM 8.39.702;

(i) through (s) will remain the same."

Auth: Sec. 37-1-131, 37-47-201, MCA; IMP, Sec. 37-47-201, 37-47-301, 37-47-302, 37-47-341, 37-47-402, 37-47-404, MCA

REASON: This amendment will bring the conduct requirements into line with the requirements for certification of a non-resident hunter for a big game license.

"8.39.702 CONDUCT--ADDITIONAL REQUIRED OUTFITTER PROCEDURES (1) Outfitters or an authorized agent shall furnish clients with a current and complete rate schedule, which shall include all charges and the mode of payment acceptable, a deposit policy, and deposit refund policy, all in writing, for services offered. ~~The outfitter shall advise the client in writing of any differences in rates or policies from those published.~~ After the outfitter receives and accepts the deposit from the client, the outfitter shall not change the rates and/or policies from those published without the written consent of the client."

(2) and (3) will remain the same."

Auth: Sec. 37-1-131, 37-47-201, MCA; IMP, Sec. 37-47-201, 37-47-301, MCA

REASON: This amendment is necessary to better protect the public from having a last minute change imposed on them after a substantial investment of time and money. The current rule allows an outfitter to change the terms without the client's consent at any time.

3. The proposed new rule will read as follows:

"I MISCONDUCT Misconduct, for purposes of defining subsection (9) of section 37-47-341, MCA, is determined by the board to mean conduct of either a licensed outfitter or licensed professional guide which fails to conform to the accepted standards of the outfitting and guiding profession and which could jeopardize the health, safety and welfare of the public, and shall include the following:

(1) any violation of ARM sections 8.39.701 through 8.39.707;

(2) failure to account, in records submitted to the board with the outfitter's renewal application, for every client certified under the set aside license as provided in section 87-2-511, MCA;

(3) use of the set aside license for purposes of a drop camp in which the outfitter does not provide personal outfitting and/or guiding services to the client;

(4) failure to adequately provide for a client's safety;

(5) assault or abuse of a client;

(6) failure to cooperate with a board-authorized investigation;

(7) resorting to fraud, misrepresentation or deceit in taking the licensing examination or in obtaining a license;

(8) aiding, abetting, assisting, or hiring an individual to violate or circumvent any of the laws relating to licensure under Title 37, chapter 47, MCA.

(9) delegation of functions to a guide that are restricted to the practice of an outfitter;

(10) failure to provide adequate supervision of a guide;

(11) acting beyond the scope of activities for which the individual is licensed;

(12) having hunting or fishing privileges suspended, revoked, placed on probation, or voluntarily surrendered in the state of Montana, or any other jurisdiction;

(13) having a license to act as an outfitter or guide denied, suspended, revoked, placed on probation, or voluntarily surrendered in another jurisdiction;

(14) pleading guilty to or having been found guilty of a crime that relates adversely to the licensee's practice of outfitting or to the ability of the licensee to practice outfitting;

(15) pleading guilty to or having been found guilty of a crime involving fraud, deceit, theft, or other deception;

(16) violation of a disciplinary order of the board;

(17) failure to properly license a guide in accordance with ARM 8.39.505; and

(18) failure to report to the board facts known to the licensed individual regarding the unlicensed or otherwise illegal practice of outfitting or guiding in the state of Montana."

Auth: Sec. 37-47-201, MCA; IMP, Sec. 37-47-341, MCA

REASON: This rule defines misconduct in compliance with statutory amendments of section 37-47-341, MCA, enacted by the 1993 Legislature.

4. Interested persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Outfitters, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513, to be received no later than 5:00 p.m., October 14, 1993.

5. Lance L. Melton, attorney, has been designated to preside over and conduct the hearing.

BOARD OF OUTFITTERS
IRVING L. "MAX" CHASE, CHAIRMAN

Robert P. Verdon
ROBERT P. VERDON
Rule Reviewer

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, September 3, 1993.

BEFORE THE BOARD OF PHARMACY
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of a rule pertaining to fees and the proposed adoption of new rules pertaining to out-of-state mail service pharmacies	NOTICE OF PROPOSED AMENDMENT OF 8.40.404 FEE SCHEDULE AND THE PROPOSED ADOPTION OF NEW RULES PERTAINING TO OUT-OF-STATE MAIL SERVICE PHARMACIES

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On October 16, 1993, the Board of Pharmacy proposes to amend and adopt the above-stated rules.

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

"8.40.404 FEE SCHEDULE (1) through (17) will remain the same.

(18) Out-of-state mail service pharmacy initial license	200.00
(19) Out-of-state mail service pharmacy renewal"	100.00

Auth: Sec. 37-1-134, 37-7-201, 50-32-103, MCA; IMP, Sec. 37-1-134, 37-7-201, 37-7-302, 37-7-303, 37-7-321, 37-7-703, MCA

REASON: The above-mentioned fees are being added to make them commensurate with program area costs since the implementation of 37-7-701 through 37-7-711, MCA, amended in the 1993 Legislature adding out-of-state mail service pharmacies to the programs administered by the Board of Pharmacy.

3. The proposed new rules will read as follows:

"I LICENSURE OF OUT-OF-STATE MAIL SERVICE PHARMACIES (1) No out-of-state pharmacy shall ship, mail, or deliver prescription drugs and/or devices to a patient in this state unless licensed by the Montana Board of Pharmacy."

Auth: Sec. 37-7-201, MCA; IMP, Sec. 37-7-703, MCA

"II AGENT OF RECORD (1) Each out-of-state mail service pharmacy that ships, mails, or delivers prescription drugs and/or devices to a patient in the state of Montana shall designate a resident agent in Montana for service of process.

(2) Any such out-of-state mail service pharmacy that does not so designate a registered agent and that ships, mails, or delivers prescription drugs and/or devices in the state of Montana shall be deemed an appointment by such out-of-state mail service pharmacy of the secretary of state to be its true and lawful attorney, upon whom may be served all legal process in any action or proceeding against such pharmacy growing out of or arising from such delivery.

(3) A copy of any such service of process shall be mailed to the out-of-state mail service pharmacy by the complaining party by certified mail, return receipt requested, postage prepaid, at the address of such out-of-state mail service pharmacy as designated on the pharmacy's application for licensure in this state.

(4) If any such pharmacy is not licensed in this state, service on the secretary of state of Montana only shall be sufficient service."

Auth: Sec. 37-7-201, MCA; IMP, Sec. 37-7-703, MCA

"III CONDITIONS OF LICENSURE (1) As conditions of licensure, the out-of-state mail service pharmacy must comply with the following:

(a) be registered in this state as a foreign corporation;

(b) be licensed and in good standing in the state of Montana;

(c) maintain, in readily retrievable form, records of legend drugs and/or devices dispensed to Montana patients;

(d) supply upon request, all information needed by the Montana board of pharmacy to carry out the board's responsibilities under the statutes and regulations pertaining to out-of-state mail service pharmacies;

(e) maintain pharmacy hours that permit the timely dispensing of drugs to Montana patients and provide reasonable access for the Montana patients to consult with a licensed pharmacist about such patients' medications.

(f) Provide toll-free telephone communication consultation between a Montana patient and a pharmacist at the pharmacy who has access to the patient's records, and ensure that said telephone number(s) will be placed upon the label affixed to each legend drug container."

Auth: Sec. 37-7-201, MCA; IMP, Sec. 2-18-704, 37-7-701, 37-7-702, 37-7-703, 37-7-704, 37-7-706, MCA

"IV COMPLIANCE (1) Each out-of-state mail service pharmacy shall comply with the following:

(a) All statutory and regulatory requirements of the state of Montana for controlled substances, including those that are different from federal law or regulation, unless compliance would violate the pharmacy drug laws or regulations of the state in which the pharmacy is located.

(b) All statutory and regulatory requirements of the state of Montana regarding drug product selection laws, unless compliance would violate the laws or regulations of the state in which the pharmacy is located.

(c) Labeling of all prescriptions dispensed, to include but not be limited to identification of the product and quantity dispensed.

(d) All the statutory and regulatory requirements of the state of Montana for dispensing prescriptions in accordance with the quantities indicated by the prescriber, unless compliance would violate laws or regulations of the state in which the pharmacy is located."

Auth: Sec. 37-7-201, MCA; IMP, Sec. 37-7-701, 37-7-703, MCA

"V POLICY AND PROCEDURE MANUAL (1) Each out-of-state mail service pharmacy shall develop and provide the resident board of pharmacy with a policy and procedure manual that sets forth:

(a) Normal delivery protocols and times;

(b) The procedure to be followed if the patient's medication is not available at the out-of-state mail service pharmacy, or if delivery will be delayed beyond the normal delivery time;

(c) The procedure to be followed upon receipt of a prescription for an acute illness, which policy shall include a procedure for delivery of the medication to the patient from the nonresident pharmacy at the earliest possible time (i.e., courier delivery), or an alternative that assures the patient the opportunity to obtain the medication at the earliest possible time.

(d) The procedure to be followed when the out-of-state mail service pharmacy is advised that the patient's medication has not been received within the normal delivery time and that the patient is out of medication and requires interim dosage until mailed prescription drugs become available."

Auth: Sec. 37-7-201, MCA; IMP, Sec. 37-7-703, MCA

"VI DISCIPLINARY ACTION Except in emergencies that constitute an immediate threat to public health and require prompt action by the board, the Montana board of pharmacy shall file a complaint against any out-of-state mail service pharmacy that violates any statute or regulation of Montana with the board in which the out-of-state mail service pharmacy is located. If the board in the state in which the out-of-state mail service pharmacy is based fails to resolve the violation complained of within a reasonable time, (not less than ninety days from the date that the complaint is filed), disciplinary proceedings may be instituted in Montana before the board."

Auth: Sec. 37-7-201, MCA; IMP, Sec. 37-7-703, 37-7-704, 37-7-711, MCA

"VII REGISTRATION OF PHARMACIST IN CHARGE OF DISPENSING TO MONTANA (1) Each out-of-state mail service pharmacy that ships, mails, or delivers prescription drugs and/or devices to a patient in the state of Montana shall identify a pharmacist in charge of dispensing prescriptions for shipment to Montana. Each pharmacist so identified shall meet the following requirements:

(a) be licensed in good standing in the state in which the out-of-state mail service pharmacy is located;

(b) be properly listed on the application form prescribed by the board;

(c) comply with all applicable Montana laws and rules;

(d) notify the Montana board promptly of any relevant changes in employment or address, etc.;

(e) notify the Montana board promptly of any disciplinary actions initiated and/or finalized against the pharmacist's license."

Auth: Sec. 37-7-201, MCA: IMP, Sec. 37-7-703, MCA

"VIII USE OF PHARMACY TECHNICIANS BY OUT-OF-STATE MAIL SERVICE PHARMACIES (1) Any application for out-of-state mail service pharmacy licensure from a facility located in a state which does not regulate the use of pharmacy technicians shall not be required to include information on supervisor to technicians ratios, or submit a pharmacy technicians utilization plan for approval by the Montana board.

(2) Any application for out-of-state mail service pharmacy licensure from a facility located in a state which does regulate the use of pharmacy technicians shall provide information on the supervisor to technician ratio allowed in the resident state, and:

(a) if the ratio is greater than the maximum ratio allowed for in-state retail pharmacies (2:1 if engaged in intravenous admixture and other sterile product preparation, filling of unit dose cassettes, prepackaging, or bulk compounding), provide a copy of the pharmacy technician utilization plan for board approval; or

(b) if the ratio is not greater than the maximum ratio allowed for in-state retail pharmacies, provide verification of the facility's use of this ratio."

Auth: Sec. 37-7-201, MCA; IMP, Sec. 37-7-703, MCA

REASON: The proposed rules will implement the sections in Title 37, chapter 7 that deal with out-of-state mail service pharmacies, as mandated by the 1991 Legislature and amended by the 1993 Legislature.

4. Interested persons may present their data, views or arguments concerning the proposed amendment and adoptions in writing to the Board of Pharmacy, Lower Level, Arcade Building, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513, to be received no later than 5:00 p.m., October 14, 1993.

5. If a person who is directly affected by the proposed amendment and adoptions wishes to present his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request along with any comments he has to the Board of Pharmacy, Lower Level, Arcade Building, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0407, to be received no later than 5:00 p.m., October 14, 1993.

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

the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 117 based on the 1166 licensees in Montana.

BOARD OF PHARMACY
ROBERT KELLEY, PRESIDENT

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

_____
ROBERT P. VERDON, RULE REVIEWER

Certified to the Secretary of State, September 3, 1993.

BEFORE THE MONTANA LOTTERY COMMISSION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of a rule pertaining to retailer commission	NOTICE OF THE PROPOSED AMENDMENT OF 8.127.407 RETAILER COMMISSION NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On October 16, 1993, the Montana Lottery Commission proposes to amend the above-stated rule.

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

"8.127.407 RETAILER COMMISSION (1) will remain the same.

(a) Each retailer is assigned a weekly instant ticket sales base created by using his own average weekly instant and/or on-line sales over at least six months.

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

Auth: Sec. 23-7-202, 23-7-301, MCA; IMP, Sec. 23-7-301, MCA

REASON: This rule is being amended to use instant and/or on-line sales when establishing retailers' weekly sales bases.

3. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Montana Lottery Commission, 2525 North Montana, Helena, Montana 59620, to be received no later than 5:00 p.m., October 14, 1993.

4. If a person who is directly affected by the proposed amendment wishes to present his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request along with any comments he has to the Montana Lottery Commission, 2525 North Montana, Helena, Montana 59620, to be received no later than 5:00 p.m., October 14, 1993.

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

percent of those persons directly affected has been determined to be 80 based on the 797 licensees in Montana.

MONTANA LOTTERY COMMISSION
BECKY ERICKSON, CHAIRMAN

ANNIE M. BARTOS
RULE REVIEWER

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

Certified to the Secretary of State, September 3, 1993.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of Rules 11.7.601, 11.7.602, and 11.7.608, and the repeal of 11.7.611 pertaining to foster care support services.	NOTICE OF PROPOSED AMENDMENT OF RULES 11.7.601, 11.7.602, AND 11.7.608, AND THE REPEAL OF 11.7.611 PERTAINING TO FOSTER CARE SUPPORT SERVICES

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On October 28, 1993, the Department of Family Services proposes to amend Rules 11.7.601, 11.7.602, and 11.7.608, and to repeal 11.7.611, pertaining to foster care support services.

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

11.7.601 FOSTER CARE SUPPORT SERVICES, PURPOSE The purpose of this subchapter is to establish eligibility criteria for foster care support services. Payment for foster care support services may be made on behalf of foster children who require diapers, clothing, respite care, ~~dietary aids, transportation,~~ and other specific special services which are not available from other sources.

AUTH: Sec. 41-3-1103 and 52-2-111, MCA.
IMP: Sec. 41-3-1103 and 52-2-111, MCA.

11.7.602 FOSTER CARE SUPPORT SERVICES, DEFINITIONS For the purposes of this rule, the following definitions apply:

Subsection (1) remains the same.

(2) "Foster care support services" means a diaper allowance, clothing allowance, respite care allowance, ~~diet support allowance~~ or other special need allowance paid on behalf of a foster child who has a documented need for such foster care support services.

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

(5) "Supplemental services allowance" means payments made on behalf of a foster child who requires ~~medically or~~ educationally related services or equipment which is not available from any other source. Special needs include ~~transportation, orthopedic services and devices, eye glasses, and~~ any ~~other~~ documented special requirements necessary for the foster child, subject to the conditions and limitations set forth in ARM 11.7.608.

Subsection (6) remains the same.

~~(7) "Diet support allowance" means payments made on behalf of a foster child who requires special dietary supplements, aids or formulas to maintain the health of the child. Diet support allowances are subject to the conditions and limitations set forth in ARM 11.7.611.~~

AUTH: Sec. 41-3-1103 and 52-2-111, MCA.
IMP: Sec. 41-3-1103 and 52-2-111, MCA.

11.7.608 FOSTER CARE SUPPORT SERVICES, SUPPLEMENTAL SERVICES ALLOWANCE Subsections (1) and (2) remain the same.

(3) A supplemental services allowance for transportation costs will be authorized only for foster children who must travel to secure necessary ~~medical services or~~ special educational or training services.

(a) To be eligible for reimbursement for transportation costs, the following requirements must be met:

(i) travel one-way must be ten or more miles; and

(ii) transportation is necessary to obtain services not reasonably available in closer proximity to foster parents' residence; and

(iii) transportation is approved in advance by the department.

~~(b) Transportation shall be by the least expensive available means suitable to the foster child's medical needs.~~

~~(4) Supplemental services allowances for orthopedic or orthodontic services shall be paid at a rate not to exceed the medicaid rate for such services.~~

~~(5)~~ (4) ~~All other s~~Supplemental services allowances shall be limited to the lesser of:

(a) actual costs; or

(b) $87.50 per month per child.

AUTH: Sec. 41-3-1103 and 52-2-111, MCA.
IMP: Sec. 41-3-1103 and 52-2-111, MCA.

3. The Rule 11.7.611 FOSTER CARE SUPPORT SERVICES, DIET SUPPORT ALLOWANCE as proposed to be repealed is on page 11-326 of the Administrative Rules of Montana.

AUTH: Sec. 41-3-1103, and 52-2-111, MCA.
IMP: Sec. 41-3-1103, and 52-2-111, MCA.

4. The proposed amendments and repeal of rules in this notice are intended to delete provisions obligating department-funded foster care support services so that such services may be funded through the Montana Medicaid program. As long as the department retains primary responsibility for these support services under the rules proposed to be amended and repealed, Medicaid funding will be unavailable.

5. The proposed amendments and repeal of rules will be effective for services provided on or after July 1, 1993, so that coverage for services under Montana Medicaid may be retroactive to the beginning of the fiscal year. No adverse effect upon providers or recipients is anticipated under this rule-making.

6. Interested persons may submit their data, views or arguments to the proposed amendments and repeal in writing to the Office of Legal Affairs, Department of Family Services, 48 North

Last Chance Gulch, P.O. Box 8005, Helena, Montana 59604, no later than October 17, 1993.

7. If a person who is directly affected by the proposed amendments and repeal wishes to express data, views and arguments orally or in writing at a public hearing, that person must make a written request for a public hearing and submit such request, along with any written comments, to the Office of Legal Affairs, Department of Family Services, 48 North Last Chance Gulch, P.O. Box 8005, Helena, Montana 59604, no later than October 17, 1993.

8. If the Department of Family Services receives requests for a public hearing on the proposed amendments and repeal 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 are directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

DEPARTMENT OF FAMILY SERVICES

Hank Hudson, Director

John Melcher, Rule Reviewer

Certified to the Secretary of State, September 3, 1993.

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

In the matter of the amendment of rules 16.14.501, 506, 521, 540, and 701, dealing with municipal solid waste management	))))	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES (Solid Waste)

To: All Interested Persons

1. On October 6, 1993, at 1:00 p.m., the department will hold a public hearing in Room C209, Side 2, of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the above-captioned rules.

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

16.14.501 PURPOSE AND APPLICABILITY (1)-(3) Remain the same.

(4) The effective dates of ARM 16.14.506 and 16.14.521(1)(e) and (g) are extended until April 9, 1994, as they apply to existing landfill units and lateral extensions to existing units that meet the following requirements:

(a) the unit disposed of less than 100 tons per day of solid waste between October 9, 1991, and October 9, 1992;

(b) the unit does not dispose of more than an average per month of 100 tons per day of solid waste between October 9, 1993 and April 9, 1994; and

(c) the unit is not on the national priorities list (NPL) as found in 40 CFR, part 300, appendix B.

(5) Existing MSWLF units that meet the requirements for the small community exemption found in ARM 16.14.506(16) or the requirements of (4) above that receive waste after October 9, 1993, and stop receiving waste prior to April 9, 1994, are only subject to the final cover requirements found in ARM 16.14.530. Final cover must be installed by October 9, 1994. Owners or operators that fail to complete cover installation by October 9, 1994, are subject to all of the requirements of this subchapter unless otherwise specified.

AUTH: 75-10-204, MCA; IMP: 75-10-204, MCA

16.14.506 DESIGN CRITERIA FOR LANDFILLS (1)-(16) Remain the same.

(17) The requirements of this rule are effective October 9, 1993, except for the existing landfill units and lateral extensions to existing units defined in ARM 16.14.501(4), which must comply by April 9, 1994.

AUTH: 75-10-204, MCA; IMP: 75-10-204, MCA

16.14.521 SPECIFIC OPERATIONAL AND MAINTENANCE REQUIREMENTS -- SOLID WASTE MANAGEMENT SYSTEMS (1)-(3) Remain the same.

(4) Subsections (1)(e) and (g) of this rule are effective October 9, 1993, except that the application of those subsections to the existing landfill units and lateral extensions to existing units defined in ARM 16.14.501(4) is delayed until April 9, 1994.

(4) Remains the same but is renumbered (5).

AUTH: 75-10-204, MCA; IMP: 75-10-204, MCA

16.14.540 FINANCIAL ASSURANCE REQUIREMENTS FOR CLASS II LANDFILLS (1)(a) Remains the same.

(b) The requirements of this rule are effective April 9, ~~1994~~ 1995, except for units meeting the requirements of ARM 16.14.506(16), which must comply by October 9, 1995.

(2)-(4) Remain the same.

(5)(a)(i)-(iv) Remain the same.

(v) The initial payment into the trust fund must be made before the initial receipt of waste or before the applicable effective date of this section ~~(April 9, 1994)~~ as specified in (1)(b) above, whichever is later, in the case of closure and post-closure care, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of ARM 16.14.708.

(vi)-(viii) Remain the same.

(b) A surety bond may be used to guarantee payment or performance under the following circumstances:

(i) An owner or operator may demonstrate financial assurance for closure or post-closure care by obtaining a payment or performance surety bond which conforms to the requirements of this paragraph. An owner or operator may demonstrate financial assurance for corrective action by obtaining a performance bond which conforms to the requirements of this paragraph. The bond must be effective before the initial receipt of waste or before the applicable effective date of this section, ~~(April 9, 1994)~~ as specified in (1)(b) above, whichever is later, in the case of closure and post-closure care, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of ARM 16.14.708. The owner or operator must submit a copy of the bond to the department and place a copy in the operating record. The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on federal bonds in Circular 570 of the U.S. department of the treasury and licensed to do business in Montana.

(ii)-(vii) Remain the same.

(c)-(h) Remain the same.

AUTH: 75-10-204, MCA; IMP: 75-10-204, MCA

16.14.701 PURPOSE AND APPLICABILITY (1) Remains the same.

(2) Compliance with the requirements of this subchapter must be implemented according to the following schedule:

(a)-(b) Remain the same.

(c) Existing Class II disposal units and lateral expansions that serve a geographic area with a population of 4,999 persons or less, except those meeting the requirements of ARM 16.14.506(16), must comply with this subchapter according to the following schedule:

(i)-(iii) Remain the same.

(d) Owners and operators of all MSWLF units that meet the conditions of ARM 16.14.506(16) must comply with the requirements of this subchapter according to the following schedule:

(i) All MSWLF units less than two miles from a drinking water intake (surface or subsurface) must be in compliance and have commenced ground water monitoring by October 9, 1995; and

(ii) All MSWLF units greater than two miles from a drinking water intake (surface or subsurface) must be in compliance and have commenced ground water monitoring by October 9, 1996.

AUTH: 75-10-204, MCA; IMP: 75-10-204, 75-10-207, MCA

3. The department finds it necessary to propose these amendments to the rules in order to keep the effective date of these rules in line with the proposed delayed effective date of the U.S. Environmental Protection Agency regulations. The proposed rule change will postpone the effective date for existing smaller landfills, and postpone the effective date for financial assurance requirements for all existing landfills to allow EPA to promulgate financial tests.

4. Interested persons may submit their data, views, or arguments concerning the proposed amendments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to F. Patrick Crowley, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than October 15, 1993.

5. Dayna Shepherd has been designated to preside over and conduct the hearing.

ROBERT J. ROBINSON, Director

Certified to the Secretary of State September 3, 1993.

Reviewed by:

Eleanor Parker, DHES Attorney

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

In the matter of proposed amendments of 36.12.202 through 36.12.210, 36.12.212 through 36.12.217, and 36.12.219 through 36.12.230 and the adoption of a new rule pertaining to water right contested case hearings	)))))))	NOTICE OF PUBLIC HEARING

TO: All Interested Persons.

1. On October 19, 1993, at 1:30 P.M. in the Director's Conference Room of the Lee Metcalf Building, the Department of Natural Resources and Conservation, 1520 E. 6th Avenue, Helena, MT 59620, the Board of Natural Resources and Conservation will hold a public hearing to consider the amendment of certain rules and the adoption of a new rule pertaining to the hearing process for water right application contested cases.

2. The proposed amendments provide as follows:

"36.12.202 DEFINITIONS As used in these rules, the following definitions apply:

(1) - (3) remain the same.

(4) " Department" means the department of natural resources and conservation. ~~MCA § 85-2-102(6).~~

(5) "Director" means the director of the department or ~~his~~ the director's designee.

(6) - (10) remain the same.

(11) "Party" means those persons who are applicants, timely objectors, petitioners or permittees under MCA Title 85, chapter 2, parts 3, 4, 5, and 8 and are entitled as of lawful right to a contested case hearing. ~~The term "party" shall include the department when it is acting by and through staff participating in a proceeding. Staff participating in a proceeding shall have the full rights and responsibilities of a party under these rules and shall be bound by ARM 36.12.230.~~

(12) - (15) remain the same.

(16) "Service; serve" means personal service or service by first class United States mail, postage prepaid and addressed to ~~the party at his~~ a person's last known address. ~~An affidavit~~ Proof of service shall be made by the person making such service. Service by mail is complete upon the placing of the item to be served in the mail. Agencies of the state of Montana may also serve by depositing the item to be served with the mail and distribution section, general services division, department of administration.

(17) - (19) remain the same.

AUTH: Sec. 2-4-210, 85-2-113 MCA
IMP: Sec. 2-4-201, 85-2-113 MCA

36.12.203 HEARING EXAMINERS (1) ~~Assignment.~~ When the department orders a contested case hearing, the director shall assign a hearing examiner to hear the case. ~~The hearing examiner shall not simultaneously be an employee of the agency which also assumes either an applicant or objector position to the hearing.~~ The file that is submitted to the hearing examiner, subsequent to the assignment of the case, shall contain ~~only~~ the parties' applications, notices of applications, petitions, objections to the applications, or permits under consideration to be modified or revoked. After reviewing the file, the hearing examiner shall contact the parties and advise them as to the location and time during which a hearing should be held. Except as required under the circumstances of ARM 36.12.232, no hearing shall be scheduled on a Saturday, Sunday or legal holiday.

(2) ~~Duties.~~ Consistent with law, the hearing examiner shall perform the following duties:

(a) - (g) remain the same.

(h) examine witnesses where ~~he~~ the hearing examiner deems it necessary to make a complete record;

(i) - (k) remain the same.

(l) require testimony, upon the motion of a party or upon ~~his~~ the hearing examiner's ~~own~~ motion, to be prefiled in whole or in part when prefiling will expedite the hearing and the interests of the parties will not be prejudiced substantially;

(m) - (n) remain the same.

(o) prepare a proposal for decision or a final order containing findings of fact, conclusions of law and a proposed or final order;

(p) after issuing ~~the~~ a proposal for decision, participate in the final decision-making process;

(q) do all things necessary and proper to the performance of the foregoing; and

(r) as authorized by law and rule, perform such other duties as well as any that may be delegated ~~to him~~ by the director.

AUTH: Sec. 2-4-201, 85-2-113 MCA
IMP: Sec. 2-4-611, 2-4-612, 2-4-621 MCA

36.12.204 COMMENCEMENT OF A CONTESTED CASE A contested case is commenced, subsequent to the assignment of a hearing examiner, by the service of a notice of and order for hearing by the director.

Subsection (1) (a) through (i) remain the same.

(j) a statement advising the parties that communication with the hearings examiner containing obscene, lewd, profane, or abusive language which terrifies, intimidates, threatens, harasses, annoys, or offends the hearing examiner will be returned. Any communication returned shall be conclusively presumed to have not been served or filed with the department

for purposes of these rules.

(2) ~~Service.~~ The notice of and order for hearing shall be served not less than 30 days prior to the hearing unless all parties agree in writing to a shorter notice time period. Provided, however, that a shorter time period may be allowed when the hearing examiner determines, on the basis of the parties' applications and objections to applications, that the parties will not be substantially prejudiced by a shorter time.

(3) When a party is represented by an attorney, service upon the attorney shall constitute service upon the party. (Note: ~~§§~~ (1)(a)(c)(d)(1st sentence (e)(h) of this rule are codified at MCA §2-4-601(2)(a-e).)

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-601 MCA

36.12.205 ~~THE~~ DEFECTIVE NOTICE OF APPLICATION (1) ~~Duty of applicant. Before the notice of application is published, the department shall send a copy of the notice of application to the applicant for his review. The applicant shall have the duty and responsibility at all times to make certain that the information published in the notice of application is correct and conforms with the filed application.~~

~~(2) When republication of the notice of application is necessary. When either during the time of the notice of application is being published or at any subsequent time, the department discovers that the notice of application omits or erroneously describes the period of appropriation or the total amount appropriated (rate of flow or volume); the place of diversion, place of use, purpose of use or place of storage; which are claimed by the applicant in his filed application and which the department determines to be material errors or material omissions, the notice of application shall be republished to correct such material omissions or material errors. The determination of whether an omission or error is material shall be made by the hearing examiner. If the hearing examiner makes the determination that the omissions or errors are not material, the applicant has the discretion to republish the notice of application.~~

~~(3) The defective notice of application and its effect on scheduled hearings.~~ When the notice of application is republished, scheduled hearings shall be continued until the time period for filing objections (as set forth in the republished notice of application) has expired~~,. unless all the parties agree (a) to participate in the scheduled hearings and (b) to waive their right to file objections to the republished notice of application. Regardless of the parties' agreement, when additional timely objections are filed in response to the republished notice of application, the hearing examiner shall hold such hearings as are necessary to allow the additional timely objectors an opportunity to exercise their rights under these rules. Further, upon written request by any additional timely objector, the hearing examiner shall order that transcripts of any hearings (including prehearing~~

~~conferences) held prior to or during the time the notice of application is being republished, be prepared and be made available to the additional timely objector. Except as provided above, no other action shall be taken in the case by the hearing examiner or any final decision-makers until the time period for filing objections (as set forth in the republished notice of application) has expired.~~

~~(4)~~ (2) ~~Cost.~~ The cost of republishing the notice of application shall be paid by the applicant. ~~The cost of preparing and duplicating transcripts for additional timely objector(s) shall be paid by the applicant.~~ However, if the department fails to send a notice of application to the applicant for review ~~as required in subsection 1 of this rule~~, the department shall pay for said costs. No hearings shall be held until the applicant has paid all ~~his~~ costs incurred under this rule.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-105 MCA

36.12.206 REPRESENTATION ~~RIGHT TO COUNSEL~~ (1) Any party may be represented by legal counsel throughout the proceedings in a contested case or an individual may appear on ~~their~~ his/her own behalf. This rule shall not be construed to sanction the unauthorized practice of law. ~~Admission of foreign attorneys, pro hac vice, shall be in accordance with the current Montana statutory law, now codified at MCA §37-61-208.~~

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-105 MCA

36.12.207 INFORMAL DISPOSITION (1) Informal disposition may be made of any contested case or any issue therein at any point in the proceedings by agreed settlement, stipulation or default. ~~Agreed settlements and stipulations shall be served on the hearing examiner. For agreed settlements, the hearing examiner shall prepare a proposal for decision and serve it in the manner provided for the ARM 36.12.228(2). An opportunity to file exceptions shall be afforded to each party within the time limits specified in ARM 36.12.229(1). In the event that the proposal for decision modifies, conditions, limits or denies the agreed settlement without factual basis therefor, the hearing examiner shall, if requested within the 20 day exception period, reconvene the hearing to allow the parties an opportunity to respond and to present evidence and argument on all issues involved. A final order shall be made and issued in the manner provided for in ARM 36.12.229(2).~~ The parties may mutually agree to be bound by the terms of such settlement, stipulation, or default as a private contractual agreement; provided, however, that to the extent such settlement, stipulation or default is based on conditions which the parties agree must be included in any permit to be issued, the parties' agreement shall not be binding on the department. The parties shall submit such proposed conditions to the department for review, but the department shall include

them in the permit only if the conditions are designed to further compliance with the applicable statutory criteria.

(2) Department staff may propose conditions for settlement of a contested case which further compliance with the statutory criteria. Any proposed conditions which are sent to the parties in a contested case shall be accompanied by written notification that agreeing to the proposed condition(s) will not necessarily obviate the need for a hearing.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-603 MCA

36.12.208 DEFAULT (1) A default occurs when a party fails to appear at a hearing or fails to comply with any interlocutory orders of the hearing examiner. Upon default, the defaulting party's claim or interest in the proceeding may be dismissed (with or without prejudice), denied, disregarded or disposed of adverse to ~~him~~ the defaulting party. An applicant ~~shall not be~~ is not relieved of the duty to present evidence to satisfy ~~his~~ the applicant's substantive burden of proof when all objectors to a proceeding default.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-603, 85-2-311 MCA

36.12.209 TIME (1) ~~Computation of time.~~ The time within which an act is to be done as provided in these rules shall be computed by excluding the first day and including the last, except that if the last day be Saturday, Sunday, or a legal holiday, the act may be done on the next succeeding regular business day. When the period of time prescribed or allowed is less than ~~7~~ 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-611 MCA

36.12.210 CONSOLIDATION (1) ~~Authority.~~ Whenever it is determined, ~~before hearing on any contested case, the hearing examiner,~~ either on ~~his~~ the hearing examiner's ~~own~~ motion or upon motion by any party, ~~determines~~ that ~~separate~~ two or more contested cases present substantially the same issues of fact or law~~,~~ that a holding in one case would affect the rights of parties in another case~~,~~ and that the consolidation would not substantially prejudice any party, the hearing examiner may order such cases consolidated for a single hearing on the merits. ~~Parties may also stipulate and agree to such consolidation. Regardless of the discretion otherwise permitted in this rule, in~~ In every case, all objections to a single application shall be consolidated without requirement of order. Applications by the same applicant may be consolidated without requirement of an order.

(2) ~~Notice of order.~~ Following an order for consolidation, the hearing examiner shall serve on all parties a copy of the order for consolidation. The order shall

contain among other things:

(a) a description of the cases for consolidation;

(b) the reasons for consolidation;

(c) notification of a consolidated prehearing conference if one has been requested.

~~(3) Objection to consolidation.~~

~~(a)~~(3)(a) ~~Motion for severence.~~ Any party may object to consolidation by filing, at least 10 days prior to the hearing in the case, a motion for severance from consolidation, setting forth the party's name and address, the title of ~~his~~ the case prior to consolidation, and the reasons for ~~his~~ that party's motion.

(b) ~~Determination.~~ If the hearing examiner finds that conslidaton would prejudice the party, he may, without hearing, order such severence or other relief as he deems necessary.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 85-2-309 MCA

36.12.212 PREHEARING CONFERENCE (1) ~~Purpose.~~ The purpose of the prehearing conference is to simplify the issues to be determined, to fix hearing dates, to obtain stipulations in regard to foundation for testimony or exhibits, to hear and rule upon evidentiary objections to prefiled testimony, to identify the proposed witnesses for each party, to schedule discovery, to discuss the procedure at the hearing, to consider such other matters that may be necessary or advisable, and, if possible, to reach a final settlement without the necessity of further hearing.

(2) ~~Procedure.~~ Upon written request of any party or upon ~~his~~ the hearing examiner's ~~own~~ motion, ~~the hearing examiner may, in his discretion, hold~~ a prehearing conference may be ordered prior to each contested case hearing. The hearing examiner may require the parties to file a prehearing statement prior to the prehearing conference which shall contain such items as the hearing examiner deems necessary to promote a useful prehearing conference. A prehearing conference shall be an informal proceeding conducted expeditiously following written notice to all parties or their attorneys, ~~by the hearing examiner.~~ Agreements on the simplification of issues, amendments, stipulations or other matters may be entered on the record or may be the subject of an order by the hearing examiner. A party who fails (without having made prior arrangements with the hearing examiner) to appear at a prehearing conference shall have waived ~~his~~ the right to object to any matter agreed upon by other parties in attendance at the prehearing conference. Following a prehearing conference, the hearing examiner may issue a procedural order which fixes any dates which are appurtenant to the disposition of the case, and which sets out the procedures to be followed by the parties. The procedural order may include a description of the matters discussed at and the actions taken pursuant to the prehearing conference.

AUTH: 2-4-201, 85-2-113 MCA

IMP: 2-4-611 MCA

36.12.213 MOTIONS TO HEARING EXAMINER (1) Any application to the hearing examiner for an order shall be by motion which, unless made during the hearing, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. Written motions or responses to motions shall first be served on all parties, and then filed with the hearing examiner~~,~~ with a certificate of service attached. A written motion shall give notice to other parties that should they wish to contest the motion they must file a written response with the hearing examiner (after first serving all parties), and that the written response, with ~~an affidavit~~ a certificate of service attached, must be filed within ~~7~~ 10 days after service of the motion. ~~Only motions served and filed in the manner described above shall be considered and ruled upon by the hearing examiner. Improperly filed and served motions shall be promptly dismissed without prejudice.~~ Requests for disqualification of a hearing examiner, prehearing conferences, and subpoenas~~, and continuances~~ are not governed by the requirements of this rule. The hearing examiner may~~, at his discretion,~~ require a hearing or telephone conference call before issuing an order on the motion. All orders on such motions, other than those made during the course of the hearing, shall be in writing, and shall be served upon all parties of record. In ruling on motions where these rules are silent, the hearing examiner shall apply the Montana Rules of Civil Procedure to the extent ~~that he~~ the hearing examiner determines ~~that it~~ is appropriate to do so in order to promote a fair and expeditious proceeding.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-611 MCA

36.12.214 MOTIONS TO THE DIRECTOR (1) ~~Certification of motions to the director.~~ No motions shall be made directly to or be decided by the director subsequent to the assignment of a hearing examiner and prior to the completion and filing of the hearing examiner's proposal for decision except as provided by ARM 36.12.211 or except when the motion is certified to the director by the hearing examiner. Any party may request that a pending motion, or a motion decided adversely to that party by the hearing examiner before or during the course of the hearing be certified by the hearing examiner to the director. In deciding what motions should be certified, the hearing examiner shall consider the following:

(a) and (b) remain the same.

(2) ~~Briefs. The hearing examiner or the~~ The director may require the parties to file briefs before ruling upon a certified motion. Certified motions shall be decided in the manner provided for in ARM 36.12.229(2). Uncertified motions shall be ~~made to~~ ruled upon by the hearing examiner and ~~considered~~ reviewed during the final decision-making process.

AUTH: 2-4-201, 85-2-113 MCA

IMP: 2-4-611 MCA

36.12.215 DISCOVERY (1) ~~Demand.~~ Each party shall, within 10 days of a demand by another party, disclose the following:

(a) and (b) remain the same.

(2) ~~Failure to disclose statements.~~ Any party unreasonably failing upon demand to make disclosure by this rule, may~~, in the discretion of the hearing examiner,~~ be foreclosed from presenting any evidence at the hearing through witnesses not disclosed or through witnesses whose statements are not disclosed.

(3) ~~Requests for admissions.~~ A party may serve upon any other party a written request for the admission of relevant facts or opinions, or of the application of law to relevant facts or opinions, including the genuineness of any document. ~~The request must be served at least 15 days prior to the hearing, and it shall be answered in writing by the party to whom the request is directed within 10 days of the receipt of the request.~~ The written answer shall either admit or deny the truth of the matters contained in the request, or shall make a specific objection thereto. Failure to make a written answer may result in the subject matter of the request being deemed admitted.

~~(4) Motion to hearing examiner for discovery. Upon the motion of a party, the hearing examiner may order discovery of any other relevant material or information. The hearing examiner shall recognize all privileged information or communications which are undiscoverable at law. Upon proper motion made to the hearing examiner, any means of discovery available pursuant to Montana Rules of Civil Procedure (excepting Rule 37(b)(1) and 37 (b)(2)(D) may be allowed provided that such requests can be shown to be needed for the proper presentation of a party's case, are not for the purposes of delay, and the issues or amounts in controversy are significant enough to warrant extensive discovery. Upon the failure of a party to reasonably comply with an order of the hearing examiner made pursuant to this rule, the hearing examiner may make further orders as follows:~~

(4) A demand or request for admission made pursuant to (1) or (3) hereof must be served at least 15 days prior to the hearing, and shall be answered in writing by the party to whom the demand or request is directed within 10 days of the service of the demand or request.

(5) Any means of discovery available pursuant to the Montana Rules of Civil Procedure, excepting Rule 37(b)(1)and 37(b)(2)(D), is allowed provided such discovery is needed for the proper presentation of a parties' case, is not for purposes of delay, and the issues in controversy are significant enough to warrant such discovery. Objection for a demand for discovery may be made by motion to quash, and the form, filing, and disposition of such motion shall be governed by the provisions of ARM 36.12.213. If a party fails to reasonably comply with a proper demand for discovery, the

hearing examiner may:

(a) ~~An~~ order that the subject matter of the order for discovery or any other relevant facts ~~shall~~ be taken as established for the purposes of the case in accordance with the claim of the party requesting the order~~.~~; or

(b) ~~An order refusing~~ refuse to allow the party failing to comply to support or oppose designated claims or defenses, or ~~an order~~ prohibit~~ing~~ ~~him~~ that party from introducing designated matters into evidence.

(6) A demand for other discovery made pursuant to subsection (5) hereof shall be served at least 30 days prior to the hearing; except that such demand may be served less than 30 days prior to the hearing upon showing of good cause.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-602 MCA

36.12.216 DEPOSITIONS TO PRESERVE TESTIMONY (1) Upon the motion of any party, the hearing examiner may order that the testimony of any witness be taken by deposition to preserve ~~his~~ that witness' testimony in the manner prescribed by law for depositions in civil actions~~.~~, which includes the right of other parties to attend the deposition and cross-examine the witness. The motion shall indicate the relevancy and shall make a showing that the witness will be unable or cannot be compelled to attend the hearing or show other good cause. No part of a deposition shall constitute a part of the record unless received in evidence by the hearing examiner.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-602, 2-4-611 MCA

36.12.217 SUBPOENAS (1) Requests for subpoenas for the attendance of witnesses or the production of documents shall be made in writing to the hearing examiner and shall contain a brief statement demonstrating the potential relevance of the testimony or evidence sought and shall identify any documents sought with specificity, and shall name all persons to be subpoenaed.

~~(1) Service of subpoenas.~~

(a) and (b) remain the same.

(c) The person serving the subpoena shall make proof of service by filing the subpoena together with ~~his~~ a ~~affidavit~~ certificate of service with the hearing examiner.

(2) ~~Motion to quash.~~ Upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance therewith, the ~~hearing examiner~~ subpoena may be ~~quash~~ quashed or ~~modify~~ modified ~~the subpoena~~ if ~~he~~ the hearing examiner finds ~~that~~ it is unreasonable or oppressive.

(3) ~~Enforcement.~~ The party seeking the subpoena may seek enforcement of the same by applying to a judge of any district court of the state of Montana for an order to show cause why the subpoena should not be enforced against any witness who fails to obey the subpoena.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-104, 2-4-611 MCA

36.12.219 ~~PARTICIPATION BY~~ UNTIMELY OBJECTORS ~~The hearing examiner may hear testimony and receive exhibits from an untimely objector at the hearing, or allow an untimely objector to note his appearance, or allow an untimely objector to question witnesses, but no untimely objector shall become or be deemed to have become, a party by reason of such participation. Untimely objectors offering testimony or exhibits may be questioned by parties to the proceeding.~~

(1) Untimely objectors do not have the status of parties in a contested case. Such non-parties have no right to participate in the contested case process.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-611 2-4-612 MCA

36.12.220 WITNESSES (1) Any party may be a witness and may present witnesses ~~on his behalf~~ at the hearing. All oral testimony at the hearing shall be under oath or affirmation.

~~(1)~~ (2) ~~Prefiled testimony. The~~ Upon the hearing ~~examiner~~ examiner's motion or, upon the motion of a party, ~~or upon his own motion,~~ the hearing examiner may order that the testimony to be given upon direct examination by experts or other witnesses shall be prepared in advance in either question and answer or narrative format. Such prefiled testimony shall be served upon the hearing examiner and all parties at least 7 days prior to the first hearing date. The prefiled testimony will be part of the record in each proceeding as if read, but all of the witnesses whose substantive testimony is prefiled ~~shall~~ must be available for cross-examination at the hearing. Evidentiary objections (such as motions to strike) to such direct testimony may be made by any party at any time during the hearings conducted pursuant to these rules. At the hearing, the party presenting the testimony may, if they deem it appropriate, briefly summarize the prefiled testimony prior to the start of cross-examination. Nothing contained herein shall be deemed to foreclose any party from presenting rebuttal testimony or from presenting testimony in response to reasonably unforeseen areas without the necessity of prefiling.

~~(2)~~ (3) ~~Appointment of staff expert witnesses. Before or during the hearing, the hearing examiner may, on his own motion, enter and order to show cause why staff expert witnesses should not be appointed. The parties may recommend the special expertise or qualifications that the staff expert witnesses should possess. The parties' recommendations shall in no way prohibit the hearing examiner from appointing staff expert witnesses of his own selection. The staff expert witnesses so appointed shall be informed of their duties by the hearing examiner in writing, a copy of which shall be either served on the parties or submitted to the parties at a prehearing conference.~~ All parties shall be advised of a staff expert witness' ~~A staff expert witness so appointed shall advise the parties of his~~ findings, if any, based on any prepared written testimony filed by the parties pursuant to ARM 36.12.220(1), site observations taken pursuant to ARM

36.12.225, materials noticed pursuant to ARM 36.12.221(4) and ARM 36.12.228(1)(b), or testimony or other documents introduced during the proceeding. ~~His~~ A staff expert witness' deposition may be taken by any party and ~~he~~ the expert may be called to testify by any party and/or by the hearing examiner. ~~He~~ The expert witness shall be subject to cross-examination by ~~each party~~ all parties. Nothing in this rule shall prevent any of the parties from producing other expert evidence on the same fact or matter to which the testimony of the staff expert witness appointed by the hearing examiner relates.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-611, 2-4-612 MCA

36.12.221 RULES OF EVIDENCE (1) ~~General rules.~~ The common law and statutory rules of evidence shall apply only upon stipulation of all parties to the hearing. Otherwise, the hearing examiner may admit all evidence that possesses probative value, including hearsay if it is the type of evidence commonly relied upon by reasonable prudent persons in the conduct of their affairs. The hearing examiner shall give effect to the rules of privilege recognized by law. Evidence which is irrelevant, immaterial, or unduly repetitious may be excluded.

(2) ~~Evidence must to be offered to be considered.~~ The department file shall be deemed part of the record in its entirety unless objections are made to a specific portion thereof upon review by the parties. If the objection is sustained, that portion of the file will not be made a part of the record. All other evidence to be considered in the case, including all records and documents in the possession of a party (or a true and accurate photocopy thereof), shall be offered and made a part of the record in the case. No other factual information or evidence shall be considered in the determination of the case.

(3) ~~Documentary evidence.~~ Documentary evidence in the form of copies or excerpts may be received or incorporated by reference ~~in the discretion of the hearing examiner or upon agreement of the parties~~. Upon request, parties shall be given an opportunity to compare copies with the originals.

(4) ~~Notice of facts.~~ The hearing examiner may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the department's specialized knowledge. Parties shall be notified, either before or during the hearing or by reference in the proposal for decision of the material noticed~~, including any staff memoranda or data~~. Each party shall be afforded an opportunity to contest the materials so noticed.

(5) ~~Examination of adverse party.~~ A party may call an adverse ~~party~~ witness ~~or his~~ who may be a party's managing agent or employees, or an officer, director, managing agent, or employee of the state or any political subdivision thereof, or of a public or private corporation or of a partnership or association or body politic which is an adverse party, and interrogate ~~him~~ the adverse witness by leading questions and

contradict and impeach ~~him~~ the adverse witness on material matters in all respects as if ~~he~~ the adverse witness had been called by the adverse party. The adverse ~~party~~ witness may be examined by ~~his~~ counsel for the adverse witness upon the subject matter of ~~his~~ the examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted, and impeached by any other party adversely affected by ~~his~~ the adverse witness' testimony.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-612, 85-2-121 MCA

36.12.222 CONTINUANCES (1) ~~Filing and service of request-motion. A request for a continuance of the hearing shall be filed in writing with the hearing examiner, shall state with particularity the reasons for the continuance and shall be served on all parties of record. Only requests filed and served in the manner described above shall be considered and ruled upon by the hearing examiner. Improperly filed and served requests shall be promptly dismissed without prejudice.~~ A motion for continuance of a hearing shall be made pursuant to the requirements of ARM 36.12.213.

(2) ~~Granting continuances. A request for a continuance filed not less than 5 days prior to the hearing may, in the discretion of the hearing examiner, be granted upon a showing of good cause. Due regard shall be given to the ability of the party requesting a continuance to proceed effectively without a continuance.~~ A motion for continuance filed not less than 10 days prior to the hearing may be granted upon showing of good cause

(3) ~~Denying continuances. A request for a continuance filed less than 5 days prior to the hearing shall be denied unless good cause exists and the reason for the request could not have been ascertained earlier.~~ A motion for continuance filed less than 10 days prior to the hearing shall be denied unless good cause exists and the reason for the request could not have been ascertained earlier and cannot be avoided.

(4) ~~What constitutes good cause.~~ "Good cause" for purposes of this rule includes but is not limited to:

(a) death or incapacitating illness of a party or member of a party's immediate family or attorney of a party or witness to an essential fact;

(b) - (d) remain the same.

(e) unavailability of counsel due to engagement in court or another administrative proceeding provided counsel submits copies of documents requiring counsel's presence at said proceeding;

(e) through (g) remain the same but will be renumbered (f) through (h)

(5) ~~What does not constitute good cause.~~ "Good cause" for purposes of this rule shall not include:

(a) intentional delay;

~~(b) unavailability of counsel due to engagement in court or another administrative proceeding unless all other members of the attorney's firm are similarly engaged;~~

(~~e~~b) unavailability of an expert witness if the witness's deposition could have been taken prior to the hearing;

(~~d~~c) failure of a party or their counsel to properly utilize the notice period to prepare for the hearing; or

(~~e~~d) failure of a party to act with due diligence in acquiring counsel within the notice period.

(6) ~~Continuance during hearing.~~ During a hearing, if it appears in the interest of justice that further testimony should be received, the hearing examiner~~, in his discretion,~~ may continue the hearing to a future date and oral notice of such continuance on the record shall be sufficient.

AUTH: 2-4-201(2) and 85-2-113(2) MCA
IMP: 2-4-611 MCA

36.12.223 HEARING PROCEDURE (1) Unless the hearing examiner determines otherwise the hearing shall be conducted substantially in the following manner:

~~(1)~~(a) ~~Statement of hearing examiner.~~ After opening the hearing, the hearing examiner shall, unless all parties are represented by counsel, state the procedural rules for the hearing including the following:

~~(a)~~(i) remains the same.

~~(b)~~(ii) All parties have a right to be represented at the hearing~~; and~~.

~~(c)~~(iii) remains the same.

(2) ~~Stipulations or agreements.~~ Any stipulation agreements entered into by any of the parties prior to or during the hearing shall be entered into the record.

(3) ~~Opening statements.~~ The party with the burden of proof may make an opening statement. All of the parties may make such statements in a sequence determined by the hearing examiner.

(4) ~~Presentation of evidence.~~ After any opening statement, unless otherwise determined by the hearing examiner, the applicant shall begin the presentation of evidence. ~~He~~ The applicant shall be followed by the other parties and/or the expert staff witness in a sequence determined by the hearing examiner.

(5) ~~Cross-examination.~~ Cross-examination of witnesses shall be conducted in a sequence determined by the hearing examiner.

(6) ~~Final argument.~~ When all parties and witnesses have been heard, opportunity shall be offered to present final argument in a sequence determined by the hearing examiner. Such final argument may~~, in the discretion of the hearing examiner,~~ be in the form of written memoranda or oral argument, or both. ~~The final argument need not be recorded if, in the discretion of the hearing examiner, it becomes unduly repetitious, irrelevant, or immaterial.~~

(7) ~~End or continuance of hearing.~~ After final argument, the hearing shall be closed or continued ~~at the discretion of the hearing examiner~~. If continued, it shall be either continued to a certain time and day, announced at the

time of the hearing and made a part of the record, or continued to a date to be determined later, which must be ~~upon~~ not less than ~~5~~ 10 days written notice to the parties.

(8) ~~Proposed findings and briefs.~~ The hearing examiner may require all parties of record to file proposed findings of fact or briefs, or both, at the close of testimony in the hearing. The proposed findings and briefs may~~, at the discretion of the hearing examiner,~~ be submitted simultaneously or sequentially and within such time periods as the hearing examiner may prescribe. Any party may volunteer to file proposed findings and briefs, and the hearing examiner~~, in his discretion,~~ may receive them even if the other parties choose not to so file.

(9) ~~Closure of Record.~~ The record of the contested case proceeding shall be closed upon receipt of the final written memorandum, transcript, if any, or late filed exhibits that the parties and the hearing examiner have agreed should be received into the record, whichever occurs latest.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-611, 2-4-612 MCA

36.12.224 DISRUPTION OF HEARING (1) It is the duty of the hearing examiner to conduct a fair and impartial hearing and to maintain order. All parties to the hearing, their counsel and any other persons present shall conduct themselves in a respectful manner. Any disregard by parties or their attorneys of the rulings of the hearing examiner on matters of order and procedure may be noted on the record. ~~and, where deemed necessary, referred to in the proposal for decision. In the event that parties or their attorneys conduct themselves in a disrespectful, disorderly, or contumacious manner~~ If the applicant is responsible for disrespectful, disruptive, or disorderly conduct which interferes with the proper and orderly holding of the hearing, the hearing examiner may~~, in his discretion,~~ recess or continue the hearing. If a party or person other than the applicant is disrespectful, disorderly or disruptive, the hearing examiner may bar that party or person from the proceeding and may strike all evidence presented by that party or person if the applicant's case is not prejudiced by the absence of the offending party or person. Before ~~recessing or continuing any hearing~~ taking action under this rule, the hearing examiner shall first read this rule to those parties or attorneys causing such interference or disruption.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-611 MCA

36.12.225 SITE VISIT (1) Upon ~~his own~~ the hearing examiner's motion or upon the motion of any party, ~~the hearing examiner~~ a site visit to the lands involved in the proceeding may~~,~~ be made at any time ~~in~~ during the proceeding. ~~, make a site visit of the lands involved in the proceeding~~. The hearing examiner may enter upon lands to view the proposed works, sources of water, location of proposed uses,

construction of works and such other views that are deemed relevant by the hearing examiner to gain a proper understanding of the issues involved in the proceeding. Before making any site visit, the hearing examiner shall give the parties at least 5 days written notice to participate, unless the motion is made during a hearing and then oral notice on the record shall be sufficient. During the final decision-making process, the final decision-makers may, upon their own motion or upon the motion of any party, make a site visit of the lands involved in the proceeding provided that the parties are given written notice as stated above.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 85-2-115 MCA

36.12.226 THE RECORD (1) ~~Location of record.~~ The hearing examiner shall maintain the official record in each contested case until the issuance of the final order.

(2) ~~What the record shall contain.~~ The record in a contested case shall contain:

(a) all pleadings, motions and intermediate rulings;

(b) all evidence received or considered, including a verbatim record of oral proceedings ~~when demanded by a party~~;

(c) - (f) remain the same.

(g) the department file and all staff memoranda or data submitted to the hearing examiner as evidence in connection with the case. (Note substantially the same as MCA §2-4-614.)

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-614 MCA

36.12.227 ~~THE TRANSCRIPT~~ VERBATIM RECORD (1) The verbatim record consisting of tape recordings of the contested case hearing shall be transcribed if requested by ~~the director, a party, or~~ the hearing examiner. If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the department for ordering and payment of preparation cost of a written transcript. If no request is made the department will transmit a copy of the tape(s) of the proceedings to the district court. ~~If a transcription is made, the requesting~~ Any party ~~or parties who~~ may request copies of the tape recordings ~~transcript~~ and shall pay the charge set by the board. All monies received for copies of the tapes ~~transcripts~~ shall be payable to the department and shall be deposited in the department's water right appropriation account in the state treasury.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-614 MCA

36.12.228 ~~THE HEARING EXAMINER'S PROPOSAL FOR THE~~ DECISION (1) The hearing record shall be the ~~basis~~ basis for the ~~proposal for~~ decision.

(a) ~~The record.~~ No factual information or evidence

which is not a part of the record shall be considered by the hearing examiner in the preparation of the ~~proposal for~~ decision.

(b) ~~Official notice.~~ The hearing examiner may take official notice of judicially cognizable facts and generally recognized technical or scientific facts within the department's specialized knowledge, in conformance with the requirements of MCA § 2-4-612(6).

(2) ~~The hearing examiner's proposal for decision.~~ Following the close of the record, the hearing examiner shall make ~~his~~ a decision pursuant to MCA § 2-4-621, and upon completion a copy of the decision shall be served upon all parties by personal service, by first class mail or by depositing it with the mail and distribution section, general services division, department of administration.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-612, 2-4-621, 2-4-623 MCA

36.12.229 EXCEPTIONS TO THE HEARING EXAMINER'S PROPOSAL FOR DECISION AND THE FINAL DECISION-MAKING PROCESS

(1) ~~Exceptions.~~ Any party adversely affected by the hearing examiner's proposal for decision may file exceptions. Such exceptions shall be filed with the hearing examiner within 20 days after the proposal is served upon the party. A written request for additional time to file exceptions may, in the discretion of the hearing examiner, be granted upon a showing of good cause. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the transcript ~~or~~ if one was prepared. ~~Parties are cautioned that vague~~ Vague assertions as to what the record shows or does not show without citation to the precise portion of the record (e.g., to exhibits or to ~~a transcript~~ specific testimony, ~~if one was prepared~~) ~~may~~ will be accorded little attention. Any exception that contains obscene, lewd, profane, or abusive language shall be returned to the sender.

(a) After the 20-day exception period has expired, the director or the director's designee shall:

(i) adopt the proposal for decision as the final order;

(ii) reject or modify the findings of fact, interpretation of administrative rules, or conclusions of law in the proposal for decision; or,

(iii) hold an oral argument hearing if requested, then adopt the proposal for decision as the final order or reject or modify the findings of fact, interpretation of administrative rules, or conclusions of law in the proposal for decision.

~~(2) The final decision-making process.~~

~~(a)~~(2) The final decision in any contested case hearing shall be rendered in accordance with MCA §§ 2-4-621 and to 2-4-623. Only factual information or evidence which is a part of the contested case hearing record shall be considered in the final decision-making process.

~~(b) After the 20-day exception period has expired, the director shall:~~

~~(i) adopt the proposal for decision as the final order; or,~~

~~(ii) reject or modify the findings of fact, interpretation of administrative rules, or conclusions of law in the proposal for decision.~~

~~(c)~~(3) A copy of the final order shall be served upon all parties by personal service, by first class mail, or by depositing it with the mail and distribution section, general services division, department of administration.

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-621, 2-4-622, 2-4-623 MCA

36.12.230 EX PARTE COMMUNICATION (1) ~~Prohibition.~~ Except as provided in ~~subsection~~ (2), no party or ~~his~~ representative of a party shall communicate, in connection with any issue of law or fact in a pending contested case, with any person serving as a hearing examiner or as a final decision-maker without notice and opportunity for all parties to participate in the communication. The prohibitions of this subsection shall apply beginning at the time at which a contested case is noticed for hearing and shall continue until a final order has been issued unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of ~~his~~ that person's acquisition of such knowledge.

(2) ~~Procedural questions.~~ A hearing examiner or a final decision-maker may respond to questions of any party or ~~his~~ representative of a party if it relates solely to procedures to be followed during the pendency of the contested case. A communication made for this purpose is not an ex parte communication.

(3) ~~Record of prohibited ex parte communications.~~ A hearing examiner or final decision-maker who receives a communication prohibited by ~~subsection~~ (1) shall decline to listen to such communication and shall explain that the matter is pending for determination~~,~~, and that the hearing examiner may not listen to information or allegation when other parties are not present to respond. If unsuccessful in preventing such communication, the recipient shall advise the communicator that ~~he~~ the hearing examiner will not consider the communication~~,~~ and that the other parties will be notified of it. The recipient shall then place on the record of the pending matter ~~all~~ any written communications received (other than those allowed pursuant to (2) ~~and all written responses to the communications~~; or a memorandum stating the substance of all oral communications received and all responses made~~;~~ and the identity of each person from whom the recipient received an ex parte communication~~;~~. ~~and~~ The recipient shall ~~advise~~ then notify all parties ~~that these matters have been placed on the record. Any party desiring to rebut the ex parte communication shall be allowed to do so upon requesting the opportunity for rebuttal within 10 days after the date of~~

~~the notice of communication. Rebuttal to ex parte communications shall be in writing, served on all parties, and received by the recipient within 20 days after the date of the notice of communication.~~ of the communication and its substance either orally on the record at the contested case hearing or, if no hearing is held, in a written memorandum. The recipient shall inform the parties that the substance of the communication is not part of the record in the pending matter, and will not be used as a basis for any part of the decision made therein.

(4) ~~Sanctions.~~ Upon receipt of a communication knowingly made in violation of ~~subsection~~ (1), a hearing examiner or final decision-maker may require, to the extent consistent with the interests of justice and the policy of underlying statutes, the communicator to show cause why ~~his~~ the communicator's claim, objection, or interest in the contested case should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation."

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-613 MCA

3. The new rule provides as follows:

"RULE I REOPENING RECORD (1) Upon motion of a party to the proceeding filed prior to issue of a final order, the record may be reopened for receipt of evidence. Such motion must be received by the hearing examiner within 15 days after the issuance of the proposal for decision. Additional evidence may be received only if it is shown to the satisfaction of the hearing examiner to be material and there were good reasons for the failure to present it in the hearing."

AUTH: 2-4-201, 85-2-113 MCA
IMP: 2-4-703, 2-4-621, 2-4-622 MCA

4. The current rules have been in effect for approximately 10 years. During that period the Department has had the opportunity to determine which procedures work and which need amendments. The board is proposing the adoption of these amended rules and new Rule I pursuant to Mont. Code Ann. § 85-2-113, to set forth the procedures necessary for contested case hearings held by the Department.

Rule 36.12.202 is amended to delete an unnecessary reference to the statute, to replace references to gender with non-gender identifications, and to delete the erroneous designation of the Department as a party in all contested case hearings.

Rule 36.12.203(1) is amended to delete the erroneous requirement that a hearing examiner cannot be an employee of the agency which assumes either an applicant or objector position to the hearing. The hearings unit is separate from other bureaus of the agency and is therefore able to preside over such hearings without bias.

Rule 36.12.203(2) is amended to replace references to

gender with non-gender identification, delete the unnecessary word "own," to add preparation of final orders to the duties of hearing examiner since that duty is routinely performed by hearing examiners, to replace the specific designation "the" with a more correct non-specific "a," and to delete the unnecessary phrase "to him."

Rule 36.12.204 is amended to add the requirement that the notice and order served on all parties shall contain an advisory statement that any communication with the hearing officer containing certain language will be returned to the sender. This became necessary to stop the use of abusive language in communications with the hearing examiners. Also a phrase was added to allow the notice of a hearing to be sent out in less than 30 days if all parties agree, to allow certain hearings to be held less than 30 days after notice and to allow the Department to serve only the attorney when a party or parties are represented by counsel thereby saving postage.

Rule 36.12.205 is amended to delete parts (1) and (2) as superfluous. Part (3) is changed to (1) and superfluous language after the first two sentences is removed. Part (4) is changed to (2) and the references to cost of preparing transcripts is deleted because transcripts are discussed in 36.12.227. The phrase "as required in subsection 1 of this rule" is superfluous and deleted as is the word "his."

Rule 36.12.206 is amended to replace the reference to gender with a non-gender identification. The last sentence is removed as superfluous.

Rule 36.12.207 is amended to clarify that agreed settlements, stipulations, or conditions entered into by the parties are not binding on the Department and are included on the permit only if designed to further compliance and if all parties agree to such inclusion. The rule is further amended to require a written notice on conditions proposed by Department staff to clarify that simply because agreements are reached, a hearing may still be necessary and that the proposed condition might not be placed on the permit.

Rule 36.12.208 is amended to replace references to gender with non-gender identification and to replace the phrase "shall not be" with the more correct "is not."

Rule 36.12.209(1) is amended to extend the number of days from 7 to 11 when weekends and legal holidays are not counted in the computation of time in which an act must be completed. This is the same amount of time set forth in the Rules of Civil Procedure which should ease the confusion concerning time computation in the Department's contested case hearings.

Rule 36.12.210 is amended to delete superfluous language, replace references to gender with non-gender identification, and set forth the intention to consolidate applications by the same person in one hearing.

Rule 36.12.212(2) is amended to replace references to gender with non-gender identification, remove superfluous language, set forth that a prehearing conference is not required, and that written notice of a prehearing conference

must be given.

Rule 36.12.213 is amended to clarify that all motions to the hearing examiner must be served on all parties and a certificate of service must be attached to all motions to the hearing examiner, to extend the period of time in which to file responses to the motion from 7 days to a more reasonable 10 days, to remove superfluous language, to include motions for continuances in this rule, and to replace references to gender with non-gender identification.

Rule 36.12.214 is amended to clarify that the director (not the hearing examiner) may require parties to file briefs on a motion certified to the director and that uncertified motions shall be ruled upon by the hearing examiner and reviewed during the final-decision making process.

Rule 36.12.215 is amended to delete superfluous language, to replace references to gender with non-gender identification, to clarify the time periods for the different phases of the discovery process, to set forth the means of discovery available as well as the methods for objections to such demands and how the hearing examiner may handle failure to comply with discovery demands.

Rule 36.12.216 is amended to replace references to gender with non-gender identification and to clarify the rights of other parties to attend and participate in depositions.

Rule 36.12.217 is amended to replace the reference to gender with a non-gender identification.

Rule 36.12.219 is amended to delete superfluous language and to clarify that untimely objectors do not have status of parties nor do they have the right to participate in the process.

Rule 36.12.220 is amended to delete superfluous language, to replace references to gender with non-gender identification, to replace "shall" with a more correct "must," and to clarify that all parties must be advised of a staff expert witness' findings.

Rule 36.12.221 is amended to add the provision that the department file will become a part of the record unless there are objections to a portion thereof and if that objection to a specific part of the file is sustained that portion will not be made a part of the record, delete superfluous language, and replace references to gender with non-gender identification.

Rule 36.12.222 is amended to delete superfluous language, clarify the procedure for continuances, and replace references to gender with non-gender identification.

Rule 36.12.223 is amended to replace a semicolon and the word "and" with a more correct period, replace references to gender with non-gender identification, remove superfluous language, and to extend the length of time for written notice to the objectors from 5 days to a more reasonable 10 days.

Rule 36.12.224 is amended to clarify the consequences of disrespectful, disruptive, or disorderly conduct during the hearing, and to delete superfluous language.

Rule 36.12.225 is amended to replace references to gender with non-gender identification and to clarify who may file a

motion for a site visit.

Rule 36.12.226 is amended to clarify that the official record will contain the Department file and to delete superfluous language.

Rule 36.12.227 is amended to clarify that the verbatim record will be tape recordings of the contested case hearing. It further clarifies that if a petition for judicial review is filed and a party to the proceeding elects to have a written transcription, arrangements must be made with the Department for ordering and payment of the transcription costs and that if no request is made to the Department for a written transcription, copies of tapes will be transmitted to the district court.

Rule 36.12.228 is amended to delete superfluous language.

Rule 36.12.229 is amended to clarify the procedure for filing exceptions to a proposal for decision and to caution against abusive language. This rule is further amended to add the option to request an oral argument hearing.

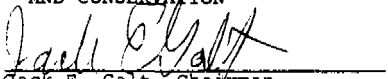
Rule 36.12.230 is amended to replace references to gender with non-gender identification and clarify the procedure for and consequence of ex parte communications.

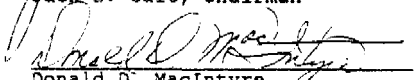
New Rule I is to establish the procedure for reopening the record for evidence provided it can be shown there were good reasons for failure to present said evidence at the hearing.

5. Interested parties may present their data, views and arguments, either orally or in writing, at the hearing. Written data, comments or arguments may also be submitted to Ronald J. Guse, Section Supervisor, Department of Natural Resources and Conservation, 1520 East Sixth Avenue, Helena, Montana, no later than October 19, 1993.

6. John E. Stults will preside over and conduct the hearing.

BOARD OF NATURAL RESOURCES
AND CONSERVATION

By: 
Jack E. Galt, Chairman


Donald D. MacIntyre
Rule Reviewer

Certified to the Secretary of State on September 3, 1993.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT) of ARM 42.31.402 relating to) Telephones)	NOTICE OF THE PROPOSED AMENDMENT of ARM 42.31.402 relating to Telephones

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On October 29, 1993, the Department of Revenue proposes to amend ARM 42.31.402 relating to telephones.

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

42.31.402 REFUND PROCEDURES (1) Refunds due to overpayment of fees may be requested at any time within ~~two~~ five years from the due date of the return to which the overpayment applies. Refunds may be requested by filing an amended return for the quarter in which the fee was overpaid together with a narrative explanation of the cause of the overpayment. The department shall refund the amount of the excess payment with interest. Interest shall be calculated on the excess amount at the rate of 0.5% a month or a fraction of a month from the date of the excess payment until the date of the refund.

AUTH: Secs. 10-4-203, 10-4-212, and 15-1-201(1) MCA; IMP: Secs. 10-4-203 and 10-4-205 MCA.

3. ARM 42.31.402 is proposed to be amended because the 1993 Legislature increased the length of time a taxpayer can request a refund on an overpayment from 2 years to 5 years when it enacted House Bill 300.

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

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

no later than October 14, 1993.

5. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Cleo Anderson at the above address no later than October 14, 1993.

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

Legislature; from a governmental subdivision, or agency; or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25.

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State September 3, 1993.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.35.211, 42.35.213 42.35.231, 42.35.317, 42.36.211 and the REPEAL of ARM 42.35.232 42.35.233, and 42.35.234 relating to Inheritance Tax	NOTICE OF THE PROPOSED AMENDMENT of ARM 42.35.211, 42.35.213, 42.35.231, 42.35.317, 42.36.211 and the REPEAL of ARM 42.35.232, 42.35.233, and 42.35.234 relating to Inheritance Tax

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On November 11, 1993, the Department of Revenue proposes to amend ARM 42.35.211, 42.35.213, 42.35.231, 42.35.317, 42.36.211 and the repeal of ARM 42.35.232, 42.35.233, and 42.35.234 relating to inheritance tax.

2. The Department proposes to repeal the following rules:

42.35.232 TREATMENT WHEN DEATH OCCURRED PRIOR TO JULY 1, 1977 found at page 42-3525 of the Administrative Rules of Montana.

AUTH: Sec. 15-1-201 and 72-16-201 MCA; IMP, Sec. 72-16-303 MCA.

42.35.233 TREATMENT WHEN DEATH OCCURRED ON OR AFTER JULY 1, 1977, AND PRIOR TO JULY 1, 1979 found at page 42-3525 of the Administrative Rules of Montana. AUTH: Sec. 15-1-201 and 72-16-201 MCA; IMP: Sec. 72-16-303 MCA.

42.35.234 TREATMENT WHEN DEATH OCCURRED ON OR AFTER JULY 1, 1979 found at page 42-3526 of the Administrative Rules of Montana. AUTH: Sec. 15-1-201 and 72-16-201 MCA; IMP: Sec. 72-16-303 MCA.

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

42.35.211 TRANSFERS IN CONTEMPLATION OF DEATH (1) Transfers of property within the jurisdiction of this state which are to become effective only at or after the death of the transferor are transfers in contemplation of death.

(2) Except as provided in (3), Every ~~material~~ transfer of estate property within the jurisdiction of this state which is made either within 3 years of the transferor's death or which is in the nature of a final distribution of estate property, and is made for less than fair consideration in money or money's worth, shall be presumed to be a transfer made in contemplation of death. Such transfers shall be subject to the inheritance tax unless the presumption is rebutted.

(3) Every transfer within 3 years of the transferor's death in which a federal gift tax return was not required to be filed with respect to the transfer may not be considered a contemplation of death transfer. The value of any transferred property is not reduced by the amount of the federal gift tax exclusion allowable for federal estate and gift tax purposes.

AUTH: Sec. 15-1-201 and 72-16-201 MCA; IMP: Sec. 72-16-301 MCA.

42.35.213 GIFTS (1) remains the same.

(2) Inter vivos gifts are fully executed prior to the death of the transferor, but they still may be made in contemplation of death, depending upon the intent of the donor. Inter vivos gifts are presumed to be made in contemplation of death if made within 3 years of the death of the transferor and a federal gift tax return was required to be filed with respect to the transfer. The value of any property gifted is not reduced by the amount of the federal gift tax exclusion allowable for federal estate and gift tax purposes.

AUTH: Sec. 15-1-201 and 72-16-201 MCA; IMP: Sec. 72-16-301 MCA.

42.35.231 TRANSFER OF JOINT INTEREST PROPERTY (1) remains the same.

(2)(a) The inheritance tax does not apply to the transfer by right of survivorship of any property, or part thereof, which can be shown to have originally belonged to the survivor, or acquired by the survivor for adequate and full consideration in money or money's worth, and never to have belonged to the decedent prior to the creation of the joint interest. For this exception to apply, the survivor must show that the decedent had no interest, equitable or legal, in the property, or part thereof, immediately prior to the creation of the joint interest. This exception does not apply where the interest passes to a survivor and the property had originally belonged to a different survivor. It applies only where the interest passing originally belonged to the specific survivor claiming the exception.

(b) ~~The treatment of joint interest property is subject to the provisions of 72-16-301(3), MCA.~~ Whenever property that is held in joint ownership was acquired through gift, bequest, devise, or inheritance from another, the decedent's fractional share of the property is included for inheritance tax purposes. Thus, if "A" makes a gift of property to his three brothers, "B", "C", and "D", as joint tenants with the right of survivorship and "B" dies, survived by "C" and "D", one-third of the fair market value of the property is considered a taxable transfer from "B" to "C" and "D".

(3) Except as provided in (2), when the decedent died prior to October 1, 1989, the transfer of joint interest property is taxable as provided in this section.

(a) If the joint tenancy was created within 3 years from

the date of the decedent's death, the inheritance tax is based upon the full value of the joint tenancy property.

(b) If the joint tenancy was created prior to 3 years from the date of the decedent's death, the inheritance tax is based upon the value of the fraction of the decedent's interest passing determined by dividing the value of the property by the number of joint tenants.

(4) Except as provided in (2), when the decedent dies on or after October 1, 1989, the transfer of joint interest property is taxable as provided in this section. The inheritance tax is based upon the full value of the joint tenancy property and is not reduced in proportion to the fraction received by the survivor.

AUTH: Sec. 15-1-201 and 72-16-201 MCA; IMP: Sec. 72-16-303 MCA.

42.35.317 LIMITED, FUTURE, AND CONTINGENT ESTATES (1) The value of all future contingent or limited estate income or interest in property is generally the present value or worth of such estate income or interest at the date of the decedent's death. Section 72-16-417, MCA, specifically requires that the rate of interest be set at 5%. This statute further requires that the Commissioner of Insurance determines the value based on the rule, method, standard of mortality, and value used in life insurance and annuity policies. The table which has been recommended by the Commissioner of Insurance is the American Experience Table at 5%. A copy has been reproduced as follows:

AMERICAN EXPERIENCE TABLE

AGE	SINGLE LIFE	AGE	SINGLE LIFE
0	12.81803	50	11.66175
1	14.92211	51	11.41594
2	15.73050	52	11.16361
3	16.12501	53	10.90499
4	16.34592	54	10.64036
5	16.47245	55	10.37017
6	16.53456	56	10.09472
7	16.56098	57	9.81450
8	16.56023	58	9.52988
9	16.53953	59	9.24127
10	16.50475	60	8.94928
11	16.46076	61	8.65445
12	16.41469	62	8.35742
13	16.36642	63	8.05876
14	16.31581	64	7.75900
15	16.26274	65	7.45885
16	16.20722	66	7.15921
17	16.14896	67	6.86074
18	16.08779	68	6.56420
19	16.02372	69	6.27048

20	15.95658	70	5.98022
21	15.88620	71	5.69422
22	15.81257	72	5.41286
23	15.72552	73	5.13592
24	15.65484	74	4.86279
25	15.57033	75	4.59264
26	15.48176	76	4.32477
27	15.38910	77	4.05856
28	15.29210	78	3.79392
29	15.19051	79	3.53109
30	15.08425	80	3.27017
31	14.97307	81	3.01349
32	14.85666	82	2.76062
33	14.73492	83	2.51052
34	14.60774	84	2.26066
35	14.47479	85	2.00986
36	14.33572	86	1.76061
37	14.19057	87	1.51750
38	14.03897	88	1.28611
39	13.88092	89	1.06704
40	13.71604	90	.85453
41	13.54430	91	.64497
42	13.36528	92	.44851
43	13.17891	93	.28761
44	12.98484	94	.13605
45	12.78344		
46	12.57414		
47	12.35728		
48	12.13275		
49	11.90076		

(2) Example: A, age 50, receives $10,000 for life with remainder over to B.

$10,000 x 5% = $500, the annual income or annuity.

$500 x 11.66175 (factor) = $5,830.88, the value of the life estate of A.

$10,000 - $5,830.88 = $4,169.12, the value of the remainder estate of B.

AUTH: Sec. 15-1-201 and 72-16-201 MCA; IMP: Sec. 72-16-417 MCA.

42.36.211 APPLICATION OF EXEMPTIONS (1) The exemptions ~~below~~ found in this chapter, when applied to a ~~widow~~ surviving spouse shall include all of ~~her~~ the statutory dower and other allowances. The ~~above~~ exemptions found in this chapter, when applied to children or adopted children of the decedent shall include mutually acknowledged children.

(2) For decedents dying prior to January 1, 1991, ~~T~~to be afforded the exemption, the mutually acknowledged child must have stood in such relationship with the decedent beginning prior to the child's 15th birthday and continued for 10 consecutive years.

(3) For decedents dying after December 30, 1990, to be afforded the exemption, the mutually acknowledged child or stepchild must have stood in such relationship prior to the child's 18th birthday.

AUTH: Sec. 15-1-201 and 72-16-201 MCA; IMP: Sec. 72-16-313 MCA.

4. The above amendments and repeals are necessary to either clarify the rules or make technical corrections due to statutory amendments enacted during the past two legislative sessions.

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

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

no later than October 15, 1993.

6. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Cleo Anderson at the above address no later than October 15, 1993.

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

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State September 3, 1993.

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

In the matter of the amendment of rule 46.10.410 pertaining to at-risk child care services	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.10.410 PERTAINING TO AT-RISK CHILD CARE SERVICES

TO: All Interested Persons

1. On October 6, 1993 at 9:30 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 46.10.410 pertaining to at-risk child care services.

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

46.10.410 AT-RISK CHILD CARE SERVICES (1) The purpose of the at-risk child care program is to provide child care assistance to low income families who are not currently receiving aid to families with dependent children (AFDC), need child care in order to work, and would be at risk of becoming eligible for AFDC without such assistance. ~~The at-risk child care program will be operated only in a limited number of geographic areas of the state.~~

(2) Families ~~who reside in an area of the state in which the department operates an at-risk child care program~~ are eligible for at-risk child care if all eligibility requirements set forth in subsections (2)(a), (2)(a)(i), (2)(b)- through (f)(i), and (3) are met. There will be a limited number of slots available based on funding and the average cost of child care per family paid by the department. At-risk child care assistance will be given on a first come, first served basis. In the event that two or more families apply for assistance at the same time, priority will be given as follows: first priority will be given to parents whose earned income is below 34% of the state median income; second priority will be given to families whose earned income is at or below 75% of the state median income but above 34% of the state median income, ~~and who within the last 24 month lost eligibility for transitional child care; third priority will be given to families whose earned income is below 75% of the state median income but above 34% of the state median income.~~ In each of these income categories, priority will be given to any family which has lost eligibility for transitional child care in the 24 months immediately prior to their application for at-risk child care.

(a) A family is eligible for at-risk child care if a family member ~~employed part-time or full-time~~ working for pay at

least 15 hours per week needs assistance to pay for employment-related child care, and the family would be at risk of becoming eligible for AFDC if child care assistance were not available.

(i) A family is at risk and is income-eligible for assistance if its income is at or below the maximum income for a family of its size set forth in the tables in ~~subsection (3)~~ ARM 46.10.409. Education income from scholarships, grants, loans and work study will be excluded as well as earned income tax credits, tribal per capita payments, VISTA volunteer stipends, ~~and~~ independent living individual needs criteria (INC) payments for youth~~.~~, food stamp benefits, and foster care payments. All other gross family income will be counted.

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

(f) Eligibility begins the first month after the month of application if all eligibility criteria are met, ~~and~~ there is an employment-related child care need~~.~~, and the department has funds available to provide assistance. No assistance will be provided for previous months. ~~prior to the month of application.~~

(i) Eligibility continues as long as the family continues to meet income and all other eligibility requirements. ~~needs the child care for a family member to work, and the department has funds available to provide assistance.~~

Subsections (2)(ii) through (2)(iv) remain the same.

(g) Families may choose any legally operating child care provider to care for their children, as long as the person is age 18 or over and ~~does~~ is not ~~reside in the same household.~~ the parent or a person living with the children as a parent. If not already licensed or registered, the provider must register with the local office of the department of family services in order to receive payment.

Subsection (2)(h) remains the same.

(i) A co-payment is required for participation in this program as ~~set forth in the tables~~ specified in subsection (~~3~~4) and ARM 46.10.409. The department's child care assistance payment to the family cannot exceed the maximum child care reimbursement rates established in ARM 46.10.404~~(3)(e)(g)(ii)~~.

(3) ~~Subject to the provisions of section (4) below, t~~The maximum income a family may have to be eligible for at-risk child care ~~and~~ is the maximum gross income amount for that family size shown in the tables in ARM 46.10.409. ~~the co-payment by the family required if the family is eligible are:~~

~~(a) through September 30, 1992, as follows:~~

Family Size	Gross Monthly Income	Monthly Copayment (1 child)	Monthly Copayment (2 children)*
2	0 - 740	$ 4	
	741 - 840	17	
	841 - 940	28	
	941 - 1040	42	
	1041 - 1140	57	
	1141 - 1240	74	
	1241 - 1340	93	
	1341 - 1374	115	
	1375+ - ineligible		
3	0 - 928	$ 6	$ 8
	929 - 1028	20	26
	1029 - 1128	34	44
	1129 - 1228	49	64
	1229 - 1328	66	86
	1329 - 1428	86	113
	1429 - 1528	107	140
	1529 - 1628	130	170
	1629 - 1698	138	181
	1699+ - ineligible		
4	0 - 1117	$ 8	$ 10
	1118 - 1217	24	31
	1218 - 1317	40	52
	1318 - 1417	57	75
	1418 - 1517	76	100
	1518 - 1617	97	107
	1618 - 1717	120	157
	1718 - 1817	145	190
	1818 - 1917	163	200
	1918 - 2021	182	238
	2022+ - ineligible		
5	0 - 1305	$ 10	$ 12
	1306 - 1405	28	37
	1406 - 1505	45	59
	1506 - 1605	64	84
	1606 - 1705	85	111
	1706 - 1805	108	141
	1806 - 1905	133	174
	1906 - 2005	160	210
	2006 - 2105	189	248
	2106 - 2205	198	259
	2206 - 2305	207	271
	2306 - 2344	234	306
	2345+ - ineligible		

~~Family Size~~	~~Gross Monthly Income~~	~~Monthly Copayment (1 child)~~	~~Monthly Copayment (2 children)*~~
~~6~~	~~0 - 1493~~	~~$ 12~~	~~$ 14~~
	~~1494 - 1593~~	~~32~~	~~42~~
	~~1594 - 1693~~	~~51~~	~~67~~
	~~1694 - 1793~~	~~72~~	~~94~~
	~~1794 - 1893~~	~~95~~	~~124~~
	~~1894 - 1993~~	~~120~~	~~157~~
	~~1994 - 2093~~	~~147~~	~~193~~
	~~2094 - 2193~~	~~175~~	~~229~~
	~~2194 - 2293~~	~~206~~	~~270~~
	~~2294 - 2393~~	~~215~~	~~283~~
	~~2394 - 2493~~	~~224~~	~~294~~
	~~2494 - 2593~~	~~253~~	~~339~~
	~~2594 - 2668~~	~~267~~	~~350~~
	~~2669 - ineligible~~		
~~7~~	~~0 - 1682~~	~~$ 14~~	~~$ 16~~
	~~1683 - 1782~~	~~36~~	~~47~~
	~~1783 - 1882~~	~~56~~	~~73~~
	~~1883 - 1982~~	~~79~~	~~103~~
	~~1983 - 2082~~	~~104~~	~~136~~
	~~2083 - 2182~~	~~131~~	~~172~~
	~~2183 - 2282~~	~~160~~	~~210~~
	~~2283 - 2382~~	~~191~~	~~250~~
	~~2383 - 2482~~	~~223~~	~~292~~
	~~2483 - 2582~~	~~232~~	~~304~~
	~~2583 - 2682~~	~~268~~	~~351~~
	~~2683 - 2728~~	~~273~~	~~358~~
	~~2729 - ineligible~~		

~~* Note: There will be no additional charge if a family places more than 2 children in child care; the maximum fee will be the 2 children rate.~~

~~(b) effective October 1, 1992, as in ARM 46.10.409.~~

(4) The co-payment for families using less than 20 hours per week of child care will be one-half of the co-payment shown in ~~the tables in subsections (3)(a) or (3)(b).~~ ARM 46.10.409.

Subsections (5) through (9)(iv) remain the same.

AUTH: Sec. 53-2-201 and 53-4-212 MCA
IMP: Sec. 53-2-108, 53-2-201, 53-2-606, 53-4-212 and 53-4-231 MCA

3. The at-risk child care program was previously administered by the Department of Social and Rehabilitation Services (SRS) as a pilot program in only two counties using private and county funds as the required match for federal funds. The 53rd Montana Legislature in HB 2 appropriated sufficient funds to the Department of Family Services (DFS) to operate the at-risk program statewide.

The program will now be operated by DFS, except in Missoula County, one of the pilot counties. (The pilot program in

Missoula County will continue to be operated by SRS using county funds to add additional child care slots.) However, rulemaking authority for the at-risk program will continue to reside with SRS rather than DFS, because the at-risk program receives its federal funding under Subchapter IV-A of the Social Security Act, which authorizes the Aid to Families with Dependent Children (AFDC) program administered by SRS.

The amendment of this rule is necessary to implement the appropriations provided by the 1993 Montana Legislature that this program be operated statewide. This appropriation of funds is provided in House Bill 2, Chapter 623, Laws of Montana, 1993. The rule currently limits eligibility to families living in limited geographic area. This restriction is now being eliminated.

Subsection (2), which sets forth the priorities used to determine eligibility for limited child care slots, is being amended to provide that at each level of priority, the highest priority will be given to families which have recently lost eligibility for transitional child care. A high priority is being given to these families because it is believed that families which recently lost the child care assistance which helped them to make the transition from AFDC to supporting their families without any AFDC are at especially high risk of becoming eligible for AFDC again.

Also, subsection (2) currently sets three levels of priority. Second priority is given to families whose income is greater than 34% but less than 75% of the state median income and who have lost eligibility for transitional child care (TCC) within the past 24 months. Third priority is given to families in the same income range who have not lost TCC within the past 24 months. The third level of priority has been deleted since priority will be given under the amended rule to families in each income category who have recently lost TCC over those who never had TCC, with those who never had TCC eligible for any remaining openings based on their income category. In essence, the third level of priority has been incorporated into the first and second levels.

Subsection (2)(a) previously stated that a family member must work at least part-time in order for the family to qualify for at-risk child care assistance, but did not define what part-time employment was. This subsection is now being amended to specify that the individual must work at least 15 hours per week.

Subsection (2)(a) is also being amended to state that a family will only be eligible for assistance if the child care is necessary to allow the family member to engage in work for pay. It was never SRS' intention to pay for care for a child while a

family member was engaged in volunteer work or other unpaid employment. The rule is now being amended to clarify this point.

Subsection (2)(f) is being changed to provide that eligibility begins the month after the month in which the application is filed, rather than the month of application, in order to make the policy for the at-risk program consistent with that of the community block grant child care program. Subsection (2)(f)(i) is being amended to make it more succinct. There is no change in policy.

In subsection (2)(g), language is being added to make it clear that assistance will not be given to pay for child care provided by the child's parent, regardless of whether the parent resides with the child. The change in language also authorizes payment to caregivers living in the same household as the child if the caregiver does not have a parental relationship with the child. It was felt there the family should have as much discretion to choose a caregiver for the child as possible, even if the caregiver is a household member, as long as the caregiver is not a parent or a person who fulfills the role of parent and resides with the child.

Subsection (3)(a) is being deleted because it was effective only through September 30, 1992, and subsection (3)(b) is being deleted because it is now merged into subsection (3). Other organizational changes and minor changes in wording in subsections (3) and (4) have been made which do not affect the substance of 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 October 14, 1993.

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 September 3, 1993.

BEFORE THE DEPARTMENT OF AGRICULTURE
STATE OF MONTANA

In the matter of the adoption of New Rules on civil penalties relating to beekeeping in Montana, and designating regulated bee diseases; amending ARM 4.12.105 clarifying the apiary registration forfeiture procedure; and repealing ARM 4.12.101 relating to restrictions on apiary registration.	NOTICE OF ADOPTION OF NEW RULES I (4.12.109), II (4.12.110) AND III (4.12.111) RELATING TO BEEKEEPING IN MONTANA, AND DESIGNATING REGULATED BEE DISEASES; AMENDING ARM 4.12.105 CLARIFYING THE APIARY FORFEITURE PROCEDURE; AND REPEALING ARM 4.12.101 RELATING TO RESTRICTIONS ON APIARY REGISTRATION.

TO: All Interested Persons:

1. On July 29, 1993, the Department of Agriculture published notice adopting new rules ARM 4.12.109, ARM 4.12.110 and ARM 4.12.111 on civil penalties relating to beekeeping in Montana and designating regulated honey bee diseases; amend ARM 4.12.105 clarifying procedure to void the registration of an apiary because of non-use; and repealing ARM 4.12.101 relating to apiary registration limitations at page 1588 of the Montana Administrative Register, issue #14.

2. The department has adopted, amended, and repealed the rules as proposed.

3. No comments or testimony were received.

MONTANA DEPARTMENT OF AGRICULTURE

LEO A. GIACOMETTO, DIRECTOR

TIMOTHY J. MELOY, ATTORNEY
RULE REVIEWER

Certified to the Secretary of State, September 1, 1993

BEFORE THE BOARD OF OPTOMETRISTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to board meetings, applications for examination, examinations, reciprocity, general practice requirements, fees and applicants for licensure	))))))	NOTICE OF AMENDMENT OF RULES PERTAINING TO THE PRACTICE OF OPTOMETRY

TO: All Interested Persons:

1. On July 15, 1993, the Board of Optometrists published a notice of proposed amendment of rules pertaining to the practice of optometry, at page 1447, 1993 Montana Administrative Register, issue number 13.

2. The Board has amended ARM 8.36.401, 8.36.403 through 8.36.405, 8.36.409 and 8.36.802 exactly as proposed. The Board has tabled adoption of the proposed amendment of ARM 8.36.406.

3. One comment was received with regard to ARM 8.36.406 which will be considered along with the proposed amendment at a later date.

4. In addition, the Administrative Code Committee suggested that the authority section for ARM 8.36.401, as it is proposed to be amended, should be revised from 37-10-201 to 37-10-202. This revision was adopted. Also, the Administrative Code Committee staff desired more information regarding the rationale for this rule amendment. The rule is being amended to delete references to meetings dealing with examinations, which formerly had been conducted during the July meeting. The 1993 Legislature approved legislation allowing the Board to delegate its examination functions and deleting the requirement for a meeting on the fourth Monday of July.

5. No other comments or testimony were received.

BOARD OF OPTOMETRISTS
LARRY J. BONDERUD, O.D.,
CHAIRMAN

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

_____
ROBERT P. VERDON, RULE REVIEWER

Certified to the Secretary of State, September 3, 1993.

BEFORE THE BOARD OF PUBLIC ACCOUNTANTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of a rule pertaining to qualifications for a license as a licensed public accountant	)))	NOTICE OF AMENDMENT OF 8.54.407 QUALIFICATIONS FOR A LICENSE AS A LICENSED PUBLIC ACCOUNTANT

TO: All Interested Persons:

1. On July 15, 1993, the Board of Public Accountants published a notice of public hearing at page 1453, 1993 Montana Administrative Register, issue number 13. The hearing was held on August 9, 1993, at 1:30 p.m., in Helena, Montana.

2. The Board has amended the rule as proposed but with the following change:

"8.54.407 QUALIFICATIONS FOR A LICENSE AS LICENSED PUBLIC ACCOUNTANT (1) through (3)(d) will remain the same as proposed.

(4) THOSE INDIVIDUALS PASSING PORTIONS OF THE NOVEMBER 1993 EXAMINATION, THAT WOULD QUALIFY THEM UNDER THE THEN-EXISTING LAW FOR LICENSURE AS A LICENSED PUBLIC ACCOUNTANT, SHALL HAVE 90 DAYS FROM THE UNIFORM MAILING DATE OF EXAMINATION RESULTS TO APPLY FOR LICENSURE."

Auth: Sec. 37-50-203, 37-50-304, MCA; IMP, Sec.37-50-303, 37-50-304, 37-50-308, MCA

3. The Board has amended the rule in its adoption notice to provide a transition formula for those individuals sitting for the November 1993 examination. By this amendment, the Board intends to allow November examinees a mechanism under which they may be licensed pursuant to examination set up in effect this year.

4. No comments or testimony were received.

BOARD OF PUBLIC ACCOUNTANTS
SHIRLEY J. WAREHIME, CPA
CHAIRMAN

BY: _____
ANDY J. POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

_____
ROBERT P. VERDON
RULE REVIEWER

Certified to the Secretary of State, September 3, 1993.

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

In the matter of the amendment of a rule pertaining to continuing education	)))	NOTICE OF AMENDMENT OF 8.58.415A CONTINUING REAL ESTATE EDUCATION

TO: All Interested Persons:

1. On May 27, 1993, the Board of Realty Regulation published a notice of public hearing at page 1063, 1993 Montana Administrative Register, issue number 10. The hearing was held on June 25, 1993, in the conference room of the Professional and Occupational Licensing Bureau, Helena, Montana.

2. The Board previously amended and adopted the other rules in issue number 15 at page 1909, 1993 Montana Administrative Register. The Board is now amending ARM 8.58.415A as proposed but with the following changes:

"8.58.415A CONTINUING REAL ESTATE EDUCATION (1) and (2) will remain the same as proposed.

(3) By October 1 of each odd numbered year, the board shall prescribe topics in which the 15 hours of education must be obtained. ~~A prescribed combination of required topics will be accepted to fulfill the 15 hours of mandatory education. These topics will concentrate on new and updated information necessary to conduct daily real estate activity for the protection of the public.~~ LICENSEES REQUIRING EDUCATION FOR RENEWING WILL BE GRANTED CREDIT FOR ANY CONTINUING EDUCATION CREDITS OBTAINED DURING EITHER THAT RENEWAL YEAR OR THE YEAR PRECEDING AND WHICH WERE OBTAINED FROM PRESCRIBED TOPICS. FOR EXAMPLE, THE BOARD WILL PRESCRIBE TOPICS BY OCT. 1, 1993 FOR 1994-95 AND BY OCT. 1, 1995 FOR 1996-97. LICENSEES WHO NEED TO REPORT THEIR EDUCATION IN 1994 MAY USE ANY APPROVED COURSE FROM 1993 (EVEN THOUGH NOT A PRESCRIBED TOPIC) OR ANY APPROVED COURSE FROM THE 1994 PRESCRIBED TOPIC LIST. LICENSEES WHO NEED TO REPORT THEIR EDUCATION IN 1995 MAY USE APPROVED COURSES FROM THE 1994-95 PRESCRIBED TOPIC LIST. LICENSEES WHO NEED TO REPORT THEIR EDUCATION IN 1996 MAY USE APPROVED COURSES FROM THE 1995 PRESCRIBED LIST, THE 1996 PRESCRIBED LIST, OR ANY COMBINATION OF THOSE TWO LISTS.

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

COMMENT: Various individuals had said the rule as originally proposed was cumbersome, confusing and unfair to certain licensees who may be disadvantaged by the timing of the board's selection of the prescribed education topics.

RESPONSE: The board amended the rule to note that all licensees could use education prescribed in either of the two years prior to their date of reporting continuing education as reportable education.

BOARD OF REALTY REGULATION
JACK MOORE, CHAIRMAN

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

_____
ROBERT P. VERDON, RULE REVIEWER

Certified to the Secretary of State, September 3, 1993.

BEFORE THE BOARD OF RESPIRATORY CARE PRACTITIONERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to applications, temporary permits, renewals and continuing education	))))))	NOTICE OF AMENDMENT OF 8.59.501 APPLICATION FOR LICENSURE, 8.59.503 TEMPORARY PERMIT, 8.59.505 PROCEDURES FOR RENEWAL, AND 8.59.601 CONTINUING EDUCATION REQUIREMENTS

TO: All Interested Persons:

1. On July 15, 1993, the Board of Respiratory Care Practitioners published a notice of proposed amendment of the above-stated rules at page 1458, 1993 Montana Administrative Register, issue number 13.

2. The Board has amended ARM 8.59.501, 8.59.503 and 8.59.505 exactly as proposed. The Board has amended ARM 8.59.601 as proposed but with the following changes:

"8.59.601 CONTINUING EDUCATION REQUIREMENTS (1) through (3) will remain the same as proposed.

(4) For licensees who have received their initial license during the immediately preceding licensing year, continuing education ~~will be~~ IS required on the date of initial renewal on a pro-rated basis. This pro-rated basis ~~will~~ requireS that the licensee who has received his or her initial license must attain one credit of continuing education for each month, or greater portion thereof, of licensure."

Auth: Sec. 37-28-104, MCA; IMP, Sec. 37-28-104, 37-28-203, MCA

3. All comments and testimony received were thoroughly considered by the Board. Those comments and the Board's responses thereto are as follows:

COMMENT: Staff of the Administrative Code Committee suggested minor changes to the proposed amendment of 8.59.601 to clarify that the rule is a standing requirement and does not necessitate individual orders.

RESPONSE: The Board concurred and made the changes as shown above.

BOARD OF RESPIRATORY CARE PRACTITIONERS
RICH LUNDY, CHAIRMAN

ROBERT P. VERDON
Rule Reviewer

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, September 3, 1993.

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

In the matter of the amendment of rules 16.44.202 and 16.44.803 dealing with underground injection wells	NOTICE OF AMENDMENT OF RULES

(Hazardous Waste)

To: All Interested Persons

1. On July 29, 1993, the department published notice of the proposed amendment of the above-captioned rules at page 1608 of the 1993 Montana Administrative Register, issue number 14.

2. The department has adopted the rules as proposed with no changes.

3. No comments or testimony were received.

ROBERT J. ROBINSON, Director

Certified to the Secretary of State September 3, 1993.

Reviewed by:

Eleanor Parker, DHES Attorney

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.18.105; 42.18.108; 42.18.111; 42.18.114; 42.18.117 42.18.120; 42.18.123; and 42.18.126 and the ADOPTION of NEW RULES I (42.18.106); II (42.18.109); III (42.18.112); IV (42.18.115); V (42.18.118); VI (42.18.121); and VII (42.18.124) relating to Property Reappraisal of Taxable Property in Montana	NOTICE OF THE AMENDMENT of ARM 42.18.105; 42.18.108; 42.18.111; 42.18.114; 42.18.117; 42.18.120; 42.18.123; and 42.18.126 and the ADOPTION of NEW RULES I (42.18.106); II (42.18.109); III (42.18.112); IV (42.18.115); V (42.18.118); VI (42.18.121); and VII (42.18.124) relating to Property Reappraisal of Taxable Property in Montana

TO: All Interested Persons:

1. On June 10, 1993, the Department published notice of the proposed amendment of ARM 42.18.105, 42.18.108, 42.18.111, 42.18.114, 42.18.117, 42.18.120, 42.18.123, and 42.18.126 and adoption of rules I (42.18.106); II (42.18.109); III (42.18.112); IV (42.18.115); V (42.18.118); VI (42.18.121); and VII (42.18.124) relating to Property Reappraisal of Taxable Property in Montana at page 1182 of the 1993 Montana Administrative Register, issue no. 11.

2. A Public Hearing was held on July 1, 1993, to consider the proposed amendments and adoption. No one appeared to testify and no written comments were received.

3. The Department has adopted the rules as proposed.

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State September 3, 1993.

VOLUME NO. 45 OPINION NO. 11

CONTRACTS - Approval by state of contract transfer, assignment or subcontract;
STATUTES - Approval by state of contract transfer, assignment or subcontract;
SURETY - Approval by state of contract transfer, assignment or subcontract;
MONTANA CODE ANNOTATED - Sections 18-4-105, 18-4-141, 28-1-1501, 28-1-1502;

HELD: MCA § 18-4-141(1) does not prevent the state from expressly releasing a party to a contract, or its surety, from its obligations after the state has approved a transfer, assignment, or subcontract to a new party.

August 17, 1993

Mr. Jon Noel
Director
Department of Commerce
1424 Ninth Avenue
Helena, MT 59620-0501

Dear Mr. Noel:

Your predecessor as director of the Department of Commerce asked my opinion on the following question:

> Does MCA § 18-4-141(1) prohibit the state from expressly releasing a party to a contract, or its surety, from its obligations after the state has approved a transfer, assignment, or subcontract to a new party?

Mont. Code Ann. § 18-4-141(1) authorizes the state to declare void any transfer, assignment, or subcontract of public contracts made without the express written approval of the state. The statute additionally provides that no approval by the state of a transfer, assignment or subcontract may release the original obligor or his sureties from their obligations. The statute provides in relevant part:

> No contract or order or any interest therein may be transferred, assigned, or subcontracted by the party to whom the contract or order is given to any other party without the express written approval of the state, and the state may declare void any unapproved transfer, assignment, or subcontract. *No approval of a*

transfer, assignment, or subcontract may release the original obligor or his sureties from their obligations to the state under the contract or order.

(Emphasis added.)

The Department's request for an opinion arises from the state-approved transfer of a contract for electronic gambling services. The parties intended that the transferee would provide its own surety bond to secure performance under the contract, and that the new surety bond would replace the surety bond provided by the original contractor. The transferee desires to have the original surety released since it has replaced the original bond with its own surety bond, and the Department is uncertain whether MCA § 18-4-141(1) prohibits such a release.

Prior to 1983, public contracts could not be transferred, assigned or subcontracted, regardless of approval by the state. MCA § 18-4-105 (1981). In 1983, the Legislature amended MCA § 18-4-105 (now MCA § 18-4-141) to permit the transfer, assignment or subcontract of public contracts if the state expressly grants its approval in writing. 1983 Mont. Laws, ch. 52, § 1. The legislative history reveals that Senate Bill 183 was requested by the Department of Administration because the law in effect at the time appeared to prohibit the transfer, assignment or subcontract of state contracts under any circumstances, and it was suggested that the amendment would make the statute compatible with the Uniform Commercial Code. Minutes, Senate Judiciary Committee, January 25, 1983 (comments by Valencia Lane, Department of Administration).

I conclude that the statute does not prevent the state from expressly releasing a party or its surety from its obligations under a contract. A statute must be construed according to the plain meaning of the language therein. Norfolk Holdings, Inc. v. Montana Dep't of Revenue, 249 Mont. 40, 813 P.2d 460 (1991). If the intent of the Legislature can be determined from the plain meaning of the statutory words, no other means of interpretation should be applied. State ex rel. Neuhausen v. Nachtsheim, 253 Mont. 296, 833 P.2d 201 (1992); Palmer by Diacon v. Montana Ins. Guar. Ass'n, 239 Mont. 78, 779 P.2d 61 (1989). The plain language of MCA § 18-4-141(1) prevents a finding of an implied release of the transferor's obligations. The statute provides that "[n]o *approval* of a transfer, assignment, or subcontract may release the original obligor or his sureties," which only expresses a reservation of rights regarding assignments. (Emphasis added.) See Restatement (Second) of Contracts § 329(b)-(c) (the obligor of an assigned right must manifest an intention to retain his rights against the assignor, for his silence may imply assent to a release). This language also comports with the general rule regarding assignments and

implied novations. A novation acts to release an obligated party and is defined as "the substitution of a new obligation for an existing one," including the substitution of "a new debtor in place of the old one with the intent to release the latter." MCA §§ 28-1-1501, -1502. In Kenison v. Anderson, 83 Mont. 430, 438, 272 P. 679, 681 (1928), it was held that a novation is the substitution of new debtor for original debtor with intent to release the latter, which may be expressly or impliedly created. I find nothing in MCA § 18-4-141(1) which expresses a legislative intent to prohibit the state from releasing a party or its surety under all circumstances. The statute, therefore, merely prevents the approval of an assignment, transfer or subcontract from operating as an implied novation or release of the assignor; it does not prevent the state from releasing a party or its surety by an express novation or release. In reaching this conclusion, I offer no opinion regarding the release of any particular party or its surety.

THEREFORE, IT IS MY OPINION:

MCA § 18-4-141(1) does not prevent the state from expressly releasing a party to a contract, or its surety, from its obligations after the state has approved a transfer, assignment, or subcontract to a new party.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/cwc/brf

VOLUME NO. 45 OPINION NO. 12

LAND USE - Subdivision exemption for condominium construction;
LOCAL GOVERNMENT - Subdivision exemption for condominium construction;
PROPERTY, REAL - Subdivision exemption for condominium construction;
SUBDIVISION AND PLATTING ACT - Applicability of requirements to proposed condominium developments;
MONTANA CODE ANNOTATED - Sections 1-2-101, 76-3-103(3), 76-3-103(15), 76-3-204, 76-3-601;
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 57 (1984), 39 Op. Att'y Gen. No. 74 (1982), 39 Op. Att'y Gen. No. 28 (1981), 39 Op. Att'y Gen. No. 14 (1981).

HELD: Condominiums are subdivisions which are not exempted under MCA § 76-3-204 from the provisions of the Montana Subdivision and Platting Act.

August 18, 1993

Mr. Jim Nugent
Missoula City Attorney
435 Ryman
Missoula, MT 59802-4297

Dear Mr. Nugent:

You have requested my opinion concerning the applicability of the requirements of the Montana Subdivision and Platting Act, MCA title 76, chapter 3, to proposed condominium developments. Specifically, you have asked whether MCA § 76-3-204 exempts from review the construction of eight condominiums consisting of four two-unit dwellings on property which was platted prior to the adoption of the Subdivision and Platting Act and which is zoned for duplexes.

The Montana Subdivision and Platting Act [hereinafter "Act"] generally requires local review and approval of all subdivisions. MCA § 76-3-601. A subdivision is defined by the Act as

> a division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and shall include any resubdivision and shall further include any condominium or area, regardless of its size, which provides or will provide multiple space for recreational camping vehicles or mobile homes.

MCA § 76-3-103(15). This definition has consistently been interpreted to mean that the following categories of activities are deemed subdivisions:

1. A division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed.

2. Any resubdivision.

3. Any condominium.

4. Any area, regardless of size, which provides or will provide multiple space for recreational camping vehicles.

5. Any area, regardless of size, which provides or will provide multiple space for mobile homes.

See 39 Op. Att'y Gen. No. 14 at 50, 52 (1981); 39 Op. Att'y Gen. No. 28 at 108, 111 (1981); 39 Op. Att'y Gen. No. 74 at 282 (1982); 40 Op. Att'y Gen. No. 57 at 229, 230-31 (1984).

As previously held in 39 Op. Att'y Gen. No. 74 at 283 (1982),

> the provisions of the Montana Subdivision and Platting Act apply to all condominiums not expressly exempted by one of the provisions of Title 76, chapter 3, part 2.

Two exemptions found within the Act are potentially applicable to the condominium development in question. The express statutory exemption for condominiums is MCA § 76-3-203, which provides:

> Condominiums constructed on land divided in compliance with this chapter are exempt from the provisions of this chapter.

This exemption is not applicable as the lands in question were not divided in compliance with the Act. 39 Op. Att'y Gen. No. 28 at 108 (1981).

A second exemption which arguably applies to the proposed development is MCA § 76-3-204, which provides:

> **Exemption for conveyances of one or more parts of a structure or improvement.** The sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement, whether existing or proposed, is not a division of land, as that term is

> defined in this chapter, and is not subject to the requirements of this chapter.

This provision has been the subject of three prior Attorney General's Opinions and one significant legislative amendment that was intended to overrule certain holdings of the prior opinions.

In 39 Op. Att'y Gen. No. 28 at 108 (1981), former Attorney General Greely held that the term "condominium," as it appears in the definition of "subdivision," MCA § 76-3-103(15), must be liberally construed to include *all* condominiums. In so holding, he expressly rejected the argument that a condominium is a division of a building under MCA § 76-3-204 (1981), and is therefore exempt from review under MCA § 76-4-125. Noting that the Legislature provided a specific exemption for condominiums in MCA § 76-3-203, former Attorney General Greely reasoned:

> If section 76-3-204, MCA, is a further exemption for condominiums, as has been suggested, the Legislature should have used consistent terminology throughout and referred to condominiums specifically in creating the latter exemption. Since the Legislature did not use consistent terminology, *I must conclude that section 76-3-204, MCA, refers to something other than condominiums and that the section does not exempt condominiums from review,* in light of the compelling arguments supporting inclusion.

39 Op. Att'y Gen. No. 28 at 114 (emphasis supplied).

In 39 Op. Att'y Gen. No. 74 (1982), the question was whether MCA § 76-3-204 (1981) exempted conversions of existing rental occupancy apartment houses or office buildings to individual condominium ownership. Acknowledging his prior opinions which established that condominiums were subdivisions and subject to the provisions of the Act, former Attorney General Greely concluded that the proposed conversion qualified for an exemption under MCA § 76-3-204 (1981), which provided:

> **Exemption for conveyances of one or more parts of a structure or improvement.** The sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement situated on one or more parcels of land is not a division of land, as that term is defined in this chapter, and is not subject to the requirements of this chapter.

Former Attorney General Greely construed the phrase "situated on one or more parcels of land" to mean that the Legislature was referring to an existing building, built and utilized prior to the time the division occurs. 39 Op. Att'y Gen. No. 74 at 284. Hence, the conversion to condominiums of an existing apartment or office building used for rental purposes was held to be

exempt from the requirements of the Act, as long as the conversion was not the "final step in a plan designed to purposely evade the application of the Act." Id. at 285. The opinion made clear, however, that new condominium developments were to be reviewed and approved prior to construction.

At issue in 40 Op. Att'y Gen. No. 57 (1984) was the application of the Act and its exemptions to the construction of 48 four-plexes to be used as rental occupancy buildings. Former Attorney General Greely concluded that the proposed development constituted a "division of land" as that term is defined in MCA § 76-3-103(3), and was therefore a "subdivision" under MCA § 76-3-103(15). Id. at 231-32. He further concluded that the exemption for division of a building in MCA § 76-3-204 (1981) did not apply because the buildings were not "existing building[s], built *and utilized* prior to the time the division occurs." Id. at 232, citing 39 Op. Att'y Gen. No. 74 at 282, 284 (1982) (emphasis in original).

Not long after the opinion issued in 40 Op. Att'y Gen. No. 57 (1984), the Legislature amended MCA § 76-3-204 (1981). Senate Bill 354, chapter 700 (1985) deleted the phrase "situated on one or more parcels of land," from MCA § 76-3-204 (1981) and substituted in its place the term "whether existing or proposed." According to the bill's sponsor, this amendment was offered in response to a "series of recent attorney general's opinions [which] created problems for planning agencies":

> Those opinions . . . stated that under the subdivision and platting act, a duplex is a subdivision and must be reviewed. The bill simply says that a multi-family structure is not a subdivision and should not be reviewed as such[.]

House Committee on Natural Resources, March 22, 1985, at 4.

Proponents of Senate Bill 354 were obviously concerned with the holding in 40 Op. Att'y Gen. No. 57 (1984) that construction of rental units constituted a "subdivision" and was therefore subject to the requirements of the Act. Rather than changing the definition of "subdivision," however, the Legislature expanded the exemption language in MCA § 76-2-304 to include divisions of buildings "whether existing or proposed." This amendment created an exemption for new construction of rental occupancy units which was not available under MCA § 76-3-204 (1981) as that statute was construed in 40 Op. Att'y Gen. No. 57 (1984).

When construing statutes, the intent of the Legislature must control. State ex rel. Neuhausen v. Nachtsheim, 253 Mont. 296, 299, 833 P.2d 201, 204 (1992). To ascertain legislative intent, one must first look to the language employed and the apparent purpose to be served by the statute. State v. Austin, 217 Mont.

265, 268, 704 P.2d 55, 57 (1985). It is apparent from the language of the statute and its history that the Legislature intended to change the state of the law with respect to rental occupancy buildings only. Neither the language of the statute nor its legislative history suggests a legislative intent to exempt condominiums, "whether existing or proposed," from the requirements of the Act. To construe MCA § 76-3-204 in this manner would create an exception which swallows the general rule that condominiums are subdivisions and are subject to review under the Act. MCA § 76-3-103(15); 39 Op. Att'y Gen. No. 28 (1981); 39 Op. Att'y Gen. No. 74 (1982). Although the Act underwent significant change in the 1993 legislative session, none of those changes affected the exemption language at issue here or the definition of a subdivision as specifically including "condominiums." See H.B. 408, ch. 272 (1993).

Statutes relating to the same subject must be harmonized, and none shall be held meaningless if it is possible to give it effect. Crist v. Segna, 191 Mont. 210, 212, 622 P.2d 1028, 1029 (1981); Fletcher v. Paige, 124 Mont. 114, 220 P.2d 484 (1950); Campbell v. City of Helena, 92 Mont. 366, 16 P.2d 1 (1932). Moreover, exemptions within the Act are generally given a "narrow interpretation" so as to fulfill the Act's objective of ensuring that the public health, safety, and welfare are protected. State ex rel. Florence-Carlton Sch. Dist. v. Board of County Comm'rs of Ravalli County, 180 Mont. 285, 291, 590 P.2d 602, 605 (1978), citing 3 Sutherland Statutory Construction § 71.01 (4th ed. 1974). I therefore conclude that the exemption language in MCA § 76-3-204 does not apply to condominiums.

My conclusion is consistent with the opinion of former Attorney General Greely in 39 Op. Att'y Gen. No. 28 at 114 (1981), that MCA § 76-3-204 must apply to "something other than condominiums." The meaning of this phrase is clarified by Senate Bill 354, which expresses a legislative intent to apply the exemption to multi-family dwellings to be used as rental occupancy units. See also Lee v. Flathead County, 217 Mont. 370, 373, 740 P.2d 1060, 1063 (1985) ("[t]he amendment makes it clear that not only is the renting of existing buildings exempt from subdivision review, but so are all new buildings which are to be used as rentals"). Since the construction project proposed herein is for condominiums and not for rental occupancy buildings, I conclude that it is not exempted from the requirements of the Act under MCA § 76-3-204 (1985).

THEREFORE, IT IS MY OPINION:

> Condominiums are subdivisions which are not exempted under MCA § 76-3-204 from the provisions of the Montana Subdivision and Platting Act.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/ja/mlr

VOLUME NO. 45 OPINION NO. 13

HIGHWAYS - Scope of R.S. 2477 public right-of-way;
PUBLIC LANDS - Authority of U.S. Fish and Wildlife Service to regulate R.S. 2477 public right-of-way passing across National Wildlife Refuge;
CODE OF FEDERAL REGULATIONS - 50 C.F.R. § 25.11(b) (1992);
UNITED STATES CODE - 16 U.S.C. § 460k, 43 U.S.C. § 932.

HELD: The United States Fish and Wildlife Service has the authority to regulate use of an R.S. 2477 public right-of-way within the boundaries of a wildlife refuge and public recreational use of that right-of-way may be permitted only to the extent that is practicable and not inconsistent with the primary objectives for which the refuge was established.

August 24, 1993

Mr. Thomas R. Scott
Beaverhead County Attorney
Beaverhead County Courthouse
2 South Pacific, CL #2
Dillon, MT 59725-2713

Dear Mr. Scott:

You have requested my opinion concerning the following question:

> May the Beaverhead County Commission authorize and establish a snowmobile trail on a county road which passes through the Red Rock Lakes National Wildlife Refuge?

The focus of your opinion request and accompanying memorandum of law is the creation and scope of the right-of-way on the Centennial Road and whether the county's proposed snowmobile trail falls within the lawful permitted uses of that highway. While there is merit in this discussion, my analysis has concluded that the controlling issue concerns the authority the United States Fish and Wildlife Service may exercise over a National Wildlife Refuge under the Property Clause of the United States Constitution. For purposes of clarifying these issues, I will briefly review the facts surrounding this controversy, discuss the nature of the public right-of-way, and then address the Property Clause issue.

FACTUAL BACKGROUND

In the winter of 1989-90, a group of residents of the Centennial Valley approached the Montana Department of Fish, Wildlife, and Parks with a proposal to groom the Centennial Road during winter

months for snowmobiling. The Centennial Road stretches from Monida on Interstate 15 approximately 44 miles east to Red Rock Pass on the Montana/Idaho border. This road, also known as the Red Rock Pass road, is generally regarded as a county road.[1] From a point in Lakeview, Montana, proceeding to the east at Red Rock Pass and beyond into Idaho, the road is not plowed in winter. This section of the Centennial Road runs directly through the Red Rock Lakes National Wildlife Refuge [hereinafter refuge]. Snowmobiles have traveled this road in the absence of winter grooming for several years for both recreational and other purposes.

The present refuge was created through the action of two Executive Orders of the President in 1935. In Exec. Order No. 7023, dated April 22, 1935, public lands in the Centennial Valley were withdrawn from entry and reservation, subject to existing rights, and set aside for use "as a refuge and breeding ground for wild birds and animals" and "to effectuate further the purposes of the Migratory Bird Conservation Act." On September 4, 1935, Exec. Order No. 7172 was issued which declares that private lands in the Centennial Valley, "acquired or to be acquired by the United States," are similarly reserved for purposes of the refuge.

Refuge authorities have opposed the proposal to groom the Centennial Road from its inception. Concern has been expressed that an increase in recreational snowmobile use will disrupt winter wildlife habitat and increase refuge management responsibilities. A Centennial Valley snowmobile club obtained the permission of the Beaverhead County Commissioners to groom the Centennial Road for snowmobiling in May 1990. The club attempted to secure state gasoline tax monies earmarked for grooming which are allocated by the Montana Department of Fish, Wildlife, and Parks. Following the preparation of an environmental assessment on the grooming proposal, the

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[1]Technically, up until 1991 the Centennial Road, from the interchange on Interstate 15 at Monida, for 37 miles east through Lakeview to the junction with the Elk Lake road, was a state secondary highway within the federal-aid secondary highway system. Such designation was made in 1961 at the request of the Beaverhead County Board of Commissioners. The original Montana highway map, published in 1914, depicts the Centennial Road as a "state road," and thus the road may have had prior recognition as a state road under Montana law. The federal highway bill recently enacted by Congress, the Intermodal Surface Transportation Efficiency Act of 1991, has abolished the federal-aid secondary system. The exact effect of the new highway bill on state road designations is uncertain and such distinctions are not germane to the legal issues presented by your opinion request. Questions concerning this subject may be addressed to the Legal Division Administrator for the Montana Department of Transportation.

department declined to release funds because of the unresolved legal question whether the county or the refuge has jurisdiction over the road. At this point both jurisdictions--the United States Fish and Wildlife Service and Beaverhead County--assert authority to regulate snowmobile use of the right-of-way, the existence of which is discussed below.

DISCUSSION

I. Creation and Existence of the Public Right-of-way

Neither Beaverhead County nor the federal government disputes the legal existence of a public right-of-way upon the Centennial Road. The right-of-way was created by action of a federal land grant statute of the mid-Nineteenth Century. By Act of July 26, 1866, 43 U.S.C. § 932 (section 2477 of the Revised Statutes, hereinafter R.S. 2477), Congress declared at section 8:

The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

This language has been construed by numerous courts as an offer of a right-of-way which must be accepted by a state under its particular laws for the right-of-way to be lawfully created. Vieux v. East Bay Regional Park Dist., 906 F.2d 1330 (9th Cir. 1990); Standage Ventures, Inc. v. State of Ariz., 499 F.2d 248 (9th Cir. 1974); Wilkenson v. Dep't of Interior of United States, 634 F. Supp. 1265 (D. Colo. 1986); State v. Nolan, 58 Mont. 167, 191 P. 150 (1920). It is assumed by all parties to this controversy that the offer represented by R.S. 2477 was in fact accepted with respect to the Centennial Road by action of the Madison County Commission on September 3, 1890.[2] On that date the Madison County Commissioners' journal reflects recognition of the Centennial Road as a public road. By act of the Montana Legislature in 1911, the Centennial Valley later became part of Beaverhead County.

Montana law governing the acceptance of an R.S. 2477 grant prior to 1895 is succinctly set forth in Nolan. Acceptance could be

[2]All parties have also assumed that the lands at issue were "public lands, not reserved for public uses" at the time of the acceptance of the R.S. 2477 right-of-way grant by Madison County. I make the identical assumption for purposes of analysis, but note that such assumptions have been shown very late in litigation to be erroneous in similar controversies. See Humboldt County v. United States, 684 F.2d 1276 (9th Cir. 1982) (establishment of grazing district encompassing the area in which road was located precluded county from acquiring right-of-way under R.S. 2477). In Montana, the date of the acceptance of an R.S. 2477 grant has been found to relate back to the date of the grant. City of Butte v. Mikosowitz, 39 Mont. 350, 102 P. 593 (1909).

accomplished via act of the proper authorities or by use by the public. Since there is documentation of the recognition of the public road by the Madison County authorities it is unnecessary to examine historic use of the Centennial Road to determine whether the right-of-way grant was lawfully accepted through public use. Following the lawful creation of the public right-of-way, the right-of-way represented by the Centennial Road had continued in existence up to the present day. The acquisition of private properties by the federal government in the 1930's for purposes of establishing the refuge did not affect the continuing existence of the underlying right-of-way or easement. While the existence of an R.S. 2477 public right-of-way for the Centennial Road is not controverted, the present scope of that right-of-way is disputed.

II. Scope of the Centennial Road Right-of-way

Generally questions concerning permitted uses on a public right-of-way involve a determination of the scope of the particular right-of-way. Such analysis in this situation would involve a choice of law determination between state or federal law, consideration of the nature of the resulting easement, and a conclusion as to whether the contemplated use is within the scope of that easement.
However, for reasons discussed below, even if winter grooming of the Centennial Road were found to be within the scope of the R.S. 2477 public right-of-way, application of the federal Property Clause renders such conclusion moot.[3]

III. Federal Constitutional Principles

The issue presented by consideration of federal constitutional principles is whether a National Wildlife Refuge may regulate snowmobile use upon a road within its boundaries that is recognized as a county or state public right-of-way. While this precise issue in the context of a wildlife refuge has never been addressed in a reported judicial decision, three analogous decisions uniformly hold that the National Park Service may regulate such a highway under the reach of the Property Clause of the United States Constitution. United States v. Vogler, 859 F.2d 638 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989); Robbins v. United States, 284 F. 39 (8th Cir. 1922); Wilkenson v. Dep't of Interior, 634 F. Supp. 1265 (D. Colo. 1986). Each

[3]Article IV, section 3 of the United States Constitution provides in relevant part:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States[.]

Such provision is generally known as the Property Clause.

of these opinions specifically addresses the authority of the Park Service to regulate the type of R.S. 2477 public right-ofway at issue in the Centennial Valley.

In Robbins the Eighth Circuit was confronted with an action in which the United States, as plaintiff, sought to enjoin an individual from transporting passengers for hire in Rocky Mountain National Park, Colorado. The case is arguably distinguishable from the present situation in Beaverhead County, as the court found that the State of Colorado and Larimer County had ceded jurisdiction and control over the park highways to the federal government.[4] Nevertheless, the conclusion of the Eighth Circuit extends beyond the circumstances presented to the court:

> But we are of the opinion that the power of the government to regulate the traffic on those highways, as it has done by congressional enactment and rules thereby authorized, rests on the secure footing that it is a valid exercise of control over the property of the government, even though it is of the nature of police power, and that it is sustained by section 3, art. 4, of the federal Constitution, which entitles the government to make all needful regulations respecting its territory and property.
>
> Neither grants of rights of way on the public lands, accepted by user or statute, nor state ownership of highways derived from the government or otherwise effect any abdication of such constitutional authority. Both the power of Congress to grant easements in favor of the public for travel and transportation and its power to legislate concerning territory and property are and must be consistently exercised, and the latter is accomplished by regulations to the end of devoting the adjacent domain owned by the government to the lawful purposes and objects for which a national park is granted. We therefore hold that the [federal] regulations here involved cannot be successfully assailed because of interference with private right to use the highways in the Rocky Mountain National Park.

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[4]A factual question existed in Robbins concerning the validity of the jurisdictional cession of the road upon which the defendant was cited. Because the driver had to travel a ceded road to reach the unceded road, the court of appeals did not find that resolution of the question was necessary to reach its decision. Robbins, 284 F. at 45.

Robbins, 284 F. at 45 (citations omitted).[5]

The above quotation from Robbins was cited with approval by the federal district court in Wilkenson, a case which involved a disputed R.S. 2477 public right-of-way in Colorado National Monument. Mesa County, from which the monument had been created, had abandoned one county roadway, but had not ceded jurisdiction to other roads. The district court first found that the disputed monument roads were subject to a public right-of-way. The court then invalidated a fee requirement imposed on noncommercial through-traffic by the park system. Finally, the court addressed the authority of the Secretary of the Interior to regulate commercial traffic in the monument. Relying on Robbins, Kleppe v. New Mexico, 426 U.S. 529 (1976),[6] and the organic act for the National Park Service, the

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[5]A few years following the Robbins decision the authority of the Park Service to implement regulations upon the highways of Rocky Mountain National Park was again challenged, this time by the State of Colorado. The action resulted in a United States Supreme Court decision which held that the state was entitled to attempt to prove that it had not surrendered legislative jurisdiction to the United States. Colorado v. Toll, 268 U.S. 228 (1925). The case has been relied upon as an affirmation of general state predominance over federal land in the absence of specific cession. In Kleppe v. New Mexico, 426 U.S. 529, 545, n.12 (1976), the Supreme Court disposed of this argument with the observation that "at most the case [Colorado v. Toll] stands for the proposition that where Congress does not purport to override state power over public lands under the Property Clause and where there has been no cession, a federal official lacks power to regulate contrary to state law." See also G. Coggins & C. Wilkenson, Federal Public Land and Resources Law, at 151-52 (1981). These cases indicate that while it is clear the State of Montana and Beaverhead County have not surrendered legislative jurisdiction over the Centennial Road right-of-way, the authority of local government to regulate use may be overridden by Congressional power over public lands under the Property Clause.

[6]Kleppe is the seminal modern case construing the reach of the Property Clause. The United States Supreme Court stated:

> [W]hile the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that "[t]he power over the public land thus entrusted to Congress is without limitations."

426 U.S. at 539 (citation omitted).

Secretary's authority to ban commercial vehicles on the public highways was upheld.[1]

In Vogler, the appellant was a placer miner who appealed a federal district court decision granting a permanent injunction against his use of off-road vehicles in Alaska's Yukon-Charley Rivers National Preserve. Although Vogler alleged that the trail he was using was an R.S. 2477 right-of-way, the district court held that he was required to obtain a permit from the Park Service prior to using the trail. The Ninth Circuit Court of Appeals relied upon Wilkenson and Kleppe, and summarily dismissed the appellant's argument:

> Even if we assume that the trail is an established right of way, we do not accept Vogler's argument that the government is totally without authority to regulate the manner of its use.

Vogler, 859 F.2d at 642. See also National Wildlife Fed'n v. National Park Serv., 669 F. Supp. 384, 391 (D. Wyo. 1987) (Wilkenson and Robbins provide ample authority for the Park Service to develop Interim Management Plan).

IV. Management of the National Wildlife Refuge System Under the Power of the Property Clause

The cases discussed above indicate that the National Park Service clearly has the authority under the Property Clause to regulate R.S. 2477 public rights-of-way within park boundaries. In the absence of judicial precedent, the question arises whether the Fish and Wildlife Service would be found to have similar authority.

The National Wildlife Refuge System Administration Act of 1966 [hereinafter Refuge Act], 16 U.S.C. §§ 668dd-668ee, states, inter alia, that the purpose of the refuge system is the "conservation of fish and wildlife." 16 U.S.C. § 668dd(a)(1). "[T]he U.S. Fish and Wildlife Service has responsibility for management in all areas of the refuge system." S. Rep. No. 94-593, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S.C.C.A.N. 288, 292. Unlike the National Park Service, which is statutorily charged in part "to provide for the enjoyment of the [national parks and monuments] . . . in such manner and by such means as will leave them unimpaired for the enjoyment of future

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[1]The Secretary of the Interior is authorized by the organic act of the National Park Service to prescribe rules and regulations to "conserve the scenery and the natural and historic objects and the wild life [in the national parks and monuments] and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C § 1.

generations," 16 U.S.C. § 1, the overriding duty of the Fish and Wildlife Service is wildlife management:

> All national wildlife refuges are maintained for the primary purpose of developing a national program of wildlife and ecological conservation and rehabilitation. These refuges are established for the restoration, preservation, development and management of wildlife and wildlands habitat; for the protection and preservation of endangered or threatened species and their habitat; and for the management of wildlife and wildlands to obtain the maximum benefits from these resources.

50 C.F.R. § 25.11(b) (1992).

Thus, the 1962 Refuge Recreation Act authorizes the Fish and Wildlife Service to allow public recreational use of the national wildlife refuges, but such use "shall be permitted only to the extent that is practicable and not inconsistent with . . . the primary objectives for which each particular area is established." 16 U.S.C. § 460k. Recreational use may be curtailed whenever such action is considered necessary to assure accomplishment of primary refuge objectives. Id. Decisions of the Secretary of the Interior permitting recreational use of refuges have been closely scrutinized. Defenders of Wildlife v. Andrus[Ruby Lake II], 455 F. Supp. 446 (D.D.C. 1978) (refuge regulations violate the statutory standard of the Refuge Recreation Act because the degree and manner of boating use which they would permit are not incidental or secondary use, are inconsistent, and would interfere with the refuge's primary purpose). Courts look specifically at the purpose of the particular refuge in determining the validity of management practices. Trustees for Alaska v. Watt, 425 F. Supp. 1301 (D. Alaska 1981) (Fish and Wildlife Service required to control and direct the Arctic National Wildlife Refuge by regulating human access in order to conserve the entire spectrum of wildlife found in the Refuge), aff'd, 690 F.2d 1279 (9th Cir. 1981).

The management mandate that Congress has given the Fish and Wildlife Service for the National Wildlife Refuge System is clear. The authority of that agency over federal refuge property is at least as extensive as the authority the National Park Service exercises over parks and monuments. For the reasons stated above, the authority of the Fish and Wildlife Service arguably exceeds that of the Park Service. Thus, existing judicial interpretation of the Property Clause with regard to the National Park Service applies to the management of wildlife refuges by the Fish and Wildlife Service as well. Under these authorities the Fish and Wildlife Service therefore has the power to regulate use of an R.S. 2477 public right-of-way within the boundaries of a wildlife refuge and public recreational use of that right-of-way is permitted "only to the extent that is practicable and not inconsistent" with the

primary objectives for which the refuge was established. 16 U.S.C. § 460k.

THEREFORE, IT IS MY OPINION:

> The United States Fish and Wildlife Service has the authority to regulate use of an R.S. 2477 public right-of-way within the boundaries of a wildlife refuge and public recreational use of that right-of-way may be permitted only to the extent that is practicable and not inconsistent with the primary objectives for which the refuge was established.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/gs/brf

BEFORE THE BOARD OF OUTFITTERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the petition)
for declaratory ruling on the) DECLARATORY RULING
applicability of section)
37-47-101(5) to his activity)

Introduction

1. The Board of Outfitters received a Petition for Declaratory Ruling from Larry Fish, 2971 Deer Meadow Drive, Danville, California 94506. Mr. Fish requested a ruling as to whether he would be required to be licensed as an outfitter to undertake certain proposed conduct.

2. On May 27, 1993, the Board of Outfitters published a Notice of Petition for Declaratory Ruling setting forth the facts and issues presented. This notice was published in the 1993 Montana Administrative Register, Issue 10, page 1118.

3. On June 8, 1993, the Board of Outfitters considered the Petition for Declaratory Ruling, and arrived at a unanimous decision as to the Declaratory Ruling in this matter.

Question Presented

4. The question presented for declaratory ruling is whether Petitioner is prohibited by the provisions of section 37-47-301, MCA, from engaging in non-compensated hunting with friends of his who may stay at his lodge.

Facts Presented

5. The Petitioner is the owner of a lodge in southwest Montana. The method of operation for the lodge is to furnish rooms and meals to paying guests. Guests are furnished maps of the area upon request. Those guests who hunt must provide their own transportation, seek their own hunting or fishing assistance and game or fish handling. No services are provided by lodge employees or owners for taking care of or processing any of a guests' game or fish.

6. During appropriate seasons hunters and fishermen are the main, if not the exclusive, users of the lodge. Petitioner expects from time to time to hunt and fish on federal, state, or private lands in the vicinity of the lodge with those of his paying guests who are also his friends. Petitioner states that such friends will not be charged any fee for hunting with Petitioner.

7. The Petitioner contends his activity is not prohibited by the licensing statutes because he does not charge his friends for accompanying them hunting and/or fishing, but charges them only for room and board at the lodge as he does all other guests of his lodge.

Applicable Law

8. Petitioner requests a declaratory ruling that his activity is not prohibited by the Board's licensing statutes. The statutes applicable to Petitioner's request are as follows:

A. Section 37-47-101(5), MCA, defines Outfitter, as follows:

> "(5) "Outfitter" means any person, except a person providing services on real property that he owns for the primary pursuit of bona fide agricultural interests, who:
> (a) engages in the business of outfitting for hunting or fishing parties, as the term is commonly understood;
> (b) for consideration provides any saddle or pack animal or personal service for hunting or fishing parties or camping equipment, vehicles, or other conveyance, except boats, for any person to hunt, trap, capture, take, or kill any game and accompanies such a party or person on an expedition for any of these purposes;
> (c) for consideration furnishes a boat or other floating craft and accompanies any person for the purpose of catching fish; or
> (d) for consideration aids or assists any person in locating or pursuing any game animal."

B. Section 37-47-101(6), MCA, defines Professional Guide as follows:

> "(6) "Professional guide" and "guide" mean a person:
> (a) who is an employee of an outfitter and who furnishes only personal guiding services in assisting a person to hunt or take game animals or fish and who does not furnish any facilities, transportation, or equipment; or
> (b) who has contracted independently with an outfitter and who furnishes personal guiding services and facilities, transportation, or equipment that he owns in assisting a person to hunt or take game birds or fish. A guide who provides independent contractor services to an outfitter may not provide facilities, equipment, or services for overnight use."

C. Section 37-47-102, MCA, Determination of what constitutes consideration, states as follows:

> "The providing of the services, property, or equipment mentioned in 37-47-101(5) or the advertising of services to assist persons to hunt, pursue, or take wildlife or to fish shall be

presumed to have been for consideration for the purposes of this chapter."

Summary of Comments

9. Petitioner's attorney, F. Woodside Wright, attended the Board's discussion of the Petition. Mr. Wright stated that Petitioner does not intend to violate the Board's licensure requirement, and does not intend to deviate from the practice described in his Petition. Mr. Wright stated that Petitioner would not charge Petitioner's friends for hunting with them, and that Petitioner's rate sheet would clearly reflect that Petitioner is not charging for hunting with Petitioner's friends. The Board received no other written or verbal comments on Petitioner's Petition for Declaratory Ruling.

Declaratory Ruling

1. Section 37-47-301, MCA, states that no person may act as, or advertise as an outfitter without a current license to do so. Section 37-47-101(5), MCA, provides the definition of outfitter, as previously stated in this Ruling. The common thread running through the definitions of "outfitter" is consideration. That is, the determination of whether an individual needs a license depends on whether the individual is charging a fee or taking other consideration. The facts presented by Petitioner in his Petition for Declaratory Ruling state that Petitioner does not and will not charge a fee for hunting with guests who also may be his friends. Thus, Petitioner's activity does not require a license, subject to the following qualifications.

2. This ruling is issued only as to the specific facts presented in Petitioner's petition, and is specifically limited to the facts presented in Petitioner's petition, and information supplied by petitioner's attorney.

3. The Board's understanding and interpretation of Petitioner's statement that he will hunt "from time to time" with non-paying friends is that such practice will involve an "occasional" or "sporadic" guest who is also a friend. The Board's ruling in this matter is specifically limited to this interpretation.

4. Section 37-47-102, MCA, provides that when an individual is acting as an outfitter, that the individual is presumed to be providing such services for consideration. The Board interprets this section to require that Petitioner submit proof that Petitioner is not compensated for hunting with friends. The Board suggests that such proof consist, at a minimum, of a published rate sheet that indicates the fee charged for guests of the lodge. This fee must not distinguish between guests who hunt and fish and guests who do not do so. This fee also must not distinguish between the unaccompanied guest and the accompanied guest/friend of petitioner.

5. This ruling is issued only as the Board of Outfitter's interpretation of section 37-47-101, MCA, and

neither involves nor binds other agencies that may be involved, such as but not limited to the Montana Department of Fish, Wildlife, & Parks, the United States Forest Service, the Beaverhead County Attorney's Office, or the State or Federal Bureaus of Land Management. Petitioner must deal separately with any of the listed agencies, or other agencies not listed that may have jurisdiction over petitioner's activities.

6. The Board's understanding and interpretation of Petitioner's statement that he will provide the "standard amenities" to paying lodge guests is that Petitioner will not provide, for a fee, any lodge guests with any of the items or services listed in section 37-47-101(5), MCA.

DATED this 21st day of August, 1993.

BOARD OF OUTFITTERS

By: Irving L. Max Chase
IRVING L. "MAX" CHASE
PRESIDENT

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 June 30, 1993. This table includes those rules adopted during the period July 1, 1993 through September 30, 1993 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 June 30, 1993, this table and the table of contents of this issue of the MAR.

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