MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 24

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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BEFORE THE BOARD OF LANDSCAPE ARCHITECTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of a rule pertaining to fees	)))	NOTICE OF PROPOSED AMENDMENT OF 8.24.409 FEE SCHEDULE

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On January 22, 1994, the Board of Landscape Architects proposes to amend the above-stated rule.

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

"8.24.409 FEE SCHEDULE (1) through (3)(b) will remain the same.

(c) Examination -	Test 1	~~$15.00~~	22.00
	Test 2	~~20.00~~	28.00
	Test 3	~~65.00~~	77.00
	Test 4	~~60.00~~	72.00
	Test 5	~~80.00~~	89.00
	Test 6	~~70.00~~	80.00
	Test 7	~~35.00~~	42.00

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

Auth: Sec. 37-1-134, 37-66-202, MCA; IMP, Sec. 37-1-134, 37-66-202, 37-66-305, 37-66-307, MCA

REASON: These amendments are necessary to make the fees commensurate with the amount charged for the examination by the Council of Landscape Architectural Registration Boards.

3. Interested persons may present their data, views or arguments concerning the proposed amendments in writing to the Board of Landscape Architects, 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., January 20, 1994.

4. If a person who is directly affected by the proposed amendments 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 Landscape Architects, 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., January 20, 1994.

5. If the Board receives requests for a public hearing on the proposed amendments from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed amendments and adoptions, 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 1 based on the 11 licensees in Montana.

BOARD OF LANDSCAPE ARCHITECTS
TED WIRTH, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, December 13, 1993.

BEFORE THE BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of rules pertaining to fees and ethical standards for social work examiners and professional counselors and the proposed adoption of new rules pertaining to inactive status licenses	NOTICE OF PROPOSED AMENDMENT OF 8.61.404 FEE SCHEDULE, 8.61.405 ETHICAL STANDARDS, 8.61.1203 FEE SCHEDULE AND 8.61.1204 ETHICAL STANDARDS AND THE PROPOSED ADOPTION OF NEW RULES PERTAINING TO INACTIVE STATUS LICENSES

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On January 22, 1994, the Board of Social Work Examiners and Professional Counselors proposes to amend and adopt the above-stated rules.

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

"8.61.404 FEE SCHEDULE

(1) Application fee	~~$75.00~~	50.00
(2) Original license fee	~~75.00~~	50.00
~~(3) Exam fee~~	~~75.00~~	
~~(4)~~ (3) Renewal fee (based on annual renewal)	~~75.00~~	50.00
~~(5) Retake exam fee~~	~~75.00~~	
(4) Renewal fee (inactive to active)		50.00"

Auth: Sec. 37-22-201, 37-22-302, 37-22-304, MCA; IMP, Sec. 37-22-301, 37-22-302, 37-22-304, MCA

REASON: The proposed amendment will lower licensing fees for social workers to be commensurate with costs of administering the board; will eliminate exam fees which are now paid directly to the exam service; and add a fee to change the license status from inactive to active.

"8.61.405 ETHICAL STANDARDS (1) through (1)(e) will remain the same.

(f) Engage in sexual acts with a client or with a person who has been a client within the past eighteen months. A licensee shall not provide social work services to a person with whom the licensee has had a sexual relation at any time.

(f) through (j) will remain the same but will be renumbered (g) through (k)."

Auth: Sec. 37-22-201, MCA; IMP, Sec. 37-22-201, 37-22-311, MCA

REASON: The proposed rule amendment for social workers will add a section prohibiting sexual relations with a client within 18 months from the termination of the professional relationship, as this type of unprofessional conduct has become more prevalent nationwide, and the prohibition is recommended by national organization ethical standards.

"8.61.1203 FEE SCHEDULE

(1) Application fee	~~$75.00~~	50.00
(2) Original license fee	~~75.00~~	50.00
~~(3) Examination fee~~	~~75.00~~	
~~(4)~~ (3) Renewal fee	~~75.00~~	50.00
~~(5) Retake exam fee~~	~~75.00~~	
(4) Renewal fee (inactive to active)		50.00"

Auth: Sec. 37-1-134, 37-23-103, MCA; IMP: Sec. 37-1-134, 37-23-206
REASON: The proposed ~~amendment~~ will lower licensing fees ~~for~~ licensed professional counselors to be commensurate with costs of administering the board; will eliminate exam fees which are now paid directly to the exam service; and add a fee to change the license status from inactive to active.

"8.61.1204 ETHICAL STANDARDS (1) through (e) will remain the same.

(f) Engage in sexual acts with a client or with a person who has been a client within the past eighteen months. A licensee shall not provide licensed professional counselor services to a person with whom the licensee has had a sexual relation at any time.

(f) through (j) will remain the same but will be renumbered (g) through (k)."

Auth: Sec. 37-23-103, MCA; IMP, Sec. 37-23-103, MCA

REASON: The proposed rule amendment for licensed professional counselors will add a section prohibiting sexual relations with a client within 18 months from the termination of the professional relationship, as this type of unprofessional conduct has become more prevalent nationwide, and the prohibition is recommended by national organization ethical standards.

3. The proposed new rules will read as follows:

"I APPLICATION TO CONVERT AN INACTIVE STATUS LICENSE TO AN ACTIVE STATUS LICENSE (1) An inactive status license does not entitle the holder to practice as a licensed social worker in the state of Montana. Upon application and payment of the appropriate fee, the board may reactivate an inactive license if the applicant does each of the following:

(a) signifies to the board in writing that, upon issuance of the active license, the applicant intends to be an active practitioner in the state of Montana; and

(b) presents satisfactory evidence that the applicant has not been out of active practice for more than two years; and that the applicant has attended 40 hours of continuing education which comply with the continuing education rules of the board, and is approved by the board;

(c) submits certification from the social work licensing body of all jurisdictions where the applicant is licensed or has practiced that the applicant is in good standing and has not had any disciplinary action taken against the applicant's license, or if the applicant is not in good standing by that jurisdiction, an explanation of the nature of the violation(s) resulting in that status, including the extent of the disciplinary treatment imposed."

Auth: Sec. 37-22-201, MCA; IMP, Sec. 37-22-306, MCA

"II APPLICATION TO CONVERT AN INACTIVE STATUS LICENSE TO AN ACTIVE STATUS LICENSE (1) An inactive status license does not entitle the holder to practice as a licensed professional counselor in the state of Montana. Upon application and payment of the appropriate fee, the board may reactivate an inactive license if the applicant does each of the following:

(a) signifies to the board in writing that, upon issuance of the active license, the applicant intends to be an active practitioner in the state of Montana; and

(b) presents satisfactory evidence that the applicant has not been out of active practice for more than two years; and that the applicant has attended 40 hours of continuing education which comply with the continuing education rules of the board, and is approved by the board;

(c) submits certification from the licensed professional counselor licensing body of all jurisdictions where the applicant is licensed or has practiced that the applicant is in good standing and has not had any disciplinary action taken against the applicant's license, or if the applicant is not in good standing by that jurisdiction, an explanation of the nature of the violation(s) resulting in that status, including the extent of the disciplinary treatment imposed."

Auth: Sec. 37-23-103, MCA; IMP, Sec. 37-23-207, MCA

REASON: The proposed new rule will implement the procedure for reactivating an inactive license, under the inactive status created by the 1993 Legislature at section 37-23-307, MCA

4. Interested persons may present their data, views or arguments concerning the proposed amendments and adoptions in writing to the Board of Social Work Examiners and Professional Counselors, 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., January 20, 1994.

5. If a person who is directly affected by the proposed amendments 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 Social Work Examiners and Professional Counselors, 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., January 20, 1994.

6. If the Board receives requests for a public hearing on the proposed amendments and adoptions from either 10

percent or 25, whichever is less, of those persons who are directly affected by the proposed amendments and adoptions, 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 62 based on the 621 licensees in Montana.

BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
RICHARD SIMONTON, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, December 13, 1993.

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

In the matter of the adoption of a new rule dealing with administrative penalties for violations of hazardous waste laws and rules.	NOTICE OF PUBLIC HEARING FOR PROPOSED ADOPTION OF NEW RULE I (Hazardous Waste)

To: All Interested Persons

1. On January 25, 1994, at 9:00 a.m., the department will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the adoption of the above new rule.

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

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

RULE I ADMINISTRATIVE PENALTY (1) Whenever the department documents that a violation of a statute or rule adopted under Title 75, chapter 10, part 4, MCA, has occurred, it may assess the administrative penalty prescribed by 75-10-424, MCA, against the violator in accordance with the procedures specified in (2) below.

(2)(a) Assessment of an administrative penalty under this rule must be made in conjunction with an administrative order, notice of violation, or other administrative action authorized under Title 75, chapter 10, part 4, MCA. The order, notice of violation, or other administrative action may be served upon the violator or the violator's agent either by personal service or by certified mail. Service by mail is complete on the day of mailing.

(b) Each order, notice of violation, or other administrative action which assesses an administrative penalty must include the following:

(i) A statement of the statutory or rule section(s) violated;

(ii) A statement of the facts constituting the violation(s) for which the penalty is assessed;

(iii) A statement of the amount of the penalty assessed; and

(iv) Notice of opportunity to request a hearing before the board in accordance with (3) below.

(3) A person named in an order, notice of violation, or other administrative action which assesses an administrative penalty may request a hearing on the assessment of the penalty before the board of health and environmental sciences. A request for hearing must be made in writing and filed with the board within 30 days after the order, notice of violation, or other administrative action is served upon the person request-

ing the hearing. The assessment of penalties becomes final unless a hearing is requested within the 30-day period.
AUTH: 75-10-405 IMP: 75-10-424

4. The department is proposing this rule in order to establish procedures for the assessment of administrative penalties for violations of hazardous waste laws and regulations and appeal of the penalty amount to the Board of Health and Environmental Sciences, as authorized by 75-10-405, MCA.

5. Interested persons may submit their data, views, or arguments concerning the proposed rule, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to J. Mark Stahly, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than January 28, 1994.

ROBERT J. ROBINSON, Director

Certified to the Secretary of State December 13, 1993.

Reviewed by:

Eleanor Parker, DHES Attorney

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

In the matter of the amendment of rules 46.12.501, 46.12.570 through 56.12.573, 46.12.575, 46.12.577, 46.12.2001, 46.12.2010, 46.12.2011, 46.12.2013, 46.12.5002, 46.12.5007, 46.12.5010 and the repeal of 46.12.2012 pertaining to mid-level practitioners.	)	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 46.12.501, 46.12.570 THROUGH 46.12.573, 46.12.575, 46.12.577, 46.12.2001, 46.12.2010, 46.12.2011, 46.12.2013, 46.12.5002, 46.12.5007, 46.12.5010 AND THE REPEAL OF 46.12.2012 PERTAINING TO MID-LEVEL PRACTITIONERS

TO: All Interested Persons

1. On January 12, 1994, 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 rules 46.12.501, 46.12.570 through 46.12.573, 46.12.575, 46.12.577, 46.12.2001, 46.12.2010, 46.12.2011, 46.12.2013, 46.12.5002, 46.12.5007, 46.12.5010 and the repeal of 46.12.2012 pertaining to mid-level practitioners.

The Department of Social and Rehabilitation Services will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you request an accommodation, contact the department no later than 5:00 p.m. on January 3, 1994, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970.

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

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

(ab) ~~nurse specialists~~ mid-level practitioner services; Subsections (1)(ac) and (1)(ad) remain the same.

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

46.12.570 CLINIC SERVICES, DEFINITIONS Subsections (1) through (6) remain the same.

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

(b7) "Public health department services" mean physician services and ~~nurse specialist~~ mid-level practitioner services as

provided for in ~~50-2-101 through 50-2-124~~ 50-2-116, 50-2-118, and 50-2-119 MCA.

(~~e~~8) "Protocols" mean written plans developed by a public health clinic in collaboration with physician and nursing staff specifying the nursing procedures to be followed in giving a specific exam, or providing care for particular conditions. Protocols must be updated and approved by a physician at least annually.

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

46.12.571 CLINIC SERVICES, REQUIREMENTS Subsections (1) through (9) remain the same.

(a) ~~Nurse specialist~~ Mid-level practitioner services which:

Subsection (9)(a)(i) remains the same.

(ii) meet all requirements specified in ARM 46.12.2010 through 46.12.2012~~, except for the requirement that the nurse specialist be an independent practitioner~~.

Subsections (9)(b) through (13) remain the same.

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

46.12.572 CLINIC SERVICES, COVERED PROCEDURES (1) Clinic services, covered by the medicaid program, include the following ~~A~~ambulatory surgical center procedures which are covered by medicare and medicaid:

Subsections (1)(a) through (1)(m)(v) remain the same.

(2) Clinic services, covered by the medicaid program, include the following ~~A~~ambulatory surgical center procedures which are covered by medicaid but not by medicare:

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

(3) ~~Mental health c~~Clinic services, covered by the medicaid program, include the following services provided by a mental health center ~~are limited to~~:

Subsections (3)(a) through (3)(e) remain the same.

~~(4) Mental health clinic services provided by a mental health center do not include community living support services, transitional living services or services provided by telephone.~~

(~~5~~4) Clinic services, covered by the medicaid program, include the following services provided by a ~~D~~diagnostic clinic~~: services are limited to~~

(a) speech therapy~~;~~
(b) audiology~~;~~
(c) hearing aids~~;~~
(d) psychologist services~~;~~
(e) social work services~~;~~
(f) physical therapy~~;~~
(g) occupational therapy; and

(h) medical and dental evaluation, diagnosis and treatment services.

(5) Clinic services, covered by the medicaid program, include physician services covered in ARM 46.12.2001 through 46.12.2003.

(6) Clinic services, covered by the medicaid program, include mid-level practitioner services covered in ARM 46.12.2010 through 46.12.2013.

(7) Clinic services, covered by the medicaid program do not include the provision by a mental health center of community living support services, transitional living services or services provided by telephone.

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

46.12.573 CLINIC SERVICES, REIMBURSEMENT Subsections (1) through (6) remain the same.

(7) Public health department services will be reimbursed at the lowest of ~~either~~ the following:

Subsections (7)(a) and (7)(b) remain the same.

(c) ~~the~~ any applicable fees for either physician services ~~and nurse specialist services~~ set forth in ARM 46.12.2003 and or mid-level practitioner services as set forth in ARM 46.12.2013.

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

46.12.575 FAMILY PLANNING SERVICES Subsections (1) through (8) remain the same.

(9) "Medical counseling" means counseling services provided by a physician, ~~nurse practitioner~~ mid-level practitioner, or other medical professional under the supervision of the clinic's medical director regarding:

Subsections (9)(a) through (10) remain the same.

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

46.12.577 FAMILY PLANNING SERVICES, REIMBURSEMENT Subsection (1) remains the same.

(a) for physicians ~~and nurse practitioners~~ those fees provided for in ARM 46.12.2003 ~~and 46.12.2013 respectively~~;

(b) for mid-level practitioners those fees provided in ARM 46.12.2013;

Subsection (1)(b) remains the same in text but is renumbered (1)(c).

(2) The fees in the department's fee schedule for the local delegate agencies ~~is calculated as follows:~~

~~(a) the fee for a supply item or procedure is~~ are for each item or procedure the average of the charges for that item or

procedure submitted by the delegate agencies during the preceding fiscal year~~;~~.

~~(b) t~~The adjustments to the fee schedule based upon the annual averaging ~~described in subsection (a)~~ may not exceed the adjustment for family planning services authorized ~~or directed~~ by the legislature for that fiscal year~~; and~~.

~~(c) t~~The fees in the fee schedule ~~may not exceed those~~ for services provided by physicians or mid-level practitioners may not exceed the fees available for those services set forth in ARM 46.12.2003 or 46.12.2013 ~~and nurse practitioners~~.

Subsection (3) remains the same.

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

46.12.2001 PHYSICIAN SERVICES, DEFINITIONS (1) "Physician services" means those services provided by individuals licensed under the State Medical Practice Act to practice medicine or osteopathy which, as defined by state law, are within the scope of their practice. ~~Such services will include those services rendered by physician assistants when furnished under the supervision of a physician and in accordance with Title 37, chapter 20, MCA.~~

Subsections (2) and (3) remain the same.

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

46.12.2010 ~~NURSE SPECIALIST~~ MID-LEVEL PRACTITIONER SERVICES, REQUIREMENTS (1) ~~This rule~~ ARM 46.12.2011 and 46.12.2013 provide~~s~~ the requirements for medicaid coverage of ~~nurse specialist~~ mid-level practitioner services. The requirements in ~~this~~ those rules are in addition to those contained in ARM 46.12.301 through 46.12.308.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-101 MCA

46.12.2011 ~~NURSE SPECIALIST~~ MID-LEVEL PRACTITIONER SERVICES, DEFINITIONS ~~(1)~~ For the purpose of ~~this~~ these rule~~s~~, the following definitions will apply:

(1) "Advanced practice registered nurse" means a registered professional nurse licensed as provided in Title 37, chapter 8, MCA and ARM Title 8, chapter 32, subchapter 3 and includes nurse practitioner, nurse anesthetist, and nurse midwife. The term does not include clinical nurse specialist as defined, licensed and certified under those statutes and rules.

Subsection (1)(a) remains the same in text but is renumbered (2).

~~(b) "Medical protocol" means an agreement or standing order between the physician and the nurse practitioner or~~

~~midwife which defines the medical functions, hospital procedures, referrals, communications, consultations and backup arrangements for the nurse practitioner or midwife.~~

(3) "Independent employment status" means that a separate federal tax identification number is obtained for the mid-level practitioner and the billed services are not provided in the course of the mid-level practitioner's employment by or contract with a physician, hospital or ambulatory surgical center.

(~~e~~4) "~~Nurse specialist~~ Mid-level practitioner" means the following professionals:

(~~i~~a) ~~nurse practitioner~~ advanced practice registered nurse; and

(~~ii~~b) ~~nurse anesthetist; and~~ physician assistant.

~~(iii) nurse midwife.~~

Subsections (d) through (f) remain the same in text but are renumbered (6) through (8).

(~~g~~5) "~~Nurse specialist~~ Mid-level practitioner services" means those services provided by ~~nurse specialists~~ mid-level practitioners in accord with the laws and rules defining and governing through licensing and certification the practices of ~~nurse practitioners, nurse anesthetists and nurse midwives~~ advanced practice registered nurses and physician assistants.

(9) "Physician assistant" means a person who is licensed as provided in Title 37, Chapter 20, MCA and ARM Title 8, Chapter 28, Subchapter 15.

Subsections (h) through (k) remain the same in text but are renumbered (10) through (13).

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-101 MCA

46.12.2013 ~~NURSE SPECIALIST~~ MID-LEVEL PRACTITIONER SERVICES, REIMBURSEMENT (1) Medicaid reimbursement to ~~nurse specialists~~ mid-level practitioners is only available for those services listed in the procedure code report (PCR) incorporated by reference in ARM 46.12.2003.

(2) ~~Nurse specialist~~ Mid-level practitioner services must be medically necessary as defined in ARM 46.12.102 and 46.12.306.

(3) Medicaid ~~will~~ reimburses the following providers of mid-level practitioner services:

(a) ~~directly nurse specialists~~ mid-level practitioners who are considered to have an independent employment status.

~~(i) "Independent employment status" means that a separate federal tax identification number is obtained for the nurse specialist and the billed services are not provided in the course of the nurse anesthetist's employment by or contract with a physician, hospital or ambulatory surgical center.~~

~~(ii) Nurse specialists shall be reimbursed for kids count screening services and immunizations at the same rate as physicians.~~

(b) hospitals ~~which~~ employing or contracting with certified registered nurse anesthetists ~~or contract for certified registered nurse anesthetist services,~~ if:

Subsections (3)(b)(i) through (3)(b)(iii) remain the same.

(c) physicians, ~~or~~ ambulatory surgical centers, diagnostic centers or public health departments, ~~which~~ employing or contracting with mid-level practitioners ~~certified registered nurse anesthetists or contract for certified registered nurse anesthetist services,~~ if:

(i) the physician or the ~~ambulatory surgical center~~ provider entity obtains from the department or its fiscal agent a provider number for ~~certified registered nurse anesthetist~~ the mid-level practitioner ~~services~~; and

(ii) the physician or the ~~ambulatory surgical center~~ provider entity bills for services on form HCFA-1500.

~~(d) nurse practitioner or nurse midwife employed by a single physician or by a physician clinic and under the direction of physician(s).~~

~~(i) The employer obtains from the department or its fiscal agent a provider number for the nurse specialist(s).~~

~~(ii) Nurse practitioner or nurse midwife employed by a physician(s) may retain a copy of their protocol with their employer.~~

~~(4) The rate of reimbursement prior to the establishment of a final fee schedule by the department will be 65.2% of billed charges but not more than 80% of the reimbursement for physicians provided in the PCR.~~

~~(5) The reimbursement rate, once the fee schedule is established by the department as provided for in (c)(i), shall be the lower of:~~

(4) Reimbursement for services, except as otherwise provided in this rule, is the lowest of:

(a) billed charges; or

(b) ~~80%~~ 90% of the reimbursement for physicians provided in ~~the PCR; or~~ ARM 46.12.2003.

~~(c) the fee schedule established by the department.~~

~~(i) The fee schedule established by the department will consist of the average medicaid amount paid by the department for each procedure derived from 50 billings for each procedure.~~

(5) Reimbursement for immunizations and for kids count/early and periodic screening, diagnostic and treatment services as authorized at ARM 46.12.514 through 46.12.517 is the lowest of:

(a) billed charges; or

(b) 100% of the reimbursement for physicians provided in ARM 46.12.2003.

(6) ~~Nurse specialists shall~~ Mid-level practitioners must bill useing the Health Care Financing Administration's common procedure coding system (HCPCS) ~~found in the PCR for all billing purposes~~.

(7) Reimbursement ~~to nurse specialists~~ for drugs ~~administered by nurse specialists and~~ which are billed under HCPCS "J" and "Q" codes ~~will be~~ is the lowest of:

(a) the billed charge; or

(b) the Montana estimated acquisition cost or maximum allowable cost~~, or the provider's usual and customary charge, whichever is lower. Reimbursement will be available only to nurse specialists who are authorized to prescribe or dispense the medication provided. No dispensing fee will be paid to nurse specialists~~.

~~(a) The maximum allowable cost limitation shall not apply in those cases under subsection (4) where the prescribing physician certifies in their own handwriting that in their medical judgment a specific brand name drug is medically necessary for a particular patient. Acceptable certification statements are "brand necessary" or "brand required." A check-off box on a form or a rubber stamp is not acceptable.~~

(8) The following ~~nurse specialist~~ services are not ~~covered~~ reimbursed by medicaid as mid-level practitioner services:

Subsections (8)(a) through (8)(e) remain the same.

(f) consultations with other ~~nurse specialists~~ mid-level practitioners; ~~and~~

(g) delivery services not provided in a licensed health care facility unless provided in an emergency situation~~.~~; and

(h) drug dispensing fees.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-101 MCA

46.12.5002 PASSPORT TO HEALTH PROGRAM: DEFINITIONS

Subsections (1) through (10) remain the same.

(11) "Primary care provider" means a physician, ~~nurse specialist,~~ mid-level practitioner other than a certified registered nurse anesthetist or a clinic which is responsible by agreement with the department for providing primary care and case management to enrollees in the passport to health program.

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

46.12.5007 PASSPORT TO HEALTH PROGRAM: SERVICES

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

(iv) physician ~~and physician assistant~~ services as defined in ARM 46.12.2001;

Subsections (1)(a)(v) and (1)(a)(vi) remain the same.

(vii) ~~nurse specialist~~ mid-level practitioner services as defined in ARM 46.12.2011;

Subsections (1)(a)(viii) through (3) remain the same.

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

46.12.5010 PASSPORT TO HEALTH PROGRAM: PRIMARY CARE PROVIDERS REQUIREMENTS Subsections (1) through (3) remain the same.

(4) ~~An independent nurse practitioner must have a protocol with a physician as required in ARM 46.12.2011 and a~~ A physician assistant must have a utilization plan with a physician as required in ARM 8.28.1501, et seq.

Subsection (5) remains the same.

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

3. The rule 46.12.2012 as proposed to be repealed is on page 46-2458 of the Administrative Rules of Montana.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-101 MCA

4. The proposed rule changes relating to the category of mid-level professional services are necessary to consolidate similar professional services into the category, to implement new terminology for the category, to add coverage of another professional group under these rules, to revise the rate of reimbursement for the category, and to allow for the provision of additional services by nurse-midwives. The proposed changes to the structure and language of the rules are necessary to improve comprehension.

The amendment of ARM 46.12.2011, to provide the single nomenclature of "mid-level practitioner" for several professional services, is necessary so that the medicaid program may improve administration by implementation of a single service category for the various professional services incorporated. Those professional services are physician assistants, nurse practitioner, nurse anesthetist, and nurse midwife. The proposed changes to ARM 46.12.501, 46.12.570, 46.12.571, 46.12.572, 46.12.573, 46.12.577, 46.12.2001, 46.12.5002, 46.12.5007, and 46.12.5010 are necessary to conform with the new term mid-level practitioner.

The general term, advanced practice registered nurse, proposed for adoption in ARM 46.12.2011 to designate the nursing professional services of nurse practitioner, nurse anesthetist, and nurse midwife, is necessary to conform with the use of the term in the statutory authorities governing licensing of nurses at Title 37, chapter 8, MCA.

Services provided by physician assistants are proposed for inclusion in the category of mid-level practitioners since their practice is of the same nature as those of the advanced registered practice nurses. The rule changes relating to the licensing of physician assistants now allow for independent practitioners and therefore physician assistants now may be reimbursed directly for medicaid services just as are the advanced practice registered nurses.

The proposed amendments to ARM 46.12.2013, increasing the rates of reimbursement for mid-level practitioner services, are necessary to encourage more mid-level practitioners to participate in the medicaid program and to assure that practitioners provide necessary preventive health measures to children. Increased participation by mid-level practitioners should increase the availability of these services for medicaid recipients in many communities and areas where other professional medical services are lacking. Other changes to ARM 46.12.2013 remove redundant and inappropriate language and make necessary clarifications to language.

The proposed amendments to ARM 46.12.572, incorporating into clinic services mid-level practitioner services and physician services, are necessary to allow for the reimbursement of those services where provided by clinics.

The proposed amendment of ARM 46.12.2001, deleting physician assistants as a definitional aspect of physician services, is necessary since physician assistants, as a mid-level practitioner, will now be primarily subject to the requirements of ARM 46.12.2011 and 46.12.2013 in order to receive medicaid reimbursement.

The proposed amendments of ARM 46.12.2011 and 46.12.5010, deleting reference to a protocol with a physician, are necessary to conform the medicaid rules with program directions from federal authorities. The rule changes will recognize that the professions of advanced practice registered nurses need not be subject to control by physicians except as may be provided in state statutes or rules governing the licensure of nurses.

The repeal of ARM 46.12.2012 as proposed is necessary since the rule contains requirements that are unnecessary for purposes of medicaid coverage or that are duplicative of requirements that are provided in the relevant licensing authorities which are referenced in ARM 46.12.2011.

5. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Russell E. Cater, Chief Legal Counsel, Office of Legal Affairs, Department

of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, no later than January 20, 1994.

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

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State December 13, 1993.

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

In the matter of the adoption of new rules implementing a continuing education program for insurance producers and consultants	))))	NOTICE OF ADOPTION OF NEW RULES 6.6.4102 AND 6.6.4201-6.6.4210

TO: All Interested Persons.

On October 28, 1993, the state auditor and commissioner of insurance of the state of Montana published notice of public hearing with respect to the proposed adoption of new rules implementing a continuing education program of insurance producers and consultants. The notice was published at page 2466 of the 1993 Montana Administrative Register, issue No. 20.

1. The agency has assigned rule numbers 6.6.4201 through 6.6.4210 to the substantive rules I through X proposed for adoption, and 6.6.4102 to Rule XI, establishing an applicable fee schedule proposed for adoption.

2. The agency has adopted new rules I (6.6.4201), IV (6.6.4204), V (6.6.4205), and VII (6.6.4207) as proposed.

3. The agency has adopted Rules II (6.6.4202), III (6.6.4203), VI (6.6.4206), VIII (6.6.4208), IX (6.6.4209), X (6.6.4210) and XI (6.6.4102) with the following changes (material stricken is interlined; new matter added is underlined):

RULE II (6.6.4202) DEFINITIONS For the purposes of this sub-chapter, the following terms have the following meanings:

(1) "Accredited educational institution" means an institution of higher learning that is certified by its appropriate ~~regional~~ accrediting agency to meet that agency's prescribed standards.

(2) remains the same.

(3) "Certificate of completion" means a document issued by the ~~course provider~~sponsoring organization to the licensee signifying satisfactory completion of a course and reflecting credit hours earned by the licensee.

(4) remains the same.

(5) "Correspondence study" means those independent study methods taught outside the classroom setting through approved text(s), audiovisual materials or other method of information exchange.

(5) through (6) are renumbered (6) through (7). Text remains the same.

(7) is renumbered (11), revised and inserted in correct numerical order below.

(8) "Instructor" means an individual who meets the requirements set forth in Rule IV, is identified by a sponsoring

organization in a course submission, participates in course presentations, activities and discussions, and who may monitor the attendance and conduct of course participants or administer examinations.

(~~9~~8) "Licensee" means an individual required to be licensed under Title 33, chapter 17, parts 2, 4 or 5, MCA, except for those licensees involved in the ~~incidental sale~~selling of credit life and disability insurance incidental to other noninsurance activities.

(~~10~~9) "Proctor" means a person who monitors the attendance and conduct ~~of~~or the examination process for course participants, but who does not participate in course presentations, activities or discussions or complete any required examinations.

(~~11~~7) "~~Incidental sale~~Selling of credit life and disability insurance incidental to other noninsurance activities" means, for the purposes of determining which licensees must complete continuing education requirements, cumulative annual premiums for a calendar year sold in an amount less than $5000.00.

(10) is renumbered (12). Text remains the same.

(13) "Sponsoring organization" means any group(s) or organization(s) and their agent(s) that submits courses for department review and offers or provides approved courses for continuing education credit to allow licensees to meet the requirements of 33-17-1203, MCA and is responsible for those course offerings.

AUTH: 33-1-313 and 33-17-1206, MCA
IMP: 33-17-1203 and 33-17-1204, MCA

RULE III (6.6.4203) COURSE SUBMISSIONS (1) The following standards, by which acceptability of submitted courses should be evaluated, must all be certified by the sponsoring organization.

(a) The practical and academic experience of each faculty member is sufficient to teach the subject assigned.

(b) The course enhances the ability of a producer to provide insurance services to the public effectively.

(c) The subject matter relates to professional ethics, where practicable.

(2~~1~~) Submissions for approval of courses must include at least the following information:

(a) the name of the sponsoring organization;

(b) the title of the course;

(c) the proposed date(s) of offering;

(d) course goals and objectives;

(e) major course topic(s);

(f) course length;

~~(g) practical and academic experience of each faculty member to teach the subject assigned;~~

~~(h) how the course enhances the ability of a producer to provide insurance services to the public effectively;~~

~~(i) a discussion of the relationship of the subject matter to professional ethics;~~

(g~~j~~) a list of other states that have approved the course and the credits granted the course in other states;

(h~~k~~) a syllabus or course outline;

(i~~l~~) a summary of each course outline element;

(j~~m~~) method of instruction, such as classroom, correspondence, videotape, audiotape, teleconference, etc;

(k~~n~~) method of administering examinations, if any;

(l~~o~~) method of attendance verification;

(m~~p~~) method of student record maintenance;

(n~~q~~) instructor~~s qualifications~~;

(o~~r~~) a designated contact person; and

(p~~s~~) a written explanation of ~~test~~examination security measures and examination administration methods.

(2) and (3) are renumbered (3) and (4). Text remains the same.

(5~~4~~) Charges for courses must be clearly disclosed to students before enrollment.

(a) If a course is cancelled for any reason, all charges are refundable in full, unless the refund policy is clearly defined in the enrollment application.

(b) In all instances, the charges must be refunded within 45 days of cancellation.

(c) In the event a course is postponed for any reason, students must be given the choice of attending ~~the~~a course at a later date or having their charges refunded in full. The charges must be refunded within 45 days of postponement unless the sponsoring organization is notified that the student has chosen to ~~participate in the postponed~~attend a course.

(d) A sponsoring organization may have a refund policy addressing a student's cancellation or failure to complete a course, as long as that policy is made clear to potential students.

(6~~5~~) A ~~course provider~~sponsoring organization must provide proof of course completion to each course participant who successfully completes the approved course of study within one month of course completion or prior to the end of the calendar year during which the participant completed the course. The sponsoring organization shall be granted up to 2 months to provide such proof of course completion, if the sponsoring organization notifies the course participants in writing, in advance of the course.

(7~~6~~) ~~Course providers~~Sponsoring organizations who add qualified course instructors after a course is approved must submit the name(s) of those instructors to the commissioner prior to the course offering.

(8~~7~~) A ~~course provider~~sponsoring organization may not schedule more than eight hours of class time in one day.

(8) is renumbered (9). Text remains the same.

(10~~9~~) ~~Course providers~~Sponsoring organizations must resubmit courses for new review and certification whenever significant changes in course content are made.

(10) is renumbered (11). Text remains the same.

(12~~11~~) The number of credit hours assigned to a course will normally be based upon the classroom or contact time, or the equivalent hours for a correspondence course.

(12) is renumbered (13). Text remains the same.

(14~~13~~) No activity may be advertised as having been approved for credit until the sponsoring organization receives written approval from the commissioner.

AUTH: 33-1-313 and 33-17-1206, MCA
IMP: 33-17-1204, MCA

RULE VI (6.6.4206) CERTIFICATION REQUIREMENTS FOR LICENSEES AND LIMIT ON CREDIT FOR COURSES REPEATED (1) Each licensee subject to these rules must file an appropriate certificate of completion and pay the required certification fee each year in the first six months of the calendar year for courses completed in the preceding year. Such certification must be submitted on a schedule established on forms supplied or approved by the commissioner, and completed in their entirety.

(2) remains the same.

AUTH: 33-1-313 and 33-17-1206, MCA
IMP: 33-17-1203 and 33-17-1204, MCA

RULE VIII (6.6.4208) NON-RESIDENT REQUIREMENTS (1) A non-resident licensee whose state of residence imposes continuing education requirements similar to those of Montana, may comply with Montana's continuing education requirement by submitting a completed compliance certification form ~~and~~or a letter of certification from the resident state confirming compliance in that state.

(2) remains the same.

AUTH: 33-1-313 and 33-17-1206, MCA
IMP: 33-17-1203 and 33-17-1204, MCA

RULE IX (6.6.4209) COURSE AUDIT (1) remains the same.

(2) ~~Course provider~~Sponsoring organization records must be made available to the commissioners staff for audit, at department request.

AUTH: 33-1-313 and 33-17-1206, MCA
IMP: 33-17-1203, 33-17-1204 and 33-17-1205, MCA

RULE X (6.6.4210) SANCTIONS AGAINST COURSES AND SPONSORING ORGANIZATION SUSPENSION (1) Approval of a program may be revoked or placed under probationary approval if the commissioner determines that:

(a) The program teaching method or program content no longer meet the standards of these rules or have been significantly changed without approval of the commissioner; or

(b) The ~~course provider~~sponsoring organization certifies that an individual has completed a program in accordance with

the standards established for certification or completion of the program, when in fact the individual has not done so; or

(c) Individuals who have satisfactorily completed the program in accordance with the standards established for certification or completion were not so certified by the ~~program~~sponsoring organization or instructor; or

(d) The instructor or sponsoring organization no longer meets the standards of these rules, has had a license revoked or placed under probationary approval, or lacks education or experience in the subject matter of the proposed courses.

(2) and (3) remain the same.

AUTH: 33-1-313 and 33-17-1206, MCA
IMP: 33-17-1204 and 33-17-1205, MCA

RULE XI (6.6.4102) CONTINUING EDUCATION FEES (1) remains the same.

(2) ~~Course providers~~Sponsoring organizations:

(a) Submission of a course or program for review and initial biennial certification . . . . . $ 75.00

(b) A maximum submission fee of $1,500.00 may be charged a ~~course provider~~sponsoring organization during a biennium for initial review of courses.

(3) Accredited educational institutions are exempt from fee requirements for courses provided for academic credit.

(4) remains the same.

AUTH: 33-1-313 and 33-12-1206, MCA
IMP: 33-2-708, MCA

4. A public hearing on the proposed rules was held on November 29, 1993. Twenty-four interested persons attended the hearing, nine of whom submitted data, views and arguments on some of the proposed rules. In addition, there were six written submissions of data, views and arguments. The agency has fully and thoroughly considered all oral and written submissions received respecting the proposed rules and responds thereto as follows:

WITH RESPECT TO PROPOSED RULE II (6.6.4202):

COMMENT:
The word "regional" should be deleted from the definition of "accredited educational institution".

RESPONSE:
The agency concurs and revises the rule accordingly.

COMMENT:
There should be standardized use of the term "sponsoring organization".

RESPONSE:
The agency concurs and replaces the terms "course provider", "program", and "sponsor" with the term "sponsoring organization" wherever applicable.

COMMENT:
The rule should include a definition for the term "sponsoring organization".

RESPONSE:
The agency concurs and revises the rule accordingly.

COMMENT:
The rule should include a definition for the term "course provider".

RESPONSE:
The term "course provider" has been replaced by the term "sponsoring organization".

COMMENT:
The definition of "incidental sale of credit life and disability insurance" should be revised to mean, for the purposes of determining which licensees must complete continuing education requirements, such insurance that is incidental to other noninsurance activities of the licensee.

The definition of "incidental sale of credit life and disability insurance" should be revised to increase the annual premiums for a calendar year to a level to reflect both the reality of the market place and legislative intent.

The definition of "incidental sale of credit life and disability insurance" should be revised to exclude those offering credit life and disability in connection with the credit transaction.

RESPONSE:
The problem lies with 33-17-1203(4)(f), MCA, which exempts some persons who sell credit life and disability insurance incidental to other noninsurance activities from the continuing education requirements of the Act.

Obviously, the legislature did not intend to exempt all persons who sell credit life and disability insurance. If it so intended, it could have said so and would have said so. By the same token, it did not intend to require that all persons who sell credit life and disability insurance meet the continuing education requirements of the Act. It could have made that intent clear, too.

Unfortunately, the phrase "incidental to other noninsurance activities" is broad and open to considerable latitude in interpretation. But, just as it is open to interpretation, it is subject to implementation.

In addressing the need for implementation, the agency is guided primarily by the purpose of the Act, which is to protect insurance consumers. 33-17-1202(1), MCA. See also the statement of intent to Chapter 622, Laws of 1993.

Credit life and disability insurance consumers are vulnerable to sales of unnecessary insurance products, inappropriate products and too much insurance. At some point, so many insurance consumers become vulnerable that the sales are no longer an "incidental" risk to the public. The proposed definition constitutes an attempt to identify that point.

The agency's information was that a $5,000.00 premium limit reflects a sales volume of eight to ten contracts in a year. This figure does not reflect unsuccessful sales attempts. Based on that data, the agency decided that such volume not only makes a substantial element of the insurance consuming public vulnerable to the competence of the individual producer, but that volume of business stands alone and is no longer incidental to other noninsurance activities.

COMMENT:
The rule should revise the definition of the term "proctor" to make clear that a proctor monitors the examination process of course participants.

RESPONSE:
The agency concurs and revises the rule accordingly.

COMMENT:
The rule should include a definition for the term "instructor".

RESPONSE:
The agency concurs and revises the rule accordingly.

COMMENT:
The rule should include a definition for the term "correspondence study".

RESPONSE:
The agency concurs and revises the rule accordingly.

WITH RESPECT TO PROPOSED RULE III (6.6.4203):

COMMENT:
Proposed subsections (1)(g) and (1)(q) should be deleted because listing every possible instructor's personal qualifications is unnecessary and redundant.

Proposed subsections (1)(g), (1)(h) and (1)(i) should be deleted.

Proposed subsection (1)(i) should be clarified.

RESPONSE:
The agency revises the rule. Subsection (1)(q) is revised and retained.

Section 33-17-1204, MCA, provides that instructors must be approved and periodically reviewed by the commissioner. The requirement for a sponsoring organization to provide a list of course instructors as part of a course submission allows the commissioner to fulfill this responsibility.

COMMENT:
The rule should include the following provisions:
1. No credit will be given for partial completion of a course.
2. A provider authorization agreement should be required if another provider is submitting a course that has already been submitted and approved by the publisher.
3. All new provider fees and application forms will be required from the second provider.

RESPONSE:
The agency rejects these comments for the following reasons:
1. Rule X(1)(b) addresses this concern.
2. It is not the role of the advisory council or the commissioner to review or enforce such contracts.
3. Each sponsoring organization must submit required course materials and fees prior to course offering.

COMMENT:
Subsection (4)(c) should be revised to allow for student participation in a future educational offering by the sponsoring organization.

RESPONSE:
The agency concurs and revises the rule accordingly.

COMMENT:
Subsection (5) should be revised to include a time period during which a sponsoring organization must furnish a certificate to a student.

RESPONSE:
The agency concurs and revises the rule accordingly.

COMMENT:
Subsection (11) should be revised to allow for equivalent hours for a correspondence course.

RESPONSE:
The agency concurs and revises the rule accordingly.

WITH RESPECT TO PROPOSED RULE V (6.6.4205):

COMMENT:
The rule should specify a pass-fail score.

RESPONSE:
The agency declines to revise the proposed rule because sponsoring organizations must provide the pass-fail score as part of their course submissions under Rule III.

COMMENT:
The rule should specify an allowable number of examination repetitions.

RESPONSE:
The agency declines to revise the proposed rule for the reason that sponsoring organizations must disclose the allowable number of examination repetitions as part of their course submissions under Rule III.

COMMENT:
The rule should require prefiling of, or submission of, all examinations to the department.

RESPONSE:
The agency declines to revise the proposed rule for the reason that the commissioner may request examinations for review under 33-17-1204(2), MCA.

COMMENT:
The rule should specify a level of exam rigor.

RESPONSE:
The agency declines to revise the proposed rule for the reason that sponsoring organizations must disclose the level of examination rigor as part of their course submissions.

COMMENT:
The rule should include a requirement for a notarized affidavit that examinations have been administered, monitored, graded, and the results recorded by the sponsoring organization.

RESPONSE:
The agency declines to revise the proposed rule for the reason that sponsoring organizations must certify that examinations have been administered, monitored, graded, and the results recorded by the sponsoring organization, as part of their course submissions.

COMMENT:
The rule should include a definition of the term "monitored examination".

RESPONSE:
The agency declines to include this definition for the reason that sponsoring organizations must provide this information as part of their course submissions.

COMMENT:
The rule should include the following or a similar provision: "The provider of a correspondence course shall not provide the student or anyone else with the answers to the questions on the course final examination prior to or after the student takes the examination. After grading the examination, the provider may only inform the student of the percentage score obtained or the number of correct and incorrect answers, and the subject area(s) in which the student needs additional study. The provider may not reveal to the student or to anyone else the specific question(s) which the student answered correctly or incorrectly."

RESPONSE:
The agency declines to revise the proposed rule for the reason that sponsoring organizations may provide this information as part of their course submissions.

WITH RESPECT TO PROPOSED RULE VI (6.6.4206):

COMMENT:
The second sentence of subsection (1) should be revised to read "...on forms supplied or approved by the commissioner..."

RESPONSE:
The agency concurs and revises the rule accordingly.

WITH RESPECT TO PROPOSED RULE VIII (6.6.4208):

COMMENT:
In subsection (1), the phrase "...completed compliance certification and a letter of certification..." is redundant and unnecessary.

RESPONSE:
The agency concurs and revises the rule accordingly.

WITH RESPECT TO PROPOSED RULE XI (6.6.4102):

COMMENT:
The fee level in subsection (2)(b) should be reduced to $1,000 during a biennium.

RESPONSE:
The fee level in subsection (2)(b) is reasonable. The fee will be reviewed at the end of each biennium and changed, as necessary.

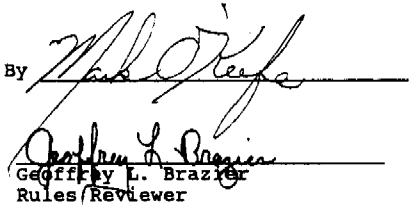
COMMENT:
Subsection (3) of the rule should be revised to prevent university-employed educators from being in competition with themselves when teaching similar courses for private sector organizations.

RESPONSE:
The agency concurs and revises the rule accordingly.

COMMENT:
The title to the rule should be changed to "continuing education fees" to distinguish the rule from the title to the subchapter and from other fee schedules in the subchapter.

RESPONSE:
The agency concurs and revises the title to the rule accordingly.

MARK O'KEEFE, State Auditor
and Commissioner of Insurance

By 

Geoffrey L. Brazier
Rules Reviewer

Certified to the Secretary of State this 13th day of December, 1993.

BEFORE THE BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to definitions, licensure requirements for social workers, application procedures for social workers and licensure requirements for professional counselors	NOTICE OF AMENDMENT OF RULES PERTAINING TO SOCIAL WORK EXAMINERS AND PROFESSIONAL COUNSELORS

TO: All Interested Persons:

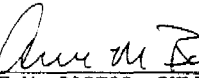
1. On October 14, 1993, the Board of Social Work Examiners and Professional Counselors published a notice of proposed amendment at page 2296, 1993 Montana Administrative Register, issue number 19.

2. The Board has amended ARM 8.61.401 through 8.61.403 and 8.61.1201 exactly as proposed.

3. No comments or testimony were received.

BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
RICHARD SIMONTON, CHAIRMAN

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


ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, December 13, 1993.

BEFORE THE MILK CONTROL BUREAU
OF THE STATE OF MONTANA

In the matter of proposed amendments of rule 8.79.101 regarding definitions and proposed adoption of new rule I concerning transactions involving the purchase and resale of milk within the state	))))))	NOTICE OF AMENDMENT AND NOTICE OF ADOPTION DOCKET #18-93

TO: ALL LICENSEES UNDER THE MONTANA MILK CONTROL ACT (SECTION 81-23-101, MCA, AND FOLLOWING), AND ALL INTERESTED PERSONS:

1. On October 14, 1993, the Department of Commerce published notice of proposed adoption of ARM 8.79.101(1) concerning rule definitions and new rule I (8.79.102) concerning transaction involving the purchase and resale of milk within the state. Notice was published at page 2301 of the 1993 Administrative Register, issue no. 19, as MAR NOTICE 8-79-30.

2. The Department has amended ARM 8.79.101(1) as proposed and adopted new rule I (8.79.102) with the following two exceptions: (The cites in paragraph (3) were incorrect, and the petitioner requested that paragraphs (16) and (17) be withdrawn from consideration. Requests were granted by the hearing officer and as a result the subsequent paragraphs require renumbering.)

"RULE I (8.79.102) TRANSACTIONS INVOLVING THE PURCHASE AND RESALE OF MILK WITHIN THE STATE

(1)-(2) same as proposed rule.

(3) Deductions of any kind (other than assessments that are required under ~~82-23-105~~ 81-23-105 and ~~81-23-302~~ 81-23-202, MCA, and license fees) from payments due producers may be made ONLY UPON WRITTEN AUTHORIZATION from producers, or, in the case of cooperatives, upon formal resolution of the directors at a regular business meeting. A copy of such authorization shall be retained by the distributor as part of its permanent records for its own protection.

(4)-(15)(c) same as proposed rule.

~~(16) When a pool handler, as defined in ARM 8.86.511(e), purchases milk outside the pool area, as defined in ARM 8.86.511(a), which is greater than the needs of its Montana market, all such purchased milk that is greater than that pool handler's Montana market requirements will be deducted from its total purchases outside the pool area.~~

~~(17) Pool handlers with surplus pool milk shall make that milk available to other pool handlers as required by the other pool handlers to fulfill their class I and II market needs. Such surplus pool milk shall be made available to the other~~

~~pool handlers at the actual cost, including transportation and other handling costs, to the pool handler having such surplus pool milk; the pool handler having such surplus milk may not charge the other pool handlers a premium, profit, or other amount in addition to the actual cost to the pool handler.~~

~~(18)~~(16) A distributor may reject milk provided by a producer because of inferior quality or noncompliance with the lawful rules of duly constituted health or sanitation agencies. In all cases the rejection of the milk must be supported by a statement to the producer setting forth the reason(s) for which the milk was rejected. A distributor shall mail a copy of the statement to the department.

~~(19)~~(17) Except for persistent repetition of the cases set forth in subsection ~~(17)~~(16) of this rule, no producer's contract or purchasing agreement, whether express or implied, may be terminated by a distributor except for cause after notice and hearing by the department in accordance with the rules and procedures prescribed by the Montana Administrative Procedure Act.

~~(20)~~(18) No producer may terminate his contract or selling agreement with any distributor except by giving at least thirty (30) days' WRITTEN notice to the distributor and to the department of his intention to terminate. However, nothing in this rule prevents a distributor and a producer from providing by WRITTEN contract or agreement for a shorter or longer period of notice. The producer must be paid in full by the 15th day of the month following the month of such termination.

~~(21)~~(19) If any provision of this chapter, or the application of this chapter to any person or circumstance shall be held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

AUTH: 81-23-104, MCA
IMP: 81-23-103 AND 81-23-402, MCA

3. There was one oral comment received stating the purpose of the amendment is to clarify language and eliminate duplication of rules.

4. There were no comments against the proposed action.

MONTANA DEPARTMENT OF COMMERCE

By: _____
Andy J. Poole, Deputy Director
Department of Commerce

By: _____
Annie M. Bartos, Rule Reviewer
Commerce Chief Legal Counsel

Certified to the Secretary of State December 13, 1993.

**BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA**

In the matter of proposed amendments to several rules: rule 8.86.301 as it relates to transportation of milk from farm-to-plant and as it relates to minimum pricing; rule 8.86.505 as it relates to readjustment to quotas; and rule 8.86.514 as it relates to settlement fund payments	)	**NOTICE OF AMENDMENT**
	)	**DOCKET #19-93**

TO: ALL LICENSEES UNDER THE MONTANA MILK CONTROL ACT (SECTION 81-23-101, MCA, AND FOLLOWING), AND ALL INTERESTED PERSONS:

1. On October 14, 1993, the Board of Milk Control published notice of proposed amendments of: ARM 8.86.301(10) and ARM 8.86.301(14)(c) concerning transportation of milk from farm-to-plant and class I retail prices; ARM 8.86.505(1)(a)(iv), (b)-(e) concerning readjustment of quotas; and ARM 8.86.514(1)(c) concerning settlement fund payments. Notice was published at page 2315 of the 1993 Administrative Register, issue no. 19, as MAR NOTICE 8-86-49.

2. The Board has amended the rules as proposed.
AUTH: 81-23-302, MCA
IMP: 81-23-302, MCA

Note: The board having deleted paragraph (10) of 8.86.301 as proposed in MAR NOTICE 8-86-49 adopts what was identified as paragraph (14)(c) as paragraph (13)(c).

3. No comments or testimony were received.

MONTANA BOARD OF MILK CONTROL
MILTON J. OLSEN, Chairman

By: _____
Andy J. Poole, Deputy Director
Department of Commerce

By: _____
Annie M. Bartos, Rule Reviewer
Commerce Chief Legal Counsel

Certified to the Secretary of State December 13, 1993.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of Rule I pertaining to qualifications of respite care providers.	))))	NOTICE OF ADOPTION OF RULE I PERTAINING TO QUALIFICATIONS OF RESPITE CARE PROVIDERS

TO: All Interested Persons.

1. On June 24, 1993, the Department of Family Services published notice of the proposed adoption of Rule I [11.7.610] pertaining to qualifications of respite care providers at page 1251 of the 1993 Montana Administrative Register, issue number 12.

2. The department has adopted the rule as proposed with the following changes:

I. [11.7.610] FOSTER CARE SUPPORT SERVICES, RESPITE CARE SELECTION AND TRAINING (1) For children eligible for respite care under ARM 11.7.609, foster parents may arrange for respite care services. The arrangement shall provide for respite care services from a qualified individual. ~~The respite care services should be provided only on a casual basis, as casual basis is defined under 29 CFR §§ 552.5 and 552.104.~~

(2) ~~Foster parents using respite care providers may be considered employers of respite care providers for purposes of meeting obligations imposed by applicable laws covering rights and duties of employment relationships. Reimbursement for respite care services to foster parents shall not be deemed to create a joint employer relationship between foster parents and the department. Foster parents must agree to assume all employer related obligations which may arise as a result of provision of respite care services.~~ Laws may require that foster parents fulfill employment obligations owed to respite care providers. Examples of laws which may apply are statutes and regulations imposing wage and overtime requirements on employers of domestic employees. The department has no role in imposing or exempting foster parents from the requirements. Nor does the department accept financial responsibility for payment which may result from imposition of employment-related requirements.

(3) Notwithstanding the disclaimer contained in subsection (2) and the requirement for prior approval for all foster care support services under ARM 11.7.615, foster parents may be reimbursed for expenses arising from imposition of employment requirements. Examples of permissible reimbursements under this subsection include payment for social security contributions and/or payment in addition to the hourly/daily rate provided in ARM 11.7.609 as a result of wage and hour requirements.

(4) Foster parents regularly utilizing a respite care provider in their home may be denied reimbursement under

subsection (3) absent prior special approval from the regional administrator whose region is responsible for reimbursement of respite care for the child.

~~(3)~~ (5) The selection of the person to provide respite care is made by the foster parent. The foster parent ~~should~~ shall consider the ability of the respite care provider to:

(a) meet the special needs of the foster child; and

(b) provide safe, developmentally appropriate care to the child.

Subsections (4) through (6) remain as proposed except they are re-numbered (6) through (8).

AUTH: Sec. 41-3-1103, 41-3-1142, 41-3-1152 and 52-2-111, MCA.
IMP: Sec. 41-3-1103, 41-3-1142, 41-3-1151 and 52-2-111, MCA.

COMMENT: (The Legislative Council, on behalf of the Administrative Code Committee) If the department intends to adopt and incorporate by reference, and thus enforce, the Federal regulations referenced in subsection (1), then the required language from § 2-4-307, MCA, must be used. If the department intends to require foster parents to assume employment obligations owed to respite care providers, then the language of subsection (2) should be changed to clarify this point.

Subsection (3)'s provision stating that respite care providers "should" have certain qualifications violates § 41-3-1152, MCA. Changing the "should" to "shall" would rectify this problem.

§ 41-3-1152, MCA, should be cited as an authorizing statute, and § 41-3-1151, MCA, should be cited as an implementing statute.

RESPONSE: The department does not intend to adopt and incorporate the cited Federal regulations for enforcement through department rule. Neither does the department intend to require foster parents to be "employers" of respite care providers. Whether foster parents are the "employers" of the respite care provider is an issue controlled by other law applied to the particular facts of each case.

Citations of specific Federal regulations have been deleted so that there is no misunderstanding as to the department's lack of authority for implementing labor standards. New language has been added in subsection (2) in an attempt to clarify the department's intent in addressing the subject in this rule.

The requested citations are inserted in this notice. The department agrees that the "should" must be changed to "shall".

COMMENT: (Liz Harter, DFS Community Social Work Supervisor) The physical, emotional, and psychological demands of providing foster care have already resulted in a short supply of foster parents. The department should strive to avoid placing any

additional obligations on foster parents. The agency should seek an exempt status for foster parents/respite care providers.

RESPONSE: The department has no authority to provide exemptions. Nor is the department responsible for imposing the requirements. For example, the United States and Montana Departments of Labor implement wage and hour requirements which may be applicable. Similarly, depending on the particular facts of the case, the United States Internal Revenue Service and the United States Department of Health and Human Services may impose employer contribution requirements for Social Security for a respite care provider.

However, the point is well-taken that the department should strive to mitigate the effect of the possible imposition of employment obligations on foster parents. Therefore, new language added to the rule authorizes the department to reimburse foster parents who must pay employment-related benefits.

COMMENT: (DFS Regional Administrators) If there is a possibility that reimbursement for respite care expenses in addition to the rate established in ARM 11.7.609 must be paid from regional budgets, then foster parents should be required to seek prior approval. Prior approval is especially appropriate where the respite care provider works in the foster parents' home. Regulations covering domestic employees may apply and lead to required Social Security contributions, as well as wage and hour payments in addition to the rate established in 11.7.609. Regional Administrators must know in advance what expenses may be required to be reimbursed, and must have the power to restrict payment if there are not sufficient funds to pay for the care, taking into consideration the need to fund other programs and services.

RESPONSE: Language has been added to allow Regional Administrators to deny reimbursement for employment-related expenses in certain cases. If the foster parents are requesting respite care on a regular basis in their home, then they may be denied reimbursement at some later date unless they also request and receive prior-special-approval of the arrangement from the Regional Administrator. The Regional Administrator will have the opportunity prior to provision of the care to consider the request in light of the possible imposition of the employer-related contributions for Social Security and wage and hour requirements, and the need to fund these payments in addition to the payment provided under ARM 11.7.609. These obligations are most likely to be validly claimed for regular, in-home care. The term "prior-special-approval" is used to distinguish prior-approval for reimbursement for employment-related expenses from the prior-approval required for all foster care support services as set out in ARM 11.7.609.

DEPARTMENT OF FAMILY SERVICES

Hank Hudson, Director

John Melcher, Rule Reviewer

Certified to the Secretary of State, December 13, 1993.

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

In the matter of the amendment of rules 16.6.901 and 902 concerning filing death certificates, repeal of 16.6.906 concerning burial transit permits, and adoption of new rule I, concerning dead body removal authorization, and new rule II, concerning notification of failure to file certificate or body removal authorization	NOTICE OF AMENDMENT, ADOPTION OF 16.6.908 AND 16.6.909, AND REPEAL OF 16.6.906 (Records & Statistics)

To: All Interested Persons

1. On November 10, 1993, the department published notice of the proposed amendment, adoption, and repeal of the above-captioned rules at page 2599 of the Montana Administrative Register, Issue No. 21.

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

16.6.901 DEATH CERTIFICATE Same as proposed.

16.6.902 FETAL DEATH CERTIFICATE Same as proposed.

RULE I (16.6.908) DEAD BODY REMOVAL AUTHORIZATION (1) A completed dead body removal authorization form must include, as a minimum:

(a) insofar as possible, decedent's full name or, in the case of a fetal death, the full name of the mother;

(b) Same as proposed.

(c) date ~~of~~ death occurred or was first discovered, or date of delivery if a fetal death;

(d)-(f) Same as proposed.

(2)-(4) Same as proposed.

RULE II (16.6.909) NOTIFICATION OF FAILURE TO FILE Same as proposed.

3. The department has repealed rule 16.6.906, found on page 16-117 of the Administrative Rules of Montana.
AUTH: 50-15-102, MCA; IMP: 50-15-405, MCA.

4. a. The Montana Funeral Directors Association expressed general support for the rule changes, and submitted the following specific requests for changes in the rules as proposed; each of the comments below is followed by the Department's response:

i. Comment: In Rule I(1)(a), the requirement that the

dead body removal authorization form include the decedent's full name should be conditioned by the phrase "if known", since funeral directors do not always know the actual legal name of the decedent at the time the form is completed.

Response: The department agreed with the comment in substance, but added the phrase "insofar as possible" instead of "if known" to make clear that whatever is known of the decedent's name must be provided.

ii. Comment: Rule II(1)(a) should be amended to require the registrar to notify the department whenever a death certificate has not been filed within two working days after the cause of death is certified on the certificate, as well as whenever no certificate was filed within 10 days after death occurred or was discovered. The reason for the request was to conform this rule's language to that in other portions of the rules.

Response: No change was made because a registrar would have no way of knowing when the cause of the death was certified unless s/he had in fact received the certificate, whereas the required notification is triggered by failure to receive a certificate.

b. The department amended Rule I(1)(c) to allow the dead body removal authorization to cite the date the death was discovered as an alternative to the date of death, in recognition of the fact that, in some cases, the date of death may be unknown or difficult to determine.

5. The effective date of the above new rules, repeal of ARM 16.6.906, and amendment of ARM 16.6.901 and 902 is January 1, 1994.

ROBERT J. ROBINSON, Director

Certified to the Secretary of State December 13, 1993.

Reviewed by:

Eleanor Parker, DHES Attorney

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the adoption, amendment, and repeal of rules regulating public gambling	)))	CORRECTED NOTICE OF ADOPTION

TO: All Interested Persons.

1. On November 24, 1993, the Department of Justice published a notice of adoption, amendment, and repeal of rules regulating public gambling at page 2786 of the 1993 Montana Administrative Register, Issue No. 22.

2. In the notice of adoption, amendment, and repeal of rules three rules should have shown a deletion of two words. The corrected rule amendments read as follows:

23.16.1914 DISTRIBUTOR'S LICENSE (1) through (2) remain as proposed.

(3) The department may waive the application license and processing fee provided in (1)(d)(i) and (1)(d)(ii) if the applicant is licensed as a manufacturer~~,~~ or route operator~~, or operator~~ and if the applicant is substantially the same and has no strangers to the license.

(4) remains as proposed.

23.16.1915 ROUTE OPERATOR'S LICENSE (1) through (2) remain as proposed.

(3) The department may waive the application license and processing fee provided in (1)(d)(i) and (1)(d)(ii) if the applicant is licensed as a manufacturer~~,~~ or distributor~~, or operator~~ and if the applicant is substantially the same and has no strangers to the license.

(4) remains as proposed.

23.16.1916 MANUFACTURERS LICENSE (1) through (2) remain as proposed.

(3) The department may waive the application license and processing fee if the applicant is licensed as a distributor~~,~~ or route operator ~~or operator~~ and if the applicant is substantially the same and has not added strangers to the license.

(4) remains as proposed.

By: JOSEPH P. MAZUREK
Attorney General

By: CHRIS TWEETEN
Chief Deputy Attorney General
Rule Reviewer

Certified to the Secretary of State December 13, 1993.

BEFORE THE BOARD OF PERSONNEL APPEALS
FOR THE STATE OF MONTANA

In the matter of the amendment of certain existing rules, the adoption of NEW RULES I through VI, and the repeal of 24.26.696, related to rules of procedure before the Board of Personnel Appeals and substantive rules relating to labor-management relations and grievances, as found in ARM Title 24, Chapter 26.	NOTICE OF ADOPTION, AMENDMENT AND REPEAL

TO ALL INTERESTED PERSONS:

1. On October 14, 1993, the Board of Personnel Appeals published notice at pages 2339 to 2367 of the Montana Administrative Register, Issue No. 19, to consider the amendment of the above-captioned rules, repeal of ARM 24.26.696, and the adoption of new rules I through VI.

2. On November 5, 1993, a public hearing was held in Helena concerning the proposed rules at which oral and written comments were received. Additional written comments were received prior to the closing date of November 12, 1993.

3. After consideration of the comments received on the proposed rules, the Board has adopted the following rules exactly as proposed, except for correcting the statutory authorization and implementation citations as noted:

New Rule I [24.26.206], Computing Time for Responses

New Rule III [24.26.649], Petition to Revoke Certification or Recognition
AUTH: Sec. ~~2-4-201~~ 39-31-104, MCA
IMP: Sec. ~~2-4-201~~ 39-31-207, MCA

New Rule V [24.26.695 A], Grievance Mediation
AUTH: Sec. ~~2-4-201~~ 39-31-104, MCA
IMP: Sec. ~~2-4-201~~ 39-31-306, MCA

New Rule VI [24.26.698 A], Panel of Arbitrators and Fact Finders
AUTH: Sec. ~~2-4-201~~ 39-31-104, MCA
IMP: Sec. ~~2-4-201~~ 39-31-308 and 39-31-310, MCA

4. After consideration of the comments received on the proposed rules, the Board has adopted the following rules with the following changes (new matter underlined, deleted matter interlined):

NEW RULE II [24.26.216] DECLARATORY RULINGS

(1) Same as proposed.

(2) The petition to institute proceedings for a declaratory ruling shall contain:

(a) through (e) Same as proposed.

(f) the specific ~~answer~~ relief requested; and

(g) Same as proposed.

(3) and (4) Same as proposed.

AUTH: Sec. 2-4-201, MCA IMP: Sec. 2-4-201, MCA

NEW RULE IV [24.26.650] PETITIONS TO AMEND CERTIFICATION OF EXCLUSIVE REPRESENTATIVE (1) A petition to amend the certification ~~or recognition~~ of an exclusive representative may be filed by a labor organization when there is no question of representation and one of the following reasons exists:

(a) and (b) Same as proposed.

(2) and (3) Same as proposed.

AUTH: Sec. ~~2-4-201~~ 39-31-104, MCA IMP: Sec. ~~2-4-201~~ 39-31-207, MCA

5. After consideration of the comments received on the proposed rules, the Board has amended the following rules exactly as proposed:

24.26.202 Board Business
24.26.301 Purpose
24.26.302 Definitions
24.26.304 Freedom From Interference, Restraint, Coercion, or Retaliation
24.26.402 Definitions
24.26.404 Freedom From Interference, Restraint, Coercion, or Retaliation
24.26.513 Consolidated Appeals
24.26.518 Failure of Department Head, Designee, or State Personnel Division to Act Within the Prescribed Time Limit
24.26.603 Filing of Labor Organization's Bylaws
24.26.612 Petition for New Unit Determination and Election
24.26.614 Employer Counter Petition
24.26.618 Petition to Intervene
24.26.646 Petition to Intervene
24.26.648 Disaffirmance of Representation by Bargaining Representative
24.26.655 Elections Directed
24.26.656 Conditions
24.26.661 Poll Watchers
24.26.662 Polling Area Electioneering
24.26.667 Certifications
24.26.680 Complaint
24.26.682 Notice of Hearing
24.26.684 Exceptions
24.26.698 Arbitration

6. After consideration of the comments received on the proposed rules, the Board has amended the rules as proposed with

the following changes (new matter underlined, deleted matter interlined, additional new matter in ALL CAPS):

24.26.303 GRIEVANCE PROCEDURE (1) Step one:

(a) An employee, ~~group of employees, or employee representative,~~ may utilize the ~~formal~~ grievance procedure, SET OUT IN THIS RULE after exhausting all available ~~informal~~ ADMINISTRATIVE remedies FOR GRIEVANCES within the department ~~of highways~~ as set forth in the department's rules or regulations, by obtaining a ~~personal~~ personnel grievance form ~~DPA-3(1)~~, completing it by detailing the specifics of the grievance and submitting it to the employee's immediate supervisor or department designee for consideration within 180 days after the alleged incident or action occurred. A copy of the form must be retained by the employee.

(b) Same as proposed.

(2) and (3) Same as proposed.

AUTH: Sec. 2-18-1001, MCA IMP: Sec. 2-18-1002, MCA

24.26.403 GRIEVANCE PROCEDURE (1) Step one:

(a) An employee may utilize the ~~formal~~ grievance procedure SET OUT IN THIS RULE after exhausting all available ~~informal~~ ADMINISTRATIVE remedies FOR GRIEVANCES within the department as set forth in the department's rules or regulations, by obtaining a Personnel Grievance form, completing it by detailing the specifics of the grievance and submitting it to the employee's immediate supervisor or department designee for consideration within 180 days after the alleged incident or action occurred. A copy of the form must be retained by the employee.

(b) Same as proposed.

(2) and (3) Same as proposed.

AUTH: Sec. 87-1-205, MCA IMP: Sec. 87-1-205, MCA

24.26.508 GRIEVANCE PROCEDURE (1) Same as proposed.

(a) Same as proposed.

(b) To complete the appeal form, the employee must ~~clearly~~ identify the issue or issues motivating the appeal and explain the reasons ~~why~~ each listed issue is being appealed. A list of appealable issues will be provided with the appeal form. ~~The employee must explain in detail the issue and their reasons for appealing. If an issue or reason for the appeal is not adequately identified, the appeal may be returned to the employee at any step in the appeal procedure.~~

(c) through (f) Same as proposed.

(2) Step ~~Two~~ one:

(a) and (b) Same as proposed.

(c) If the employee does not accept the findings of the department head or designee, the employee shall have ~~five~~ fifteen working days to forward the appeal ~~evaluation and findings of the department head~~ to the state personnel division, step ~~three~~ two. The employee must identify and explain, in writing, ~~where and why~~ HOW he or she disagrees with the findings of the department head or designee.

(3) Same as proposed.

(4) Step ~~Four~~ three:

~~(a) If the employee rejects the personnel division's findings and recommendation, the employee shall submit the form SPA 314, with all appropriate sections completed, to the board.~~

~~(b)~~ (a) The employee must identify and ~~record~~ explain, in writing, ~~where and why~~ HOW ~~they~~ the employee disagrees with ~~feel~~ the state ~~P~~personnel ~~D~~division's findings ~~are in error~~.

(b) through (h) Same as proposed.

AUTH: Sec. 2-18-1011, MCA IMP: Sec. 2-18-1011, MCA

24.26.523 FILING OF A NEW PETITION FOR HEARING AFTER FINAL ORDER ISSUED (1) After a final order concerning a position has been issued by the board, a new hearing will be granted only upon a showing of some substantial change in that position OR THE JOB EVALUATION METHODOLOGY which was not considered at the prior hearing and which would warrant a new hearing by the board or its designee.

(2) through (5) Same as proposed.

AUTH: Sec. 2-18-1011, MCA IMP: Sec. 2-18-1011, MCA

24.26.602 ~~FILING~~ DURATION OF NEGOTIATED AGREEMENTS ~~AND DURATION~~ (1) ~~One copy of each collective bargaining contract between a public employer and a labor organization shall be filed with the board within 30 days after the final execution thereof.~~

~~(2)~~ Agreements reached between a public employer and a labor organization shall be for a minimum of one year ~~and shall not exceed two years~~.

AUTH: Sec. 39-31-104, MCA IMP: Sec. 39-31-104, MCA

24.26.620 PROCEDURE FOLLOWING FILING OF PETITION FOR NEW UNIT DETERMINATION AND ELECTION (1) Same as proposed.

(2) THE EXCELSIOR LIST MUST BE PROVIDED TO THE PETITIONER WITHIN 10 DAYS OF THE POSTING OF NOTICE OF THE UNIT DETERMINATION PROCEEDINGS.

(2) Same as proposed, but renumbered as (3).

(3) Same as proposed, but renumbered as (4).

AUTH: Sec. 39-31-104, MCA IMP: Sec. 39-31-207, MCA

24.26.622 EMPLOYER PETITION (1) and (2) Same as proposed.

~~(1)~~ (3) The petition shall contain:

(a) and (b) Same as proposed.

~~(b)~~ (c) ~~If~~ where there is ~~a~~ an employer-recognized or board-certified representative, ~~the petition shall contain~~ a statement by the employer of what criteria it bases its ~~doubt belief~~ DOUBT that the incumbent, exclusive representative does not have the majority support of the members of the bargaining unit in question~~.~~; and

(d) and (e) Same as proposed.

(4) through (7) Same as proposed.

AUTH: Sec. 39-31-104, MCA IMP: Sec. 39-31-207, MCA

24.26.630 PETITION FOR UNIT CLARIFICATION OF BARGAINING UNIT (1) A ~~P~~petition for ~~C~~clarification of ~~B~~bargaining ~~U~~unit may be filed with the board ~~only~~ by an ~~bargaining~~ exclusive representative of the bargaining unit in question or by ~~a~~ the public employer ~~and~~ only if:

(a) Same as proposed [no changes].

(b) the parties to the agreement are neither engaged in negotiations nor within 120 days of the expiration date of the agreement, UNLESS THERE IS MUTUAL AGREEMENT BY THE PARTIES TO PERMIT THE PETITION;

(c) and (d) Same as proposed [no changes].

(2) through (5) Same as proposed.

AUTH: Sec. 39-31-104, MCA IMP: Sec. 39-31-207, MCA

24.26.643 PETITION FOR DECERTIFICATION (1) Same as proposed.

(2) The petition must be filed during the 30 DAY WINDOW period WHICH STARTS ON THE ~~not more than~~ 90TH days ~~before,~~ and ENDS ON THE ~~not less than~~ 60TH days ~~before~~ prior to the termination date of the ~~previous~~ collective bargaining agreement, or upon the terminal date thereof.

(3) through (8) Same as proposed.

AUTH: Sec. 39-31-104, MCA IMP: Sec. 39-31-207, MCA

24.26.660 BALLOTS (1) The rank order of ~~the employee~~ labor organization names to be placed on the ballot will be determined during the pre-election hearing. THE CURRENTLY RECOGNIZED LABOR ORGANIZATION SHALL ALWAYS BE ON THE BALLOT UNLESS OTHERWISE AGREED. "No Representation" will always be listed as the last choice.

(2) and (3) remain the same.

AUTH: Sec. 39-31-104, MCA IMP: Sec. 39-31-208, MCA

24.26.666 OBJECTIONS (1) Within five working days after the tally of ballots has been furnished~~,~~ to the parties, ~~either orally or~~ in writing, any party may file with the board, objections to the conduct of the election or conduct affecting the results of the election. Such objections shall be in writing and shall contain a brief statement of facts upon which the objections are based. An original and ~~five~~ THREE copies of such objections shall be signed and filed with the board, the original being sworn to. The party filing an objection shall serve a copy upon each of the other parties to the election.

AUTH: Sec. 39-31-104, MCA IMP: Sec. 39-31-208, MCA

24.26.680 B RESPONSE TO COMPLAINT AND INVESTIGATION OF COMPLAINT (1) Same as proposed.

(2) ~~The~~ A party so charged shall file a response with the board to the complaint within ten days ~~after receipt of the charges~~. A response is a letter setting forth in detail facts relevant to the complaint which the ~~R~~respondent wishes to bring to the board's attention including a specific reply to each factual allegation made in the complaint.

(3) through (6) Same as proposed.

AUTH: Sec. 39-31-104, MCA IMP: Sec. 39-31-405, MCA

24.26.695 ~~PETITION~~ INTEREST MEDIATION (1) ~~In the event of a labor dispute, a petition, in writing, requesting assistance of the board, may be filed with the board by an employee or group of employees, a labor organization, or a public employer.~~ When a dispute over the negotiation of a collective bargaining agreement exists between the public employer and a labor organization after a reasonable period of negotiation or upon expiration of the collective bargaining agreement, EITHER OR BOTH OF the parties shall ~~request~~ FILE A WRITTEN PETITION WITH THE BOARD FOR interest mediation. The original of the petition shall be signed by the petitioner or ~~his~~ the authorized representative, ~~and the original and five copies shall be filed with the board~~. The petitioner shall serve a copy of the petition simultaneously upon any party named in the petition. The petition shall contain:

(a) through (g) Same as proposed.

(2) Same as proposed.

(3) Upon petition for interest mediation, the board shall designate a qualified labor mediator who is an agent of the board to mediate the dispute. UPON THE WRITTEN REQUEST OF BOTH PARTIES, ~~T~~the board may instead request a mediator from the Federal Mediation and Conciliation Service, if one is available.

(4) through (6) Same as proposed.

AUTH: Sec. 39-31-104, MCA IMP: Sec. 39-31-307, MCA

24.26.697 FACT FINDER (1) through (7) Same as proposed.

(8) The cost of factfinding proceedings must be equally borne ~~between~~ BY the board and the parties concerned. The fact finder shall, within ten working days of the written findings, submit ~~his~~ an invoice of the costs and fees to the board which shall send copies of ~~an~~ the invoice to both parties on which they will be billed for one-third of the total. The parties shall pay the board within five days and the board shall forward the total amount to the fact finder.

AUTH: Sec. 39-31-104, MCA IMP: Sec. 39-31-309, MCA

7. No comments were received concerning the proposed repeal of ARM 24.26.696. The Board has repealed the rule.

8. The Board has thoroughly considered the comments and testimony received on the proposed new rules and amendments to the existing rules. The following is a summary of the comments received, along with the Board's response to those comments:

1. Comments on New Rule I, Computing Time for Responses:

Comment: The Montana Education Association (MEA) commented in support of the proposed new rule. It suggested that as an alternative, the Board could send letters via certified mail.

Response: The Board considered using certified mail. Unless there is a return receipt showing the date of delivery, however, certified mail does not address any of the questions of when to start a time period running. The cost of certified mail, return receipt requested is $2.00 in addition to the cost of postage. Given budgetary constraints, the Board prefers not to use certified mail instead of adopting New Rule I.

2. Comments on New Rule II, Declaratory Rulings:

Comment: Dan Johns of Kalispell commented that the requirement in subpart (2)(f) that the petitioner suggest the specific answer desired is not consistent with the typical provisions in declaratory ruling practice.

Response: The Board agrees with the comment and has amended the rule to require that the specific relief sought be stated. The Board's intent is to have New Rule II be consistent with Attorney General model rule 22 (ARM 1.3.227).

Comment: Mr. Johns also commented that the requirement in subpart (3) that the petitioner disclose the identities of all persons known to have an interest in the subject of the declaratory ruling seems impractical.

Response: The requirement is consistent with Attorney General model rule 22. The Board will rely on the good faith of the petitioner to disclose all persons known to be interested in the matter. However, the Board will also give notice to those other persons whom the Board believes would be interested in the matter.

3. Comments on New Rule III, Petition to Revoke Certification or Recognition:

Comment: The MEA commented that it felt that both conditions of subpart (2) must be met before a petition could be filed.

Response: The new rule requires that both conditions be present before the Board will order revocation.

4. Comments on New Rule IV, Petitions to Amend Certification of Exclusive Representative:

Comment: The MSBA commented that because the issue of recognition is a permissive/non-mandatory subject of bargaining, the Board should confine this rule to the issue of certification only.

Response: The Board agrees with the comment and has amended the rule accordingly.

Comment: The MSBA commented that the rule should include appeal rights for any interested party.

Response: The Board believes that implicit in the rule is the right of an interested party to appeal. The Board will include appropriate appeal language when it rules on a petition.

5. Comments on New Rule VI, Panel of Arbitrators and Fact Finders:

Comment: The MEA suggested that the Board should adopt by reference the American Arbitration Association (AAA) rules of procedure. The Montana School Boards Association (MSBA) offered its comments opposing the suggestion.

Response: The Board declines to incorporate the AAA rules for arbitration at this time. The Board believes that any such proposal would have to be noticed for public comment, as it falls substantially outside of the scope of New Rule VI. The Board will be open to comments as to whether, after a fair trial period, the rule needs to be amended.

6. Comments on ARM 24.26.403, Grievance Procedure:

Comment: The Department of Fish, Wildlife and Parks commented by suggesting that step one be clarified by explicitly requiring that the department's internal grievance procedures be followed before triggering the Board's formal process.

Response: The Board agrees with the comment and has amended both this rule and the parallel rule for the Department of Transportation [ARM 24.25.303] accordingly.

7. Comments on ARM 24.26.508, Grievance Procedure:

Comment: The Montana Public Employees Association (MPEA) commented that requiring workers not only to identify the issues in their grievance but also to explain "why" was unfair because of the potential for a grievance to be rejected because the explanation is deemed to be inadequate. MPEA suggested that the requirement of "why" be deleted from the rule in subparts (1)(b), (2)(c) and (4)(a).

Response: The Board agrees with the suggestion and has amended the rule accordingly.

Comment: MPEA commented that the failure of the agency to timely respond ought to be grounds for moving the grievance to the next step.

Response: The Board agrees with the comment and notes that ARM 24.26.518 provides that the failure of an agency to timely respond is grounds for moving the grievance to the next step.

8. Comments on ARM 24.26.523, Filing of a New Petition for Hearing After Order Issued:

Comment: MPEA commented that a substantial change in factoring methodology should also be a grounds for filing a new petition.

Response: The Board agrees with the suggestion and has amended the rule accordingly.

9. Comments on ARM 24.26.602, Filing of Negotiated Agreements and Duration:

Comment: Dan Johns, MSBA, and the Montana State Council of State Firefighters commented that the two year maximum on public employee contracts should be removed. Mr. Johns and MSBA commented that the Board lacked authority to set a maximum contract period by rule and that the rule should be repealed.

Response: The Board generally agrees with the comments and has removed the two year maximum contract period from the rule. The Board has maintained the one year minimum period to help promote stability in labor relations. The one year minimum is consistent with the periods expressed in ARM 24.26.630 and 24.26.648.

10. Comments on ARM 24.26.612, Petition for New Unit Determination and Election:

Comment: MEA commented that the Board should adopt the "60% rule" and permit labor organizations that obtain signed authorization cards from 60% or more of the bargaining unit to be certified, without the need for an election. MEA commented that the "60% rule" is permitted under Canadian labor law and has been proposed for incorporation in the National Labor Relations Act (NLRA). MSBA commented that it opposes the suggestion of MEA.

Response: The Board will follow the existing practice and precedent of American labor law and will not adopt the suggestion at this time. While there may be some cost savings realized by not holding an election, the Board believes that such savings are speculative. If and when the NLRA is amended to recognize the "60% rule", the Board will reconsider amending its rules to authorize the practice.

11. Comments on ARM 24.26.620, Procedure Following Filing for New Unit Determination and Election:

Comment: MEA commented on the proposed rule by suggesting that elections ought to be required within 30 days after the last date for a party to intervene, unless the party mutually otherwise agree to a different schedule.

Response: The Board believes that the suggested timetable is inappropriate. 30 days is inadequate to investigate the matter and hold a hearing, if needed.

Comment: MEA suggested that the excelsior list be required to be furnished within 10 days of the posting of notice of unit determination proceedings.

Response: The Board agrees with the comment and has amended the rule accordingly.

Comment: MEA commented that unit determination hearings should not be allowed to be used to discourage organizing.

Response: While the Board agrees that unit determination hearings should not be used solely as a means for delaying elections or frustrating organizing efforts, the hearings are an important due process safeguard and cannot be ignored or removed from the process.

12. Comments on ARM 24.26.622, Employer Petition:

Comment: The MSBA commented that the proposed amendment which changes the wording in subpart (3)(c) from "doubt" to "belief" is inconsistent with federal precedent and is a departure from the Board's past practice. MSBA suggested that the word "doubt" be retained in the rule.

Response: The Board agrees with the suggestion and has amended the rule accordingly.

13. Comments on ARM 24.26.630, Petition for Unit Clarification of Bargaining Unit:

Comment: MEA commented that subpart (1)(b) should be deleted because the need for clarification often arises during bargaining.

Response: The Board believes that unit clarification should be a subject of bargaining efforts. However, the Board agrees that such an issue may arise during negotiations. The Board has amended the rule to allow petitions during the period in question upon the mutual consent of the parties. The Board will consider further amendments to this rule at a future date.

14. Comments on ARM 24.26.643, Petition for Decertification:

Comment: Dan Johns commented that the use of the word "previous" in subpart (2) was confusing when it referred to the collective bargaining agreement.

Response: The Board agrees with the comment and has amended the rule to make the intent more clear.

Comment: Richard Larson of Billings commented that the rule should be amended to allow employees to request that they not be represented.

Response: The Board agrees with the comment and notes that the amendments specify that a petition can be for that purpose.

Comment: Mr. Larson also commented by objecting to the requirement that proof of the 30% membership support for a petition could only be shown with individual authorization cards. He suggested that signatures be allowed directly on the petition.

Response: The Board believes that an individual's privacy rights are better protected when individually signed cards requesting a decertification election are used, rather than when signatures may be collected directly on the petition. The Board's rule is consistent with the recommended practices of the National Labor Relations Board (NLRB).

15. Comments on ARM 24.26.648, Disaffirmance of Representation by Bargaining Representation:

Comment: Dan Johns commented that the rule should be amended to allow a labor organization to withdraw its representation.

Response: New Rule III addresses the concern expressed here. This rule addresses the timing of a petition for decertification, rather than who may file.

16. Comments on ARM 24.26.655, Elections Directed:

Comment: MEA commented that the rule should be amended to cross-reference the timelines that MEA suggested for inclusion in ARM 24.26.620.

Response: The Board believes that it is implicit that elections are held in conformance with the rules. The Board has not adopted the timeline suggested by MEA for ARM 24.26.620 (see comments and responses above).

17. Comments on ARM 24.26.656, Conditions:

Comment: MEA commented that on-site elections should be held whenever 100 or more employees are involved.

Response: The Board will endeavor to provide requested on-site elections when feasible for the Board and its staff. However, the Board must appropriately allocate its scarce resources and believes that the public would not be well served by making such a requirement.

Comment: MEA commented that on-site elections for large groups would eliminate the potential for abuse that exists with mail ballots.

Response: The Board will investigate allegations of abuse of balloting procedures.

18. Comments on ARM 24.26.660, Ballots:

Comment: MEA commented that the rule should provide that for decertification elections, the currently recognized labor organization should always be placed on the ballot, unless otherwise agreed.

Response: The Board agrees with the comment and has amended the rule accordingly.

19. Comments on ARM 24.26.661, Poll Watchers:

Comment: Dan Johns commented that the phrase "appropriate persons", when referring to an employers representatives should be clarified.

Response: The phrasing in question was not changed by the proposed amendments. However, to clarify, the Board looks to NLRB precedent in deciding who is an appropriate person. The election judge is empowered to rule on specific questions that arise during an election.

20. Comments on ARM 24.26.666, Objections:

Comment: Emilie Loring of Missoula and MEA commented that allowing oral notification of election results to start the running of the appeal time may lead to factual disputes over when notice was received and suggested that written notice be given.

Response: The Board agrees with the comments and has amended the rule accordingly. As a matter of providing good customer service, however, the Board will continue its practice of notifying the parties by telephone whenever feasible.

Comment: Dan Johns commented that in line with other amendments, the Board should reduce the number of copies required from five to three.

Response: The Board agrees with the comment and has amended the rule accordingly.

21. Comments on ARM 24.26.667, Certification:

Comment: Dan Johns commented that the Board should follow the practice of the NLRB and only certify the results of an election rather than certifying the representative.

Response: The Board believes that pursuant to 39-31-208, MCA, it must certify the representative.

22. Comments on ARM 24.26.680 B, Response to Complaint and Investigation of Complaint:

Comment: Emilie Loring commented that rather than basing the response time from receipt of the notice, the time should be computed from the date of mailing.

Response: The Board agrees with the comment and has amended the rule accordingly.

23. Comments on ARM 24.26.682, Notice of Hearing:

Comment: Dan Johns commented that five working days notice is too little time in which to prepare for a hearing.

Response: The Board believes that the rule should be amended as proposed. The Board foresees that in exceptional circumstances both parties may desire an expedited hearing and agree that five working days is adequate notice. However, the Board recognizes that for most hearings a greater notice period and time for preparation is needed. The Hearings Unit generally provides at least 30 days notice for hearings.

Comment: MEA commented that it opposes the deletion of the 20 working day time limit for holding a hearing.

Response: The Board recognizes the need for promptly held hearings. However, due to current budget and staffing constraints, the Board finds that it is unreasonable to require that all hearings be held within 20 working days.

24. Comments on ARM 24.26.695, Interest Mediation:

Comment: MSBA, MEA and Dan Johns all commented that they support permissive mediation, but that they oppose mandatory mediation.

Response: Section 39-31-307, MCA, states that the parties "shall request mediation" after a reasonable period of negotiation or upon the expiration of a collective bargaining agreement. The Board cannot by rule make permissive what the statute requires.

Comment: MEA commented that it supports the practice that either party may request mediation. It opposes a requirement of a joint request.

Response: The Board agrees with the comment and has amended the rule to clarify that only a request for the Federal Mediation and Conciliation Service needs to be made jointly.

Comment: Dan Johns commented that the phrase "a reasonable period of negotiation" should be defined, so that the parties do not inadvertently trigger unfair labor practice charges.

Response: The Board cannot state what is "reasonable" for every situation. Reasonableness must be judged in light of the issues and the situation of the parties. There is no particular number

of sessions that the Board is able to say is reasonable or unreasonable.

25. Comments on ARM 24.26.697, Fact Finder:

Comment: Emilie Loring commented that if the intent of the Board was to have the costs shared equally by the parties, the rule should reflect that the costs are shared "among" rather that "between" the parties.

Response: The Board agrees that the use of the word "between" is confusing and has amended the rule to follow the statutory language that the cost will be shared by the parties.

9. The Board of Personnel Appeals makes these rule amendments, rule repeal, and new rules effective January 1, 1994.

Willis M. McKeon, Chair
BOARD OF PERSONNEL APPEALS

David A. Scott
Rule Reviewer

By: David A. Scott
David A. Scott, Chief Counsel
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State: December 13, 1993.

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

In the matter of the repeal of chapter 17 and chapter 18 and adoption of new rules pertaining to renewable resource grant and loan program	))))	NOTICE OF ADOPTION OF THE REPEAL OF CHAPTER 17 AND CHAPTER 18 AND ADOPTION OF NEW RULES I THROUGH VI

To: All Interested Persons.

1. On October 28, 1993, the Department of Natural Resources and Conservation published notice of a public hearing on the repeal of chapter 17 and chapter 18 and proposed adoption of new rules concerning the renewable resource grant and loan program in the Montana Administrative Register Issue No. 20, starting at page 2498 and inclusive of page 2504.

2. On November 18, 1993, at 1:30 p.m. in the Director's conference room, Department of Natural Resources and Conservation, 1520 East Sixth Avenue, Helena, Montana, the Department of Natural Resources and Conservation held a public hearing to consider the repeal of chapter 17 and chapter 18 in their entirety and adoption of new rules relating to the renewable resource grant and loan program.

3. No comments or testimony was received.

4. The department has repealed chapter 17 and chapter 18 and adopted the new rules as proposed. New rules I through VI will be numbered as 36.17.601 through 36.17.606.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

Mark A. Simonich

MARK A. SIMONICH, DIRECTOR

Donald D. MacIntyre

DONALD D. MACINTYRE, RULE REVIEWER

Certified to Secretary of State November 4 1993.

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

In the Matter of Repeal of Rules 38.4.801 - 38.4.806 Regarding Rear-End Telemetry Systems for Trains.	))))	NOTICE OF REPEAL OF RULES 38.4.801 THROUGH 38.4.806

TO: All Interested Persons

1. On November 10, 1993 the Department of Public Service Regulation published notice of the proposals identified in the above titles at pages 2602-2603, issue number 21 of the 1993 Montana Administrative Register.

2. The Commission has repealed rules 38.4.801 through 38.4.806 as proposed.

3. No written comments were received.

Bob Anderson
Bob Anderson, Chairman

CERTIFIED TO THE SECRETARY OF STATE DECEMBER 13, 1993.

Reviewed By

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

In the Matter of Adoption by reference of the 1993 Edition of the National Electrical Safety Code.	))))	NOTICE OF ADOPTION OF A NEW RULE REGARDING THE NATIONAL ELECTRICAL SAFETY CODE

TO: All Interested Persons

1. On November 10, 1993 the Department of Public Service Regulation published notice of the proposals identified in the above titles at pages 2606-2607, issue number 21 of the 1993 Montana Administrative Register.

2. The Commission has adopted the new rule as proposed.

Rule I. 38.5.1010 INCORPORATION BY REFERENCE OF NATIONAL ELECTRICAL SAFETY CODE

3. No written comments were received.

Bob Anderson
Bob Anderson, Chairman

CERTIFIED TO THE SECRETARY OF STATE DECEMBER 13, 1993.

Reviewed By

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

In the Matter of Amendment of rules adopting Federal Pipeline Safety Regulations.	)))	NOTICE OF AMENDMENT OF RULES 38.5.2202 AND 38.5.2220

TO: All Interested Persons

1. On November 10, 1993 the Department of Public Service Regulation published notice of the proposals identified in the above titles at pages 2604-2605, issue number 21 of the 1993 Montana Administrative Register.

2. The Commission has amended the rules as proposed.

3. No written comments were received.

Bob Anderson
Bob Anderson, Chairman

CERTIFIED TO THE SECRETARY OF STATE DECEMBER 13, 1993.

Reviewed By

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

In the Matter of Repeal of Rule 38.5.3345 Regarding Unauthorized Changes of Telephone Customers' Primary Interexchange Carrier (PIC).	)))))	NOTICE OF REPEAL OF RULE 38.5.3345

TO: All Interested Persons

1. On October 14, 1993 the Department of Public Service Regulation published notice of the proposals identified in the above titles at pages 2368-2369, issue number 19 of the 1993 Montana Administrative Register.

2. The Commission has repealed rule 38.5.3345, as proposed.

3. Written comments were received from MCI Telecommunications and US Sprint agreeing with the proposed repeal.

Bob Anderson
Bob Anderson, Chairman

CERTIFIED TO THE SECRETARY OF STATE DECEMBER 13, 1993.

Reviewed By

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.17.105, 42.17.111, 42.17.112, 42.17.113, 42.17.114, 42.17.115, 42.17.116, 42.17.118, 42.17.133, 42.17.134 42.17.136, 42.17.137, and 42.17.138; and ADOPTION of RULES I (42.17.145), II (42.17.146), III (42.17.147), IV (42.17.148) V (42.17.149), VI (42.17.401), VII (42.17.402), and VIII (42.17.403) relating to Old Fund Liability Tax	NOTICE OF THE AMENDMENT of ARM 42.17.105, 42.17.111, 42.17.112, 42.17.113, 42.17.114, 42.17.115, 42.17.116, 42.17.118, 42.17.133, 42.17.134, 42.17.136, 42.17.137, and 42.17.138; and ADOPTION of RULES I (42.17.145), II (42.17.146), III (42.17.147) IV (42.17.148), V (42.17.149) VI (42.17.401), VII (42.17.402), and VIII (42.17.403) relating to Old Fund Liability Tax

TO: All Interested Persons:

1. On November 10, 1993, the Department published notice of the proposed amendment of ARM 42.17.105, 42.17.111, 42.17.112, 42.17.113, 42.17.114, 42.17.115, 42.17.116, 42.17.118, 42.17.133, 42.17.134, 42.17.136, 42.17.137, 42.17.138 and adoption of Rules I (42.17.145), II (42.17.146), III (42.17.147), IV (42.17.148), V (42.17.149), VI (42.17.401), VII (42.17.402), and VIII (42.17.403) relating to old fund liability tax at page 2612 of the 1993 Montana Administrative Register, issue no. 21.

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

3. However, the Department has determined that clarifications are necessary, and therefore, amends New Rules VI and VIII as follows:

RULE VI (42.17.401) OLD FUND LIABILITY TAX RATE (1) and (2) remain the same.

(3) Every person subject to the tax under subsection (1) shall pay a minimum of $25 per entity that is reported or should be reported on the taxpayer's individual income tax return. AN ENTITY THAT DOES NOT PRODUCE EITHER ORDINARY INCOME OR AN ORDINARY LOSS WILL NOT PAY THE OLD FUND LIABILITY TAX OR THE $25 MINIMUM.

Example: ~~Mike Vitt~~ JOHN DOE is a taxpayer who has interests in various businesses. He is a sole proprietor of a business, is a partner in a partnership, IS A PARTNER IN A LIMITED PARTNERSHIP, RECEIVES RENTAL INCOME, and is a

shareholder in a Subchapter S Corporation. In a taxable year, the income from the sole proprietorship was $30,000, the partnership was aN ORDINARY loss, THE LIMITED PARTNERSHIP WAS A PASSIVE LOSS, THE RENTAL INCOME WAS $2,500, and the income from the Subchapter S corporation was $15,000. His old fund tax liability for tax year 1993 is calculated as follows:

1.	Schedule C Income of $30,000	=	$30
2.	Subchapter S Income of $15,000	=	$25 (minimum)
3.	Partnership ORDINARY loss	=	$25 (minimum)
4.	LIMITED PARTNERSHIP PASSIVE LOSS	=	$ 0
5.	RENTAL (NOT ORDINARY) INCOME	=	$ 0
Total OFLT tax liability		=	$80

(4) and (5) remain the same.

(6) If property in a sole proprietorship is held jointly AND REPORTED BY ONE SPOUSE, the old fund liability minimum tax is applied only once. IF THE INCOME IS REPORTED BY BOTH SPOUSES ON SEPARATE RETURNS, THE MINIMUM TAX IS APPLIED TWICE.

(7) IF PART OF THE INCOME OF THE SOLE PROPRIETORSHIP IS ALLOCATED TO THE SPOUSE, THE ALLOCATED INCOME IS SUBJECT TO THE OLD FUND LIABILITY TAX AND THE $25 MINIMUM TAX. THE PORTION OF THE SOLE PROPRIETORSHIP INCOME SUBJECT TO THE OFLT TAX IS THE NET INCOME LESS ANY ALLOCATED INCOME.

(8) A PERSON IS NOT SUBJECT TO THE OLD FUND LIABILITY TAX IF THEY ARE NOT REQUIRED TO FILE A MONTANA INCOME TAX RETURN.

RULE VIII (42.17.403) OLD FUND LIABILITY TAX INCOME

(1) remains the same.

(2) The shareholder's income subject to the old fund liability is his or her share of the Subchapter S corporation's ordinary income or loss LESS ANY 179 DEPRECIATION DEDUCTION from a trade or business activities.

(3) A partner's income subject to the old fund liability is his or her share of the partnership's ordinary income or loss LESS ANY 179 DEPRECIATION DEDUCTION from trade or business activities.

(4) A liability member or manager's income that is subject to the old fund liability is his or her share of the limited liability company's ordinary income or loss LESS ANY 179 DEPRECIATION DEDUCTION from trade or business activities.

(5) and (6) remain the same.

(7) RENT AND ROYALTY INCOME NOT INCLUDED IN NET BUSINESS INCOME OF A SOLE PROPRIETORSHIP IS NOT SUBJECT TO THE OLD FUND LIABILITY TAX AND THE $25 MINIMUM.

(8) DIRECTOR'S FEES AND LIKE INCOME IS SUBJECT TO THE OLD FUND LIABILITY AND THE $25 MINIMUM.

4. Therefore, the Department adopts rules VI (42.17.401) and VIII (42.17.403) with the amendments listed above and adopts

and amends the other rules as proposed in MAR No. 21.

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State December 13, 1993.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE REPEAL of ARM 42.20.137 and 42.20.138; the AMENDMENT of ARM 42.20.133, 42.20.134, 42.20.135, 42.20.139 42.20.140, 42.20.141, 42.20.142 20.143, 42.20.144, 42.20.145, 42.20.146, AND 42.20.147 and ADOPTION of NEW RULE I (ARM 42.20.150), II (ARM 42.20.151), III (ARM 42.20.152), and IV (ARM 42.20.153), relating to Valuation of Real Property	NOTICE OF THE REPEAL of ARM 42.20.137 and 42.20.138; the AMENDMENT of ARM 42.20.133, 42.20.134, 42.20.135, 42.20.139, 42.20.140, 42.20.141, 42.20.142, 42.20.143, 42.20.144, 42.20.145, 42.20.146 and 42.20.147 and ADOPTION of RULE I (ARM 42.20.150), II (ARM 42.20.151), III (ARM 42.20.152), and IV (ARM 42.20.153), relating to Valuation of Real Property

TO: All Interested Persons:

1. On November 10, 1993 the Department published notice of the proposed repeal of ARM 42.20.137; amendment of ARM 42.20.138, 42.20.139, 42.20.140, 42.20.141, 42.20.142, 42.20.143, 42.20.144, 42.20.145, 42.20.146, 42.20.147; and adoption of new rules I (ARM 42.20.150), II (ARM 42.20.151), III (ARM 42.20.152), and IV (ARM 42.20.153) relating to valuation of real property at page 2633 of the 1993 Montana Administrative Register, issue no. 21.

2. A Public Hearing was held on December 2, 1993, in Helena, Montana, to consider the proposed action. Written and oral comments were received during the hearing and are summarized as follows along with the response of the Department:

COMMENT: Comments were presented by Park County Commissioner, Carlo Cieri (supported by written testimony), and Carbon County Commissioner, Mona Nutting, Carbon County Treasurer, John Michelice, and Carbon County Assessor, Patsy May (supported by written testimony). Their collective comments were primarily directed at wording in ARM 42.20.138 which is summarized as follows: For properties where the land and residence(s) on that land are owned disparately, there should be one acre associated with each residence valued at market value as Class 4 property. Each one acre site should be assessed to the owner of the land.

RESPONSE: Based on these comments, the Department proposes to amend ARM 42.20.134 and 42.20.135 and repeal ARM 42.20.138 as shown below. These amendments and repeal will resolve the concerns made by the parties who testified orally or in writing at the hearing.

3. Prior to the hearing the Department determined that the schedules which had been published in the 1993 Montana Administrative Register, Issue No. 21, on pages 2635 through

2643 were incorrect. The Department prepared the correct schedules and mailed copies to all persons on the Department's mailing lists. The Department staff introduced the corrected schedules at the hearing and they were made part of the record.

4. Additionally, as a result of the comments presented at the hearing, the Department has determined that it is necessary to replace the term "timberland" with the term "forest land" in ARM 42.20.133 through 42.20.147. Also, the Department will repeal ARM 42.20.138 which was proposed to be amended. Lastly, from the public comments, the Department has determined that it will be necessary to amend ARM 42.20.134 and 42.20.135 which were not originally proposed to be amended on the Notice published in Issue No. 21 of the MAR. Those amendments are as follows:

42.20.133 QUALIFICATION FOR CLASSIFICATION AS AGRICULTURAL OR ~~TIMBERLAND~~ FOREST LAND (1) One acre beneath residential improvements on agricultural land and residential improvements on ~~timberland~~ FOREST LAND must be valued at its market value. That land must qualify for classification as agricultural land pursuant to 15-7-202, MCA, or as ~~timberland~~ FOREST LAND under 15-6-143, MCA, before ARM 42.20.134 is applicable.

42.20.134 VALUATION OF ONE ACRE BENEATH AGRICULTURAL IMPROVEMENTS AND IMPROVEMENTS ON ~~TIMBERLAND~~ FOREST LAND (1) A market value determination will be made for each one acre area beneath each residence which is located on agricultural land and for each one acre area beneath each residence that is located on ~~timberland~~ FOREST LAND as defined in ARM 42.20.~~113~~ 160 AND ARM 42.20.161.

(2) Each one acre area beneath ~~an agricultural~~ A RESIDENTIAL improvement ~~or an improvement on timberland~~ ON AGRICULTURAL OR FOREST LAND as defined in paragraph (1) above, shall be appraised according to market value consistent with that of comparable land.

(a) through (c) remain the same.

AUTH: 15-1-201, MCA; IMP: 15-7-103, 15-7-201 and 15-8-111, MCA

42.20.135 PROCEDURE FOR REMOVING ONE ACRE BENEATH AGRICULTURAL IMPROVEMENTS AND IMPROVEMENTS ON ~~TIMBERLAND~~ FOREST LAND FROM PROPERTY LAND CLASSIFICATION (1) All agricultural land and ~~timberland~~ FOREST LAND acreage will be classified and valued based upon its productive capacity.

(2) All one acre tracts beneath ~~agricultural improvements and improvements on timberland valued pursuant to ARM 42.20.133 through 42.20.138~~ RESIDENTIAL IMPROVEMENTS ON AGRICULTURAL AND FOREST LAND VALUED PURSUANT TO ARM 42.20.133 THROUGH 42.20.136, will be valued based upon their market values.

(3) To avoid double taxation, the productive capacity value for the one acre beneath agricultural improvements and improvements on ~~timberland~~ FOREST LAND which are valued at market value must be subtracted from the productive capacity value for the entire property ownership.

(4) The department of revenue will attempt to determine the current land classification of land beneath all agricultural improvements and all improvements on ~~timberlands~~ FOREST LAND. Should the department of revenue be unable to make accurate determinations on current land classification of the one acre area beneath agricultural improvements and improvements on ~~timberland~~ FOREST LAND, the following estimation procedures are adopted.

(a) remains the same.

(b) For ~~timberland~~ FOREST LAND:

(i) Subtract one acre of the highest per acre productive value of the nonforest grazing classification from the property ownership.

(ii) If the property ownership contains no land in the nonforest grazing classification, subtract one acre of the highest per acre productive value of the ~~timberland~~ FOREST LAND classification from the property ownership.

(5) During the reappraisal cycle, additional review of one acre areas beneath agricultural improvements and improvements on ~~timberland~~ FOREST LAND will be conducted to ensure the correct land classification has been subtracted from the property ownership.

ATUH: 15-1-201, MCA; IMP: 15-7-103, 15-7-201, and 15-8-111, MCA

42.20.142 GRAZING LAND (1) The following is the schedule for the classification and valuation of grazing land:

~~Acres for 10-Month Grazing Season per 1,000 lb. Steer or Equivalent~~	~~Grade~~	~~Assessed Value Per Acre~~
~~Under 3~~	~~1A2~~	~~$71.69~~
~~3 - 5~~	~~1A1~~	~~44.18~~
~~5 - 6~~	~~1A+~~	~~31.27~~
~~6 - 10~~	~~1A~~	~~20.51~~
~~11 - 18~~	~~1B~~	~~10.53~~
~~19 - 21~~	~~2A~~	~~7.17~~
~~22 - 27~~	~~2B~~	~~5.42~~
~~28 - 37~~	~~3~~	~~3.72~~
~~38 - 55~~	~~4~~	~~2.52~~
~~56 - 99~~	~~5~~	~~1.47~~
~~100 or over~~	~~6~~	~~.82~~

(a) In effect from January 1, 1994, through December 31, 1994:

Acres for 10-month Grazing Season per 1,000 lb. Steer or Equivalent	Grade	Assessed Value Per Acre
Under - 3	1A2	$551.77
3 - 5	1A1	324.47

5 - 6	1A+	230.96
6 - 10	1A	153.03
11 - 18	1B	79.85
19 - 21	2A	55.18
22 - 27	2B	42.52
28 - 37	3	29.92
38 - 55	4	20.45
56 - 99	5	12.02
100 or over	6	6.92

(b) In effect from January 1, 1995, through December 31, 1995:

Acres for 10-month Grazing Season per 1,000 lb. Steer or Equivalent	Grade	Assessed Value Per Acre
Under - 3	1A2	$546.36
3 - 5	1A1	305.57
5 - 6	1A+	218.89
6 - 10	1A	146.65
11 - 18	1B	77.85
19 - 21	2A	54.64
22 - 27	2B	42.92
28 - 37	3	30.94
38 - 55	4	21.31
56 - 99	5	12.62
100 or over	6	7.47

(c) In effect from January 1, 1996, through December 31, 1996:

Acres for 10-month Grazing Season per 1,000 lb. Steer or Equivalent	Grade	Assessed Value Per Acre
Under - 3	1A2	$540.96
3 - 5	1A1	286.67
5 - 6	1A+	206.81
6 - 10	1A	140.27
11 - 18	1B	75.86
19 - 21	2A	54.09
22 - 27	2B	43.32
28 - 37	3	31.95
38 - 55	4	22.17
56 - 99	5	13.22
100 or over	6	8.02

(d) In effect from January 1, 1997, through December 31, 1997:

Acres for 10-month Grazing Season per 1,000 lb. Steer or Equivalent	Grade	Assessed Value Per Acre
Under - 3	1A2	$535.55
3 - 5	1A1	267.77
5 - 6	1A+	194.74
6 - 10	1A	133.89
11 - 18	1B	73.87
19 - 21	2A	53.55
22 - 27	2B	43.72
28 - 37	3	32.96
38 - 55	4	23.03
56 - 99	5	13.82
100 or over	6	8.57

(2) remains the same.

42.20.143 CONTINUOUSLY CROPPED HAY LAND (1) The following is the schedule for the classification and valuation of continuously cropped hay land:

~~Tons of Hay Per Acre~~	~~Grade~~	~~Assessed Value Per Acre~~
~~3.0 and Over~~	~~1~~	~~$67.60~~
~~2.5 - 2.9~~	~~2~~	~~53.03~~
~~2.0 - 2.4~~	~~3~~	~~41.38~~
~~1.5 - 1.9~~	~~4~~	~~29.43~~
~~1.0 - 1.4~~	~~5~~	~~19.30~~
~~.5 - .9~~	~~6~~	~~10.05~~
~~Less than .5~~	~~7~~	~~5.54~~

(a) In effect from January 1, 1994, through December 31, 1994:

Tons of Hay Per Acre	Grade	Assessed Value Per Acre
3.0 and Over	1	$556.70
2.5 - 2.9	2	455.50
2.0 - 2.4	3	360.49
1.5 - 1.9	4	263.72
1.0 - 1.4	5	178.03
.5 - .9	6	96.53
Less than .5	7	45.85

(b) In effect from January 1, 1995, through December 31, 1995:

Tons of Hay Per Acre	Grade	Assessed Value Per Acre
3.0 and Over	1	$588.01
2.5 - 2.9	2	498.86
2.0 - 2.4	3	399.37
1.5 - 1.9	4	298.71
1.0 - 1.4	5	205.44
.5 - .9	6	114.96
Less than .5	7	48.64

(c) In effect from January 1, 1996, through December 31, 1996:

Tons of Hay Per Acre	Grade	Assessed Value Per Acre
3.0 and Over	1	$619.32
2.5 - 2.9	2	542.21
2.0 - 2.4	3	438.25
1.5 - 1.9	4	333.70
1.0 - 1.4	5	232.84
.5 - .9	6	133.38
Less than .5	7	51.43

(d) In effect from January 1, 1997, through December 31, 1997:

Tons of Hay Per Acre	Grade	Assessed Value Per Acre
3.0 and Over	1	$650.63
2.5 - 2.9	2	585.56
2.0 - 2.4	3	477.13
1.5 - 1.9	4	368.69
1.0 - 1.4	5	260.25
.5 - .9	6	151.81
Less than .5	7	54.22

42.20.144 NONIRRIGATED FARM LAND (1) The following is the schedule for the classification and valuation of non-irrigated farm land:

~~Bu. Wheat Per Acre on Summer Fallow~~	~~Grade~~	~~Assessed Value Per Acre~~
~~40 & Over~~	~~1A8~~	~~$81.00~~
~~38 - 39~~	~~1A7~~	~~74.51~~
~~36 - 37~~	~~1A6~~	~~67.94~~
~~34 - 35~~	~~1A5~~	~~61.37~~
~~32 - 33~~	~~1A4~~	~~54.80~~

~~30 - 31~~	~~1A3~~	~~48.60~~
~~28 - 29~~	~~1A2~~	~~42.79~~
~~26 - 27~~	~~1A1~~	~~37.31~~
~~24 - 25~~	~~1A~~	~~32.22~~
~~22 - 23~~	~~1B~~	~~27.50~~
~~20 - 21~~	~~2A~~	~~23.15~~
~~18 - 19~~	~~2B~~	~~19.17~~
~~16 - 17~~	~~2C~~	~~15.56~~
~~14 - 15~~	~~3A~~	~~12.31~~
~~12 - 13~~	~~3B~~	~~9.44~~
~~10 - 11~~	~~4A~~	~~6.94~~
~~8 - 9~~	~~4B~~	~~4.81~~
~~Under 8~~	~~5~~	~~3.06~~

(a) In effect from January 1, 1994, through December 31, 1994:

Bu. Wheat Per Acre on Summer Fallow	Grade	Assessed Value Per Acre
40 & Over	1A8	$549.54
38 - 39	1A7	507.45
36 - 37	1A6	465.35
34 - 35	1A5	423.26
32 - 33	1A4	381.16
30 - 31	1A3	341.22
28 - 29	1A2	303.56
26 - 27	1A1	267.82
24 - 25	1A	234.35
22 - 23	1B	203.04
20 - 21	2A	173.88
18 - 19	2B	146.88
16 - 17	2C	122.04
14 - 15	3A	99.30
12 - 13	3B	78.77
10 - 11	4A	60.40
8 - 9	4B	44.18
6 - 7	5	25.43

(b) In effect from January 1, 1995, through December 31, 1995:

Bu. Wheat Per Acre on Summer Fallow	Grade	Assessed Value Per Acre
40 & Over	1A8	$468.93
38 - 39	1A7	435.80
36 - 37	1A6	402.67
34 - 35	1A5	369.54
32 - 33	1A4	336.41
30 - 31	1A3	304.73

28 - 29	1A2	274.55
26 - 27	1A1	245.66
24 - 25	1A	218.28
22 - 23	1B	192.34
20 - 21	2A	167.84
18 - 19	2B	144.77
16 - 17	2C	123.15
14 - 15	3A	102.92
12 - 13	3B	84.17
10 - 11	4A	66.86
8 - 9	4B	50.98
6 - 7	5	27.09

(c) In effect from January 1, 1996, through December 31, 1996:

Bu. Wheat Per Acre on Summer Fallow	Grade	Assessed Value Per Acre
40 & Over	1A8	$388.32
38 - 39	1A7	364.16
36 - 37	1A6	339.99
34 - 35	1A5	315.83
32 - 33	1A4	291.67
30 - 31	1A3	268.23
28 - 29	1A2	245.54
26 - 27	1A1	223.50
24 - 25	1A	202.21
22 - 23	1B	181.65
20 - 21	2A	161.79
18 - 19	2B	142.67
16 - 17	2C	124.25
14 - 15	3A	106.55
12 - 13	3B	89.57
10 - 11	4A	73.32
8 - 9	4B	57.78
6 - 7	5	28.74

(d) In effect from January 1, 1997, through December 31, 1997:

Bu. Wheat Per Acre on Summer Fallow	Grade	Assessed Value Per Acre
40 & Over	1A8	$307.71
38 - 39	1A7	292.51
36 - 37	1A6	277.31
34 - 35	1A5	262.12
32 - 33	1A4	246.92
30 - 31	1A3	231.73

28 - 29	1A2	216.53
26 - 27	1A1	201.34
24 - 25	1A	186.14
22 - 23	1B	170.95
20 - 21	2A	155.75
18 - 19	2B	140.56
16 - 17	2C	125.36
14 - 15	3A	110.17
12 - 13	3B	94.97
10 - 11	4A	79.78
8 - 9	4B	64.58
6 - 7	5	30.39

42.20.145 NONIRRIGATED, CONTINUOUSLY CROPPED FARM LAND (1) The following is the schedule for the classification and valuation of non-irrigated, continuously cropped farm land:

~~Bu. of Wheat Per Acre Each Year~~	~~Grade~~	~~Assessed Value Per Acre~~
~~44 & Over~~	~~1A4~~	~~$125.71~~
~~42 - 43~~	~~1A3~~	~~116.94~~
~~40 - 41~~	~~1A2~~	~~108.17~~
~~38 - 39~~	~~1A1~~	~~99.40~~
~~36 - 37~~	~~1A~~	~~90.63~~
~~34 - 35~~	~~1~~	~~81.86~~
~~32 - 33~~	~~2~~	~~73.09~~
~~30 - 31~~	~~3~~	~~64.81~~
~~28 - 29~~	~~4~~	~~57.05~~
~~26 - 27~~	~~5~~	~~49.75~~
~~24 - 25~~	~~6~~	~~42.96~~
~~22 - 23~~	~~7~~	~~36.67~~
~~20 - 21~~	~~8~~	~~30.87~~
~~18 - 19~~	~~9~~	~~25.56~~
~~16 - 17~~	~~10~~	~~20.75~~
~~14 - 15~~	~~11~~	~~16.41~~
~~12 - 13~~	~~12~~	~~12.59~~
~~10 - 11~~	~~13~~	~~9.25~~
~~less than 10~~	~~14~~	~~6.41~~

(a) In effect from January 1, 1994, through December 31, 1994:

Bu. of Wheat Per Acre Each Year	Grade	Assessed Value Per Acre
44 & Over	1A4	$901.81
42 - 43	1A3	843.10
40 - 41	1A2	784.38
38 - 39	1A1	725.66
36 - 37	1A	666.94

34 - 35	1	608.22
32 - 33	2	549.51
30 - 31	3	493.64
28 - 29	4	440.81
26 - 27	5	390.66
24 - 25	6	343.49
22 - 23	7	299.22
20 - 21	8	257.82
18 - 19	9	219.27
16 - 17	10	184.01
14 - 15	11	150.74
12 - 13	12	120.87
10 - 11	13	93.81
Less than 10	14	56.36

(b) In effect from January 1, 1995, through December 31, 1995:

Bu. of Wheat Per Acre Each Year	Grade	Assessed Value Per Acre
44 & Over	1A4	$826.61
42 - 43	1A3	777.33
40 - 41	1A2	728.05
38 - 39	1A1	678.78
36 - 37	1A	629.50
34 - 35	1	580.23
32 - 33	2	530.95
30 - 31	3	483.58
28 - 29	4	438.23
26 - 27	5	394.67
24 - 25	6	353.09
22 - 23	7	313.45
20 - 21	8	275.71
18 - 19	9	239.88
16 - 17	10	206.75
14 - 15	11	173.93
12 - 13	12	143.89
10 - 11	13	115.72
Less than 10	14	62.90

(c) In effect from January 1, 1996, through December 31, 1996:

Bu. of Wheat Per Acre Each Year	Grade	Assessed Value Per Acre
44 & Over	1A4	$751.40
42 - 43	1A3	711.57
40 - 41	1A2	671.73
38 - 39	1A1	631.90
36 - 37	1A	592.07

34 - 35	1	552.23
32 - 33	2	512.40
30 - 31	3	473.52
28 - 29	4	435.65
26 - 27	5	398.67
24 - 25	6	362.69
22 - 23	7	327.67
20 - 21	8	293.61
18 - 19	9	260.50
16 - 17	10	229.50
14 - 15	11	197.13
12 - 13	12	166.92
10 - 11	13	137.64
Less than 10	14	69.44

(d) In effect from January 1, 1997, through December 31, 1997:

Bu. of Wheat Per Acre Each Year	Grade	Assessed Value Per Acre
44 & Over	1A4	$676.19
42 - 43	1A3	645.80
40 - 41	1A2	615.41
38 - 39	1A1	585.02
36 - 37	1A	554.63
34 - 35	1	524.24
32 - 33	2	493.85
30 - 31	3	463.46
28 - 29	4	433.07
26 - 27	5	402.68
24 - 25	6	372.29
22 - 23	7	341.89
20 - 21	8	311.50
18 - 19	9	281.11
16 - 17	10	252.24
14 - 15	11	220.33
12 - 13	12	189.94
10 - 11	13	159.55
Less than 10	14	75.98

42.20.147 CRITERIA FOR AGRICULTURAL LAND VALUATION FOR LAND TOTALLING LESS THAN 20 ACRES (1) through (7) remain as proposed.

(8) For contiguous and noncontiguous parcels of land under one ownership as defined in ARM 42.20.140 totalling less than 20 acres in size, any acreage in excess of that set forth in the ~~timberland~~ FOREST LAND classification in ARM 42.20.~~113~~ 160 is classified as agricultural provided the acreage is actively devoted to agricultural use.

NEW RULE I (ARM 42.20.150) CRITERIA FOR AGRICULTURAL LAND VALUATION FOR LAND TOTALLING 20 TO 160 ACRES IN SIZE (1) through (5) remain as proposed.

(6) For land between 20 to 160 acres, any acreage IN EXCESS OF THAT SET FORTH IN ~~for timberland~~ THE FOREST LAND classification set forth in ARM 42.20.~~113~~ 160 AND ARM 42.20.161 shall be classified pursuant to 15-6-133 and 15-7-202, MCA.

NEW RULE IV (ARM 42.20.153) VALUATION OF AGRICULTURAL LAND EXCEEDING 160 ACRES (1) remains as proposed.

(2) For contiguous and noncontiguous parcels of land under one ownership as defined in ARM 42.20.140 exceeding 160 acres in size, any acreage exceeding that which meets the criteria for ~~timberland~~ FOREST LAND classification set forth in ARM 42.20.~~113~~ 160 AND ARM 42.20.161 shall be deemed to have qualified for agricultural classification subject to the provisions of 15-7-202, MCA.

(3) remains as proposed.

4. The Department has adopted New Rule II (ARM 42.20.151) and III (ARM 42.20.152); amended ARM 42.20.139, 42.20.140, 42.20.141, and 42.20.146; and repealed ARM 42.20.137 as proposed. It has further adopted New Rule I (ARM 42.20.150) and IV (ARM 42.20.153); ARM 42.20.133, 42.20.134, 42.20.135, 42.20.142, 42.20.143, 42.20.144, 42.20.145, 42.20.147 with the additional amendments shown above, and repealed 42.20.138.

4. Therefore, the Department adopts the rules as stated above.

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State December 13, 1993.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.20.303, 42.20.304, 42.20.305, 42.20.306, 42.20.432 42.20.454 and 42.20.455; and the REPEAL of ARM 42.20.308, 42.20.309, 42.20.310, 42.20.311, 42.20.420, 42.20.423, 42.20.429, 42.20.435, 42.20.438, 42.20.441 42.20.444, 42.20.447, 42.20.450 42.20.453, 42.20.468, and 42.20.471 relating to Mining Claims and Real Property Values	NOTICE OF AMENDMENT of ARM 42.20.303, 42.20.304, 42.20.305, 42.20.306, 42.20.432, 42.20.454 and 42.20.455; and the REPEAL of ARM 42.20.308, 42.20.309, 42.20.310, 42.20.311, 42.20.420, 42.20.423, 42.20.429, 42.20.435, 42.20.438, 42.20.441, 42.20.444, 42.20.447, 42.20.450, 42.20.453, 42.20.468, and 42.20.471 relating to Mining Claims and Real Property Values

TO: All Interested Persons:

1. On November 10, 1993, the Department published notice of the proposed amendment of ARM 42.20.303, 42.20.304, 42.20.305, 42.20.306, 42.20.432, 42.20.454, 42.20.455 and the repeal of ARM 42.20.308, 42.20.309, 42.20.310, 42.20.311, 42.20.420, 42.20.423, 42.20.429, 42.20.435, 42.20.438, 42.20.441, 42.20.444, 42.20.447, 42.20.450, 42.20.453, 42.20.468, and 42.20.471 relating to mining claims and real property values at page 2625 of the 1993 Montana Administrative Register, issue no. 21.

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

3. The Department amends and repeals the rules as proposed.

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State December 13, 1993.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.22.101, 42.22.102 and 42.22.117 relating to Centrally Assessed Property	NOTICE OF THE AMENDMENT of ARM 42.22.101, 42.22.102, and 42.22.117 relating to Centrally Assessed Property

TO: All Interested Persons:

1. On November 10, 1993, the Department published notice of the proposed amendment of ARM 42.22.101, 42.22.102, and 42.22.117 relating to centrally assessed property at page 2608 of the 1993 Montana Administrative Register, issue no. 21.

2. No public comments were received regarding these rules.

3. The Department amends the rules as proposed.

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State December 13, 1993.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.22.1311 and 42.22.1312 relating to Industrial Trend Tables	NOTICE OF THE AMENDMENT of ARM 42.22.1311 and 42.22.1312 relating to Industrial Trend Tables

TO: All Interested Persons:

1. On November 10, 1993, the Department published notice of the proposed amendment of ARM 42.22.1311 and 42.22.1312 relating to industrial trend tables at page 2658 of the 1993 Montana Administrative Register, issue no. 21.

2. No public comments were received regarding these rules.

3. The Department amends the rules as proposed.

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State December 13, 1993.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 1.2.419 regarding scheduled dates for the Montana Administrative Register	)))))	NOTICE OF AMENDMENT OF ARM 1.2.419 FILING, COMPILING, PRINTER PICKUP AND PUBLICATION OF THE MONTANA ADMINISTRATIVE REGISTER

TO: All Interested Persons.

1. On November 10, 1993, the Secretary of State published notice of the proposed amendment of ARM 1.2.419 relating to the compiling, printer pickup and publication of the Montana Administrative Register for 1994 at page 2667 of the 1993 Montana Administrative Register, issue no. 21.

2. A hearing was held on November 30, 1993 and one person testified and submitted written comments supporting the proposed amendments.

3. In addition, a comment was made asking that the Secretary of State give notice for the 1995 schedule by at least early October 1994 in order to better plan long-term rulemaking. The Secretary of State agrees, and will make every effort to propose the 1995 schedule earlier. No other comments or testimony were received.

4. The Secretary of State adopts the rule as proposed. However, the proposal notice stated (3) remains the same, the correct number should have been (2) remains the same.

MIKE COONEY
Secretary of State

GARTH JACOBSON
Rule Reviewer

Dated this 13th day of December 1993.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the Matter of the Adoption of New Rules Regarding Voter Information Pamphlet Format	))))	NOTICE OF ADOPTION OF RULES I THROUGH III (44.3.1301 THROUGH 44.3.1303)

To All Interested Persons.

1. On November 10, 1993 the Secretary of State published notice of public hearing on the proposed adoption of rules regarding the Voter Information Pamphlet at page 2665 of the Montana Administrative Register, Issue No. 21. The hearing was held on November 30, 1993 in the Secretary of State's conference room.

2. The Secretary of State is adopting new rules I (44.3.1301) and III (44.3.1303) as proposed.

3. The Secretary of State is adopting new rule II with the following change:

RULE II (44.3.1302) DEFINITIONS Unless the context clearly requires otherwise, the following terms shall have the following meanings:

(1) "VIP" refers to the Voter Information Pamphlet which contains the arguments for and against ballot issues.

(2) "Graphics" refers to anything other than letters, numbers used within sentences, grammar or punctuation marks.

(3) "Oversize type" and "undersize type" refer to any typesetting that is not consistent with the uniform size of the argument.

(4) "Columns" refers to any of the vertical sections of printed matter lying side by side on a page and separated by a rule or blank space.

AUTH: 13-27-401, MCA IMP: 13-27-406, 13-27-407, MCA

4. No comments or testimony were received, however, this change is being made to clarify that the use of a number within a sentence is acceptable and would not be considered graphics.

MIKE COONEY
Secretary of State

Garth Jacobson, Rule Reviewer

Dated this 13th day of December, 1993.

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

In the matter of the amendment of rules 46.10.304A, 46.10.811 and 46.10.839 pertaining to AFDC unemployed parents	))))	NOTICE OF THE AMENDMENT OF RULES 46.10.304A, 46.10.811 AND 46.10.839 PERTAINING TO AFDC UNEMPLOYED PARENTS

TO: All Interested Persons

1. On October 28, 1993, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.10.304A, 46.10.811 and 46.10.839 pertaining to AFDC unemployed parents at page 2505 of the 1993 Montana Administrative Register, issue number 20.

2. The Department has amended the following rules as proposed with the following changes:

46.10.304A UNEMPLOYED PARENT Subsections (1) through (1)(b)(i)(D) remain as proposed.

~~(I) During an individual's lifetime, no more than four quarters consisting of these activities may be counted toward the required six quarters.~~

Subsections (1)(b)(ii) through (3) remain as proposed.

(4) In an AFDC-UP ~~two-parent~~ household~~,~~; ~~only one parent must meet the criteria of this rule.~~

(a) Both parents ~~in an AFDC-UP two-parent household~~ are required to participate or be available to participate in a JOBS program in accordance with ARM 46.10.811 beginning with the date of application and continuing as long as the household receives AFDC-UP, unless he or she meets an exemption criteria in accordance with ARM 46.10.805. ~~Failure to comply may subject the household to the sanctions in ARM 46.10.839.~~

~~(b) Failure to satisfactorily participate in the JOBS program without good cause after application but prior to authorization of benefits will result in a denial of eligibility.~~ THE HOUSEHOLD'S APPLICATION FOR AFDC-UP WILL BE DENIED IF EITHER PARENT WHO IS REQUIRED TO PARTICIPATE IN THE JOBS PROGRAM FAILS TO SATISFACTORILY PARTICIPATE WITHOUT GOOD CAUSE.

~~(c) After eligibility is established, satisfactory participation in the JOBS program is required before payment of the AFDC-UP benefit will be made unless there is good cause for the failure to participate.~~

(~~d~~c) Failure to satisfactorily participate in the JOBS program after ~~eligibility has been established and~~ payment of THE AFDC-UP BENEFIT has begun will subject the household to the sanctions set forth in ARM 46.10.839.

Subsection (5) remains as proposed.

AUTH: Sec. 53-4-212 MCA
IMP: Sec. 53-4-201 and 53-4-231 MCA

46.10.811 UNEMPLOYED PARENTS TRACK PARTICIPATION AND OTHER REQUIREMENTS Subsections (1) through (9) remain as proposed.

~~(a) Failure to satisfactorily participate prior to authorization of benefits will result in a denial of eligibility.~~ THE HOUSEHOLD'S APPLICATION FOR AFDC-UP WILL BE DENIED IF EITHER PARENT WHO IS REQUIRED TO PARTICIPATE IN THE JOBS PROGRAM FAILS TO SATISFACTORILY PARTICIPATE WITHOUT GOOD CAUSE.

~~(b) After eligibility is established, satisfactory participation in the JOBS-UP program is required before payment of the AFDC-UP benefit will be made.~~ FAILURE TO SATISFACTORILY PARTICIPATE IN THE JOBS PROGRAM AFTER PAYMENT OF THE AFDC-UP BENEFIT HAS BEGUN WILL SUBJECT THE HOUSEHOLD TO THE SANCTIONS SET FORTH IN ARM 46.10.839.

AUTH: Sec. 53-4-212 and 53-4-719 MCA
IMP: Sec. 53-2-201, 53-4-211, 53-4-215, 53-4-703, 53-4-706, 53-4-707 and 53-4-720 MCA

46.10.839 SANCTIONS (~~1~~ ~~2~~ 1) AFTER PAYMENT OF THE AFDC BENEFIT HAS BEGUN, AAn AFDC recipient who is required to participate in the JOBS program and who without good cause refuses or fails to participate in the program or refuses or fails to accept or maintain employment will lose, as provided for in (2), their portion of the AFDC household grant. The sanctions will be imposed for failure to participate in any aspects of the program including orientation, assessment, employability, PLAN development ~~planning~~, case management, and participation in assigned components.

~~(1) Failure to satisfactorily participate in the JOBS program without good cause after application but prior to authorization of benefits will result in denial of eligibility for AFDC-UP.~~

~~(2) After eligibility for AFDC-UP is established, satisfactory participation in the JOBS program is required before payment of the AFDC-UP benefit will be made unless good cause exists for the failure to satisfactorily participate.~~

Subsections (4) through (6) remain as proposed in text but are renumbered (2) through (4).

AUTH: Sec. 53-4-212 and 53-4-719 MCA
IMP: Sec. 53-2-201, 53-4-211, 53-4-215, 53-4-706, 53-4-707 and 53-4-717 MCA

3. The Department has thoroughly considered all commentary received:

COMMENT: The limitation in ARM 46.10.304A(1)(b)(i)(D)(I) on using quarters during which the parent attended school to qualify for AFDC-UP assistance is not consistent with federal policy.

RESPONSE: The department agrees. ARM 46.10.304A(1)(b)(i) through (ii) specifies that one way a parent can qualify for AFDC as an unemployed parent is if the parent has at least six quarters of work within any thirteen calendar quarter period ending within one year prior to application for AFDC-UP assistance. A quarter of work is defined in ARM 46.10.304A(1)(b)(i)(D) to include a three month period when the parent attended school or participated in a Job Training Partnership Act education or training program. However, ARM 46.10.304A(b)(i)(D)(I) currently states that during the parent's lifetime he or she can use no more than four quarters spent in education or training activities to count toward the required six quarters.

The department has been advised by the Administration for Children and Families of the U. S. Department of Health and Human Services, which administers the AFDC program, that it is not permissible to limit the number of times that a parent can use quarters spent in education or training activities to count toward the six quarters of work necessary to be eligible for AFDC as an unemployed parent. It is therefore necessary to delete subsection (b)(i)(D)(I), which limits the use of such quarters, to comply with federal policy.

COMMENT: ARM 46.10.304A(4), which states that only one parent in an AFDC-UP household must meet the criteria of the rule, does not accurately reflect the department's policy.

RESPONSE: The department agrees. In an AFDC-UP household, both parents must participate in the JOBS program by attending JOBS orientation, although only the primary wage earner is required to participate in subsequent JOBS activities. Thus the statement that only one parent must meet the rule's criteria is being deleted to conform the rule to departmental policy.

COMMENT: The department's new "pay for performance" policy, whereby an application for AFDC-UP will not be approved until the parents have satisfactorily participated in the JOBS program, is not accurately described in ARM 46.10.304A(4)(a) through (d), 46.10.811(9)(a) and (b), and 46.10.839(1) and (2) as proposed to be amended on the first notice.

RESPONSE: The department agrees. The language of these sections as proposed on the first notice indicated that a household could be approved for AFDC-UP assistance before complying with JOBS participation requirements, although the first benefit check would not be issued until the household had

complied with JOBS requirements. This is incorrect. Participation in JOBS is an eligibility requirement which must be met before a household's application for AFDC-UP will be approved. ARM 46.10.304A, 46.10.811, and 46.10.839 are now being amended to accurately express this.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State December 13, 1993.

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

In the matter of the amendment of rules 46.12.510 through 46.12.513, 46.2.202 and 46.12.509A pertaining to swing-bed hospital services	)))))	NOTICE OF THE AMENDMENT OF RULES 46.12.510 THROUGH 46.12.513, 46.2.202 AND 46.12.509A PERTAINING TO SWING-BED HOSPITAL SERVICES

TO: All Interested Persons

1. On October 28, 1993, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.12.510 through 46.12.513, 46.2.202 and 46.12.509A pertaining to swing-bed hospital services at page 2508 of the 1993 Montana Administrative Register, issue number 20.

2. The Department has amended rules 46.12.511, 46.12.513, 46.2.202 and 46.12.509A as proposed.

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

46.12.510 SWING-BED HOSPITALS, DEFINITION (1) A swing-bed hospital is a LICENSED hospital OR LICENSED MEDICAL ASSISTANCE FACILITY which ~~has been~~ is medicare-certified to provide posthospital SNF care as defined in 42 CFR 409.20. ~~use medicaid patient beds interchangeably as either hospital beds or skilled or intermediate nursing care beds and which meets the requirements of ARM 46.12.511.~~

Subsection (2) remains as proposed.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111, 53-6-113 and 53-6-141 MCA

46.12.512 SWING-BED HOSPITALS, ~~PROCEDURES~~ SPECIAL SERVICE REQUIREMENTS Subsection (1) remains as proposed.

~~(a) the hospital must have provided medically necessary inpatient hospital care to the individual immediately preceding admission to the swing-bed;~~

(~~b~~a) the hospital must obtain a prescreening by a department long-term care specialist to determine the level of care required by the patient's medical condition. Medicaid will not reimburse a provider for swing-bed hospital services provided to a medicaid recipient admitted to a swing-bed unless the recipient meets the nursing facility level of care requirements specified in ARM 46.12.1305 AND 46.12.1306. The swing-bed hospital must ensure that form SRS-MA-621, "screening notifica-

tion," is completed by the department prescreening team to document the level of care determination.

(~~i~~eb) ~~The swing-bed hospital will have the responsibility of determining whether a skilled or intermediate~~ Except when a waiver is obtained under subsection (~~3~~4), the hospital must determine that no appropriate nursing ~~care~~ facility bed is available to the medicaid patient within a twenty-five (25) mile radius of the swing-bed hospital ~~before admitting a medicaid patient to a swing-bed~~. The hospital ~~will be~~ is required to maintain written documentation ~~consisting~~ of ~~written~~ inquiries to nursing ~~homes inquiring as to~~ facilities about the ~~present and future~~ availability of a nursing ~~home~~ facility bed and indicating that if a bed is not available, the hospital will provide swing-bed services to the patient. The swing-bed hospital is encouraged to enter into availability agreements with medicaid-participating nursing facilities in its geographic region that require the nursing facility to notify the hospital of the availability of nursing facility beds and dates when beds will be available.

Subsections (1)(c)(i) through (2) remain as proposed.

(3) The requirements of subsection (1)(eb) and (2) apply regardless of the 30-day notice requirement generally applicable to transfers and discharges under ARM 46.12.511(2)(a)(xii). When an appropriate nursing facility bed is or becomes available, the provider must provide notice as required by ARM 46.12.511(2)(a)(xii) (D)(VI) and must otherwise comply with the requirements of ARM 46.12.511(2)(a)(xii) to the extent practicable in the time available before transfer to the nursing facility bed.

(4) A provider may request a waiver of the determination requirement of subsection (1)(eb) FOR AN ACUTE CARE PATIENT OF THE SWING-BED HOSPITAL or MAY REQUEST FOR A SWING-BED PATIENT A WAIVER OF the transfer requirement of subsection (2) when the recipient's attending physician verifies in writing that either the recipient's condition would be endangered by transfer to an appropriate nursing facility bed within a twenty-five (25) mile radius of the swing-bed hospital or that the individual has a medical prognosis that his or her life expectancy is 6 months or less if the illness runs its normal course.

Subsections (4)(a) through (5) remain as proposed.

AUTH: Sec. 53-6-113 and 53-2-201 MCA
IMP: Sec. 53-6-101, 53-6-111, 53-6-113, 53-6-141 and 53-2-201 MCA

4. The Department has thoroughly considered all commentary received:

COMMENT: SRS should extend swing-bed coverage to hospitals up to 100 beds.

RESPONSE: Since no Montana hospitals in the 50-99 bed category currently have medicare swing-beds and very few hospitals in the state could qualify for the category, the department has chosen not to include them at this time. The department notes that the one apparent exception, Holy Rosary Hospital, actually staffs under 50 beds and therefore meets the definition of an under 50-bed hospital.

COMMENT: SRS should adopt the Medicare requirement that nursing facilities notify hospitals of the availability of beds and services.

RESPONSE: The department is not adopting the requirement that nursing facilities notify hospitals of the availability of beds and services (see 42 CFR 483.80) because, in fact, Medicare removed that requirement in the October 22, 1991 Federal Register. Since the patient is a resident in the hospital swing bed, it is the responsibility of the hospital rather than nursing facilities to work actively at discharge planning, including seeking other placements. The intent of the rule is to encourage cooperation between hospitals and nursing facilities in the appropriate placement of residents.

COMMENT: Several comments which were received relate to a similar point: (1) SRS should allow admission to a swing bed directly from the community when no nursing home bed is available; (2) SRS should allow admission to swing beds located in other hospitals when nursing home beds are not available; (3) the requirement that the hospital provided medically necessary inpatient hospital care to the patient immediately preceding admission to the swing bed is very ambiguous; and (4) many small hospitals in Montana have difficulty accepting the prohibition on direct admission to hospital swing beds.

RESPONSE: The department is changing the proposed rule to remove the acute care stay requirement. This change will allow the resident's need for services to be the primary criterion for admission. Thus, the need for nursing facility care when a nursing facility bed or other appropriate services are unavailable will be the basis for admission to the swing-bed. Although this change will allow hospitals to admit medicaid recipients from the community or from other hospitals, such admissions are permissible only when a nursing facility bed is not available within 25 miles of the swing-bed hospital. For this reason, waiver provisions in the rule apply only to individuals who are patients of the swing-bed hospital and are occupying either an acute care bed or a swing-bed.

In making these changes, the department is acknowledging the changing nature of the health care system and the need for increased flexibility in providing services to health care

recipients. When swing-bed services were first instituted, the intent was to provide greater access to nursing facility care. Now, as community and home-based health care services are developed as an alternative to nursing facility care, health care providers will have the responsibility to seek the most effective and cost-efficient means of serving recipients. The intent of the department is to facilitate efforts by health care providers to seek services most appropriate to the needs of the individual in order to attain or maintain the highest practicable physical, mental, and psychosocial well-being of that individual.

COMMENT: One commentor asked whether medical assistance facilities (MAFs) were included in the rule.

RESPONSE: The proposed rule did not specifically address this issue. The department has added language to the final rule to provide that both hospitals and MAFs which are licensed may participate if they meet the requirements of the rule. Such facilities must be licensed by the department of health and environmental sciences under title 50, chapter 5, part 2 of the Montana Code Annotated.

5. These amendments are effective January 1, 1994.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State December 13, 1993.

VOLUME NO. 45 OPINION NO. 17

COUNTY GOVERNMENT - What constitutes a public record;
EMPLOYEES, PUBLIC - Application of public record law to lists of county employees' destroyed personal property submitted to county's insurance carrier;
PUBLIC RECORDS - Application of public record law to lists of county employees' destroyed personal property submitted to county's insurance carrier;
PUBLIC RECORDS - What constitutes;
RIGHT TO KNOW - What constitutes a public record;
MONTANA CODE ANNOTATED - Sections 2-6-101, 2-6-102, 2-6-104;
MONTANA CONSTITUTION - Article II, section 9;
OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 17 (1981).

HELD: Lists of destroyed personal property generated by individuals, for no governmental function or purpose, do not constitute public writings or records subject to disclosure laws.

December 3, 1993

Mr. Robert M. McCarthy
Silver Bow County Attorney
155 West Granite Street
Butte, MT 59701

Dear Mr. McCarthy:

You have requested my opinion on the following issue:

> Are claims for loss of personal property, which were generated only for the purpose of communicating personal information to the county's insurance company and not for any governmental function, public records subject to disclosure laws?

Your question stems from a request by the media for disclosure of all claims submitted by the county and by the employees of the county to the county's insurance carrier for property lost during a fire in the county courthouse on February 17, 1992. There has been full disclosure of the claims made by the county and the county's file includes an accounting of payment made pursuant to the policy, including the amounts paid for individual claims. However, some claims for personal property destroyed in the fire were submitted directly to the insurance carrier by employees. Those lists of personal property were not copied or retained by the county and are therefore not part of the county's records. Your question is whether these claims are public records and therefore subject to disclosure laws.

Montana law generally requires the disclosure of all public documents unless there is a specific statutory exclusion from the requirement or the demand of individual privacy outweighs the merit of public disclosure. According to article II, section 9 of the Montana Constitution:

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

The question you raise requires the initial determination of whether the lists of personal property at issue constitute public documents, writings, or records. Only after resolution of this threshold issue must there be consideration of whether disclosure is required. Since I conclude that the documents are not public records, and that no disclosure is therefore required, I express no opinion here on any issue dealing with exceptions to the rule of disclosure of public records.

There is no definition of "documents . . . of . . . public bodies" in the Constitution and the issue of what constitutes such documents has not been addressed by the Montana Supreme Court. The Constitutional Convention Bill of Rights Committee, which reviewed article II, section 9 of the Constitution, deleted the word "public" from the original section allowing examination of public documents "to avoid tying the viability of this provision to the 1895 legislative efforts [currently Mont. Code Ann. § 2-6-101] to define public and private writings." The Committee went on to comment that "[the statutory] list of public writings is admirably broad; however, using this type of statutory construction is dangerous when one is attempting to establish a public right to know." IV 1972 Mont. Const. Conv. 631-32 (1981).

The Montana Supreme Court has held that the constitution is the supreme law of the state and overrides any conflicting statutes or rules. Associated Press v. Board of Pub. Educ., 246 Mont. 386, 804 P.2d 376 (1991). See also 39 Op. Att'y Gen. No. 17 (1981). However, the statutes regarding public writings are not in conflict with, but are consistent with, the constitutional provision. Thus, I believe the statutory definitions are relevant and must be considered in determining whether the documents in issue here are "documents of public bodies" under article II, section 9.

Mont. Code Ann. § 2-6-101 defines public writings as follows:

(1) Writings are of two kinds:

(a) public; and

(b) private.

(2) Public writings are:

(a) the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country;

(b) public records, kept in this state, of private writings, except as provided in 22-1-1103 and 22-3-807.

(3) Public writings are divided into four classes:

(a) laws;

(b) judicial records;

(c) other official documents;

(d) public records, kept in this state, of private writings.

(4) All other writings are private.

Mont. Code Ann. § 2-6-102(1) states: "Every citizen has a right to inspect and take a copy of any public writings of this state, except as provided in 22-1-1103 [relating to adoption records] or 22-3-807 [relating to attachment records] and as otherwise expressly provided by statute." And Mont. Code Ann. § 2-6-104 provides: "Except as provided in 40-8-126 and 27-18-111, the public records and other matters in the office of any officer are at all times during office hours open to the inspection of any person."

The lists of personal property sought here by the media do not fit into any of the categories of public writings or documents described by statute. They were generated strictly for the purpose of relating to the insurance carrier the items of personal property that were destroyed by fire. The lists do not record an act or acts of the county. They do not contain information regarding governmental matters or the duties of the employees. Similarly, the lists contain no information which would make them "documents of public bodies," as that phrase is used in the Montana Constitution. "Documents of public bodies," though not defined in the Constitution, must reasonably be taken to mean documents generated or held by a public body or somehow related to the function and duties of the public body.

The purpose of the public records provisions in the Montana Constitution and statutes is to secure the public's right to know the workings of its government. In this case, the workings of the county government are not related to nor are they reflected in the documents requested. The documents were neither created by nor held by the county. Given these facts, a conclusion that lists are not public writings or records is consistent with the meaning and spirit of both the constitutional provision and the statutes.

It is asserted by the media that all claims made by individuals to the insurance company must be reported to the public because the insurance premiums are paid with public funds. Although the expenditure of public funds is relevant to issues concerning the government's insurance policy, it is not determinative as to whether the writings sought are public records or writings. As stated above, the county's files regarding the policy are public records subject to disclosure laws. The files include information as to how much money was paid for personal property claims pursuant to the policy. By contrast, the listings of personal property, not kept in the county's file and not related to agency functions, are not public writings or records.

My conclusion is also not changed by the fact that the county, as the insured, could request access to the lists retained by the insurance company. Accessibility to a document by a governmental entity does not change the content of the document and thereby make it a public document or record.

This conclusion is consistent with court decisions regarding the issue of what constitutes an agency or public record. In United States Dep't of Justice v. Tax Analysts, 492 U.S. 136 (1989), the United States Supreme Court considered the issue of whether the Freedom of Information Act (5 U.S.C. § 552) required the United States Department of Justice to make available copies of tax opinions. The Department receives copies of all tax opinions by the federal district courts, courts of appeals, and the Claims Court; the opinions are filed and kept by the Department as a function of its representation in the courts. In considering whether the decisions were "agency records," the Supreme Court relied on its earlier decisions in Kissinger v. Reporters Comm. for Freedom of Press, 445 U.S. 136 (1980), and Forsham v. Harris, 445 U.S. 169 (1980), and stated:

> Two requirements emerge from *Kissinger* and *Forsham*, each of which must be satisfied for requested materials to qualify as "agency records." First, an agency must "either create or obtain" the requested materials "as a prerequisite to its becoming an 'agency record' within the meaning of the FOIA." . . .

> Second, the agency must be in control of the requested materials at the time the FOIA request is made. By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties. This requirement accords with *Kissinger*'s teaching that the term "agency records" is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency. See 445 U.S., at 157.

492 U.S. at 144-45.

In Salt River Pima-Maricopa Indian Community v. Rogers, 815 P.2d 900 (Ariz. 1991), the Supreme Court of Arizona considered, absent a statutory definition, what constitutes a public record. The Court recognized the following:

> The term "public record" comprehends three alternative definitions in American case law, all of which this court set forth in *Mathews v. Pyle*, 75 Ariz. 76, 78, 251 P.2d 893, 895 (1952). The term first refers to a record "made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference." *Id.* . . .
>
> . . . .
>
> A public record is also one that is "required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done." *Id.* . . .
>
> . . . .
>
> Finally, the term "public record" comprehends any "written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by . . . law or not. . . ." *Mathews*, 75 Ariz. at 78, 251 P.2d at 895.

815 P.2d at 907-08.

These opinions generally support my conclusion that, given the nature of the documents involved in this case, you are not concerned with public documents. It is clear that the lists of personal property given to the county's insurance adjuster were not the result of fulfillment of a public employee duty and were not for the purpose of documenting government business.

Because the lists of personal property are not public documents, there is no need to discuss a balancing of the public's right to know and a right of privacy. The law regarding disclosure does not apply unless the documents at issue are public writings, documents, or records.

THEREFORE, IT IS MY OPINION:

> Lists of destroyed personal property generated by individuals, for no governmental function or purpose, do not constitute public writings or records subject to disclosure laws.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/bch/brf

VOLUME NO. 45 OPINION NO. 18

ELECTIONS - Power of legislature to order special election on initiative referendum;
INITIATIVE AND REFERENDUM - Power of legislature to order special election on initiative referendum;
LEGISLATURE - Power of legislature to order special election on initiative referendum;
MONTANA CODE ANNOTATED - Section 13-1-108;
MONTANA CONSTITUTION OF 1889 - Article V, section 1;
MONTANA CONSTITUTION OF 1972 - Article III, sections 5, 6;
MONTANA LAWS OF 1993 - Chapter 634.

HELD: The Legislature retains the power to order a statewide special election on Initiative Referendum 112 at a time other than the 1994 biennial general election.

December 3, 1993

Hon. Fred Van Valkenburg
President
Montana State Senate
State Capitol, Room 305
Helena, MT 59620

Dear Senator Van Valkenburg:

You have requested my opinion on four questions relating to the interrelationship between 1993 Mont. Laws, ch. 634 (commonly known and hereafter referred to as "HB 671"), a bill which made significant changes in Montana's income and corporate license tax laws, and IR 112, an initiative petition seeking a referendum vote on HB 671. Following the enactment of HB 671 by the Legislature and its signature by the Governor, voters submitted petitions to the Secretary of State bearing the signatures of a sufficient number of voters both to refer HB 671 for approval or rejection by the voters and to suspend its effectiveness pending the referendum election. You have posed questions which I have phrased as follows:

1. May the Legislature enact a bill requiring that the election on IR 112 be held on a date other than November 8, 1994, the date which appeared on the initiative petitions and on which the next regularly scheduled statewide general election will be held?

2. Prior to the election on IR 112, does the Legislature have the power to repeal HB 671? If so, what effect would the repeal have on the referendum election?

3. Prior to the election on IR 112, does the Legislature have the power to amend HB 671? If so, what effect would an amendment have on the referendum election?

4. If HB 671 is sustained by the voters in a referendum election held in 1994, what effect will the result of the referendum election have on income and corporate license tax liabilities for calendar years 1993 and 1994?

In your opinion request, you have asked that I answer the questions you pose serially rather than in a single opinion, due to the exigencies of the impending special session. I will therefore respond to your first question here and to the remaining questions in a forthcoming opinion.

Montana's constitutional provisions for initiative and referendum were added to the Montana Constitution by a 1906 amendment to article V, section 1 of the 1889 Constitution. Prior to 1906, the Constitution provided that the legislative power of the State of Montana was vested in the two houses of the legislature alone. The 1906 amendment returned a portion of that legislative power to the people through initiative and referendum. The amendment addressed the timing of elections on referenda as follows: "All elections on measures referred to the people of the state shall be held at the biennial regular general election, except when the legislative assembly, by a majority vote, shall order a special election." 1889 Mont. Const., art. V, § 1.

The 1972 revision of Montana's Constitution rewrote the initiative and referendum provisions from the 1889 Constitution, making major changes in the style and drafting of the provisions. The references were moved from the legislative article to one on general government, and the single section containing the provisions on initiative and referendum was divided into three separate sections. It does not appear from the available historical materials, however, that the framers of the 1972 Constitution intended to make significant changes in the substance of the constitutional requirements. The 1972 provisions were adopted with very little substantive debate, and the committee reports indicate that the intention was to make no changes in the existing law. See, e.g., II 1972 Mont. Const. Conv. 820 (committee report stating that "[t]he only changes" from the 1889 version were in the number of petition signatures required, and that the two provisions were otherwise "analogous"); VII 1972 Mont. Const. Conv. 2717 (remarks of Delegate Etchart) (stating that "the only changes" from the 1889 provision were in the number of signatures required, and that the 1972 language was "parallel" to the earlier language).

The 1972 Constitution carried forward the earlier document's language on the timing of referendum elections in article III,

section 6, which states:

> Elections. The people shall vote on initiative and referendum measures at the general election unless the legislature orders a special election.

There is no Montana case law interpreting either the 1889 or the 1972 constitutional language with reference to the issue you have raised, but I find that the language is clear on its face and requires no extrinsic aids for its construction. See State ex rel. Gleason v. Stewart, 57 Mont. 397, 403, 188 P. 904, 906 (1920) (applying rule that constitutional provision clear on its face required no extrinsic aid for construction). The framers of the constitution clearly intended that the legislature retain the power to determine the timing of elections on initiative and referendum matters. Otherwise, the clause "unless the legislature orders a special election" becomes meaningless.

In this regard, it is significant that the Montana Constitution is a limitation upon, and not a grant of, legislative power. Accordingly, the Montana Supreme Court has repeatedly recognized that the legislature may enact any legislation not affirmatively prohibited by the Constitution. See, e.g., State ex rel. Bonner v. Dixon, 59 Mont. 58, 76, 195 P. 841, 844 (1921). Nothing in the Constitution prohibits the enactment of legislation setting a special election on a referendum, and accordingly, the legislature should be found to possess the power to do so.

My research has disclosed that the constitutions of the several states take divergent approaches to this question. In Arizona, the constitution provides that referenda be voted on "at the next regular general election," a provision which the Arizona courts have construed to exclude legislative power to order a special election on a referendum at any time other than the biennial general election. Tucson Manor v. Federal Nat'l Mortgage Ass'n, 73 Ariz. 387, 241 P.2d 1126 (1952). In Maine, the constitution is silent as to the timing of referendum elections, and the Maine Supreme Court has held that in the absence of a specific limitation on the power of the legislature, it may order elections on referenda whenever it chooses. Opinion of the Justices, 66 A.2d 378 (Me. 1949).

The only case disclosed by my research in which a constitutional provision similar to Montana's has been applied with reference to this question is Libby v. Olcott, 134 P. 13 (Or. 1913), in which the Oregon Supreme Court applied that state's constitutional provision stating that referendum elections "shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election." Or. Const. art. 4, § 1. The 1913 Oregon legislature enacted a bill providing that all referenda regarding enactments of that session should be voted on at a special statewide election to be conducted in November 1913. A law enacted after the adoption of the special election date was challenged by a referendum

petition. The proponents of the law brought suit to enjoin the special election, arguing among other things that the holding of a special election on the referendum was inconsistent with the Oregon Constitution. The Oregon Supreme Court rejected this challenge, relying on the explicit language of the Oregon Constitution allowing the legislature to order a special election at a time other than the biennial regular election. See also Bohrer v. Toberman, 227 S.W.2d 719 (Mo. 1950) (analogous provision of Missouri constitution).

The reasoning of the Oregon Court bears repeating here:

> [The constitutional] language must be construed as part of the general scheme outlined in that section of the Constitution. It qualifies the reservation of power by the people which they call the referendum. To the legislative assembly they have committed the authority to call a special referendum election. Whether it fetters or facilitates the exercise of that reserved power does not concern us. It exists. It is the voice of the people themselves which we must heed and to which we must give effect.

134 P. at 16. The Court noted that the people clearly intended that legislation not be left in limbo for long periods of time by requiring that referendum petitions be filed within a relatively short period after the affected legislation is adopted, and held that legislation calling a special election on a referendum did not dilute the power of the people to express their will through the referendum process.

I find this reasoning persuasive in interpreting the Montana Constitution's similar language. The date of a referendum election is not, under Montana's constitutional scheme, essential to the efficacy of the referendum power. The essential ability of the people to "approve or reject by referendum any act of the legislature except an appropriation of money," Mont. Const. art. III, § 5, is not impaired by recognition that the people have returned to the legislature the power to order a referendum election at a time other than the biennial general election, provided that the legislature submits the issue at an election in which all of the qualified electors of the state may vote, State ex rel. Diederichs v. State Highway Comm'n, 89 Mont. 205, 215, 296 P. 1033, 1036 (1931), and all the statutory requirements for a special election are satisfied. See Mont. Code Ann. § 13-1-108.

THEREFORE, IT IS MY OPINION:

> The Legislature retains the power to order a statewide special election on Initiative Referendum 112 at a time other than the 1994 biennial general election.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/cdt/brf

VOLUME NO. 45 OPINION NO. 19

BANKS AND BANKING - Trust company's remote service offices: compliance with branch banking restrictions;
COMMERCE, DEPARTMENT OF - Statutory restrictions on trust company's remote service offices;
MONTANA CODE ANNOTATED - Sections 32-1-107, 32-1-109(2) and (11), 32-1-371(5), 32-1-372;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 76 (1990);
REVISED CODES OF MONTANA, 1947 - Section 5-1028;
UNITED STATES CODE - 12 U.S.C. § 36.

HELD: A trust company is prohibited by Mont. Code Ann. §§ 32-1-371(5) and -372 from establishing remote service offices which would offer less than all services offered at the principal office, and which would not comply with the statutory geographical limitations.

December 10, 1993

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

Dear Mr. Noel:

The Financial Division of the Department of Commerce has requested my opinion regarding the issue of whether Montana law permits a chartered Montana trust company to locate trust officers at remote service offices in cities other than the location of its principal office. According to the company's proposal submitted with your request, the company would maintain telephone listings and office addresses in other cities for its trust officers and would advertise its services. The trust officers would be available to meet with existing and potential clients to discuss trust business. All administrative and operative matters in connection with any trust would be conducted in the company's principal office. Trusts would only be accepted and executed following review by officers in the principal office. All deposits to accounts, reports, statements and investment activity would be conducted and generated by the principal office.

The trust company contends that the remote service locations would not fall within the definition of a branch bank pursuant to Mont. Code Ann. § 32-1-109(3), -371(5) or -372. In my opinion, the statutes prohibit a trust company from establishing any office which offers less than all of the services offered at its principal office, unless such office complies with the

statutory restrictions placed upon detached facilities. The trust company may establish a branch office which offers all services available at the main banking house as provided by statute.

The Bank Act (Mont. Code Ann. tit. 32, ch. 1, pts. 1 to 5) applies to all corporations specified in Mont. Code Ann. § 32-1-102, which includes trust companies. Mont. Code Ann. §§ 32-1-101 and -102(1), (4)(c). The term "bank," as used in the Bank Act, includes trust companies. Mont. Code Ann. §§ 32-1-102(1) and -371(1). The Bank Act provides:

> A bank may establish and maintain a branch bank only as provided in 32-1-371 and this section and, in the case of a bank organized under the laws of this state, with the prior approval of the state banking board, provided that nothing in this section prohibits ordinary clearinghouse transactions between banks. [Mont. Code Ann. § 32-1-372(1).]
>
> . . . .
>
> "Branch bank" means a banking house, other than the main banking house, maintained and operated by a bank doing business in the state but does not include a detached facility, as provided for in 32-1-372, or a satellite terminal, as defined in 32-6-103. [Mont. Code Ann. § 32-1-109(2).]
>
> . . . .
>
> "Main banking house" means the principal place of business of a bank in the state. [Mont. Code Ann. § 32-1-109(11).]
>
> . . . .
>
> A branch bank must offer all services offered at a main banking house. [Mont. Code Ann. § 32-1-371(5).]

The statutes permit a bank to establish one detached drive-in and walk-up facility in the same city as the main banking house, subject to certain limitations on location and range of services. Mont. Code Ann. § 32-1-372(2). The trust company's proposal does not comply with the statutory restrictions for detached facilities. Nor would the proposed remote service office be an electronic satellite terminal under Mont. Code Ann. § 32-6-103. Therefore, the question becomes whether a remote service office would be a "banking house, other than the main banking house," so that the office would constitute a branch bank.

The trust company argues that it is permitted to maintain offices wherever it chooses so long is it does not conduct a

"banking business" in them. Leuthold v. Camp, 273 F. Supp. 695 (D. Mont. 1967) (dicta). The company then asserts that the activities conducted at the remote service locations would not, in and of themselves, require a corporation to become chartered as a trust company, since none of the activities are expressly enumerated in Mont. Code Ann. § 32-1-107. Since these activities would not require a separate charter, the argument proceeds, then an office performing these activities cannot be considered a branch bank. I do not agree with this analysis.

First, a similar argument was rejected by the Missouri Court of Appeals in St. Louis Union Trust Co. v. Pemberton, 494 S.W.2d 408 (Mo. Ct. App. 1973). The trust company in that case argued that the statute prohibited only a branch trust company, and not merely a second office where none of the true fiduciary actions or decisions would occur. The court determined:

> The doing of "trust business" is not solely confined to the administration of the assets of a trust or even the probate of an estate. It must of necessity include contact with existing and prospective customers . . . . It is the *getting of business* that St. Louis Union contemplates. . . . Once the advertising becomes effective to induce a customer to appear at the Clayton facility, undoubtedly the initial negotiations for the formation of a trust or the contents of a will (with or without a trust provision) include the ascertaining of the intention of the settlor or the testator in order to draft the instrument. . . . This is the critical stage of the matter of fiduciary undertaking--"the evaluation, discussion and preparation of the estate plan before the document is written. This pre-document period may require several conferences with the testator, settlor beneficiaries, lawyer, trust officers and other representatives of the corporate trustee." . . . While it is true, in some instances, that a trust instrument must be signed by a corporate trustee--which St. Louis Union says it will do only at its downtown St. Louis offices, yet many things undoubtedly would be done (with St. Louis Union's representatives) by a settlor or testator at the proposed Clayton facility: besides conferences, the execution of the trust by settlor or testator, and its delivery to St. Louis Union. These prior acts cannot be separated from St. Louis Union's entire fiduciary business, and it is factitious for it to claim that maintaining a constant business contact office at Clayton and the activities to be carried on therein (with definite contact with the public) are "only of the most tangential and peripheral nature." The isolated instances of customer interviews and property transfers taking place in their homes, which St. Louis Union correctly says would not constitute

> branching, differs vastly from the constant contact with customers in Clayton which St. Louis Union says it will do.

Id., 494 S.W.2d at 416-17. The court concluded that the second office was a "branch" prohibited by statute.

Contact with clients is necessary and incident to conducting a trust business and performing the activities listed in Mont. Code Ann. § 32-1-107. The language of Mont. Code Ann. § 32-1-371(5) is unambiguous that a branch bank must offer all of the services which are offered at the main banking house. It is the general rule that state banks have only those powers which are expressly conferred by statute or such as may be fairly implied from those expressly given. 43 Op. Att'y Gen. No. 76 at 294 (1990). The trust company is therefore prohibited from opening an office which will offer less than full services.

Second, my conclusion finds support in the legislative history of the branch banking statutes. Prior to 1989, Montana law expressly prohibited branch banking. Rev. Codes Mont. (1947) § 5-1028. House Bills 151 and 191 were introduced in the 1989 legislative session, proposing different versions of branch banking. The latter bill proposed a system of "extended teller facilities" which would offer limited services such as deposits, withdrawals, loan payments and cashing of checks. This bill was defeated in the Senate. House Bill 151 was considered at a committee hearing where testimony was offered by a representative of the trust company, who proposed an amendment which would specifically exclude trust companies from the branch banking law. Minutes, House Committee on Business and Economic Development, Jan. 18, 1989, Ex. 15. The trust company representative asserted: "Trust companies fulfill an entirely separate fiduciary service to clients that should not be subjected to the same restrictions imposed on commercial banks. The service is highly personal and requires significant personal contact with clients available best through a branch office." Id. The proposed amendment was not adopted, and the testimony in the Senate reflects the sponsor's intent that trust companies be included. Minutes, Senate Committee on Business and Industry, Mar. 6, 1989, at 1. House Bill 151 passed. Had the legislature intended to allow branch offices with limited services or to exempt trust companies from the branching restrictions, it had the opportunity to do so. I cannot insert into the statutes what the legislature has omitted. Mont. Code Ann. § 1-2-101.

Finally, the trust company argues that the Department of Commerce has the authority under Mont. Code Ann. § 32-1-362(1) to consent to any activity not expressly allowed by state statute where the activity is permitted to national banks. It is provided in Mont. Code Ann. § 32-1-362(1) that:

> With the consent of the department, every bank organized under the laws of the state shall have power to and may engage in any activity or business in which such bank could engage if it were operating as a national bank. The department may prescribe, amend, and repeal regulations affecting and controlling the exercise of the powers granted by this section, provided that, subject to subsection (2), *such regulations and powers shall not apply to activities which are expressly prohibited or limited by the statutes of the state*.

(Emphasis added.) Thus, the power of the Department of Commerce to consent to an activity is limited by any state law expressly prohibiting or limiting such activity.

Apparently, if federal law were controlling here, the trust company would be allowed to establish remote service offices. The trust company has submitted several interpretive letters from the United States Comptroller of the Currency [OCC], which allow certain "back offices" not determined to be "branch banks" under the McFadden Act of 1927, 12 U.S.C. § 36. However, the federal definition of branch bank differs significantly from the Montana definition. Under the McFadden Act, a branch bank is defined as an office where "deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f). The OCC follows a three-prong test to determine whether an office constitutes a branch bank. First, the facility must engage in one of the "core banking activities" listed in 12 U.S.C. § 36(f). Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987). According to the OCC, trust services do not constitute "core banking activities" under the McFadden Act; therefore a national bank is permitted by federal law to establish offices devoted solely to trust services without the offices being deemed branch banks. Second, it must be "established" by the bank, i.e., owned or rented by the bank. Independent Bankers Ass'n of America v. Smith, 534 F.2d 921 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976). The third requirement is that a facility's location must provide a convenience to bank customers that gives the bank a competitive advantage. First Nat'l Bank in Plant City v. Dickinson, 396 U.S. 122, 136-37 (1969). This third test is known as the "public access" test. If a location does not have public access, then it is not a branch bank. The OCC letters submitted by the trust company rely on this third test to exclude a number of "back offices" from the definition of branch bank.

The McFadden Act provides that a national bank may establish and maintain branch banks on the same terms as state banks are permitted to do so under state law. 12 U.S.C. § 36(c). Therefore, the federal law does not preempt state law in this area. Federal law controls only the definition of branch banking as it concerns national banks. Central Bank v. Smith, 532 F.2d 37 (7th Cir. 1976); North Davis Bank v. First Nat'l

Bank, 457 F.2d 820 (10th Cir. 1972). National banks may establish branch banks only when, where, and how state law would authorize a state bank to do so. Id.

The Montana statutes do not follow the same pattern as the federal law. While the statutes contain a list of purposes for which a trust company may be formed, Mont. Code Ann. § 32-1-107, there is no list of "core banking activities" which must be performed by a branch bank. Instead, the Montana statute provides that a branch bank must perform all services offered by the main bank. Mont. Code Ann. § 32-1-371(5). A branch bank or office may not offer less than full services. A "branch bank" is broadly defined as "a banking house, other than the main banking house, maintained and operated by a bank doing business in the state." Mont. Code Ann. § 32-1-109(2). While "banking house" is not defined, "main banking house" is defined as "principal place of business." Mont. Code Ann. § 32-1-109(11). Therefore, a "banking house" would be a "place of business." As discussed above, offering services to clients constitutes doing business. The state statutes simply do not lend themselves to an interpretation analogous to the federal interpretation.

The trust company has pointed out that it is placed at a competitive disadvantage if national banks with trust functions may establish remote trust offices and a state trust company cannot. It is beyond my scope of authority to determine whether my interpretation of state law would limit such activities on the part of national banks. If national banks are allowed to establish remote trust service offices while state banks and trust companies are not, the resulting inequality is a policy consideration which is within the province of the legislature.

THEREFORE, IT IS MY OPINION:

> A trust company is prohibited by Mont. Code Ann. §§ 32-1-371(5) and -372 from establishing remote service offices which would offer less than all services offered at the principal office, and which would not comply with the statutory geographical limitations.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/pjj/pdl

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

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

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

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

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

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

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

Use of the Administrative Rules of Montana (ARM):

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

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 1993. This table includes those rules adopted during the period October 1, 1993 through December 31, 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 September 30, 1993, this table and the table of contents of this issue of the MAR.

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BOARD APPOINTEES AND VACANCIES

House Bill 424, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of HB 424 was that the Secretary of State publish monthly in the *Montana Administrative Register* a list of appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments made in November, 1993, are published. Vacancies scheduled to appear from January 1, 1994, through March 31, 1994, are also listed, as are current recent vacancies due to resignations or other reasons.

Individuals interested in serving on a new board should refer to the bill that created the board for details about the number of members to be appointed and qualifications necessary.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of December 10, 1993.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES: NOVEMBER, 1993

Appointee	Appointed by	Succeeds	Appointment/End Date
Board of Dentistry (Commerce)			
Mr. Clifford Christenot	Governor	Olson	11/8/1993
Libby			3/29/1997
Qualifications (if required): denturist			
Historical Preservation Review Board (Historical Society)			
Dr. Arnold Olsen	Governor	reappointed	11/30/1993
Helena			10/1/1997
Qualifications (if required): represents federal land and water conservation interests			
Ms. Gloria Weisgerber	Governor	Foor	11/30/1993
Missoula			10/1/1997
Qualifications (if required): archeologist			
Job Training Coordinating Council (Labor and Industry)			
Mr. Fred "Rocky" Clark	Governor	Fitzpatrick	11/8/1993
Butte			7/1/1995
Qualifications (if required): represents labor/community-based organizations			
Mr. Jon Oldenburg	Governor	Matthews	11/8/1993
Lewistown			7/1/1995
Qualifications (if required): represents labor/community-based organizations			
Safety Employment Education and Training Advisory Committee (Labor and Industry)			
Mr. Bill Dahlgren	Commissioner	not listed	11/1/1993
Missoula			11/1/1996
Qualifications (if required): represents employers			
Mr. Dale Johnson	Commissioner	not listed	11/1/1993
Belt			11/1/1996
Qualifications (if required): represents employers			

BOARD AND COUNCIL APPOINTEES: NOVEMBER, 1993

Appointee	Appointed by	Succeeds	Appointment/End Date
Safety Employment Education and Training Advisory Committee (Labor and Industry) cont.			
Mr. John Maloney	Commissioner	not listed	11/1/1993
Helena			11/1/1996
Qualifications (if required): represents Department of Labor and Industry			
Mr. John Manzer	Commissioner	not listed	11/1/1993
Great Falls			11/1/1996
Qualifications (if required): represents employees			
Mr. John Monahan	Commissioner	not listed	11/1/1993
Great Falls			11/1/1996
Qualifications (if required): represents employees			
Mr. Michael Rocchio	Commissioner	not listed	11/1/1993
Boulder			11/1/1996
Qualifications (if required): represents employers			
Ms. Elizabeth Wing-Spooner	Commissioner	not listed	11/1/1993
Butte			11/1/1996
Qualifications (if required): represents employees			
State Emergency Response Commission (Governor)			
Mr. Jim F. Greene	Governor	Lieberg	11/2/1993
Helena			7/21/1995
Qualifications (if required): represents Disaster and Emergency Services			

BOARD AND COUNCIL APPOINTEES: NOVEMBER, 1993

Appointee	Appointed by	Succeeds	Appointment/End Date
Vocational/Industrial Education Advisory Council		(Corrections and Human Services)	
Mr. Bud Campbell Deer Lodge Qualifications (if required): none specified	Director	not listed	11/1/1993 0/0/0
Mr. Loren Davis Helena Qualifications (if required): none specified	Director	not listed	11/1/1993 0/0/0
Rep. Jerry L. Driscoll Billings Qualifications (if required): none specified	Director	not listed	11/1/1993 0/0/0
Mr. Wes Estep Deer Lodge Qualifications (if required): none specified	Director	not listed	11/1/1993 0/0/0
Mr. Jim Hinch Swan Lake Qualifications (if required): none specified	Director	not listed	11/1/1993 0/0/0
Senator Bob Hockett Havre Qualifications (if required): none specified	Director	not listed	11/1/1993 0/0/0
Ms. Cheri Jemeno Dillon Qualifications (if required): none specified	Director	not listed	11/1/1993 0/0/0
Mr. Steve MacAskill Warm Springs Qualifications (if required): none specified	Director	not listed	11/1/1993 0/0/0

BOARD AND COUNCIL APPOINTEES: NOVEMBER, 1993

Appointee	Appointed by	Succeeds	Appointment/End Date
Vocational/Industrial Education Advisory Council		(Corrections and Human Services) cont.	
Dr. Doug Polette	Director	not listed	11/1/1993
Bozeman			0/0/0
Qualifications (if required): none specified			
Ms. Liz Smith	Director	not listed	11/1/1993
Deer Lodge			0/0/0
Qualifications (if required): none specified			
Mr. Ross Swanson	Director	not listed	11/1/1993
Deer Lodge			0/0/0
Qualifications (if required): none specified			
Mr. David Watkins	Director	not listed	11/1/1993
Deer Lodge			0/0/0
Qualifications (if required): none specified			
Water and Wastewater Operators Advisory Council		(Health and Environmental Sciences)	
Mr. Warren Jones	Governor	Peavy	11/10/1993
Bozeman			10/16/1999
Qualifications (if required): civil engineer			
Mr. Curt Myran	Governor	Worthington	11/30/1993
Miles City			10/16/1998
Qualifications (if required): municipality representative			

VACANCIES ON BOARDS AND COUNCILS -- January 1, 1994 through March 31, 1994

Board/current position holder	Appointed by	Term end
Appellate Defender Commission (Administration)		
Mr. Mark Parker, Billings	Governor	1/1/1994
Qualifications (if required): attorney		
Board of Architects (Commerce)		
Mr. Eric W. Hefty, Missoula	Governor	3/27/1994
Qualifications (if required): registered architect		
Board of Chiropractors (Commerce)		
Dr. Dwayne Steven Borgstrand, Red Lodge	Governor	1/9/1994
Qualifications (if required): practicing chiropractor from Northwest College of Chiropractors		
Board of Dentistry (Commerce)		
Dr. Wayne Hansen, Billings	Governor	3/29/1994
Qualifications (if required): licensed dentist		
Board of Passenger Tramway Safety (Commerce)		
Mr. Guy F. Huestis, Great Falls	Governor	1/1/1994
Qualifications (if required): engineer		
Mr. Cresap S. McCracken, Great Falls	Governor	1/1/1994
Qualifications (if required): attorney		
Board of Physical Therapy Examiners (Commerce)		
Mr. John Delano, Helena	Governor	1/1/1994
Qualifications (if required): public member		
Dr. John Halseth, Great Falls	Governor	1/1/1994
Qualifications (if required): physician		

VACANCIES ON BOARDS AND COUNCILS -- January 1, 1994 through March 31, 1994

Board/current position holder	Appointed by	Term end
Board of Public Education (Education)		
Mr. Thomas A. Thompson, Browning	Governor	2/1/1994
Qualifications (if required): none specified		
Board of Regents of Higher Education (Education)		
Ms. L. Colleen Conroy, Hardin	Governor	2/1/1994
Qualifications (if required): Republican residing in the Eastern District		
Children's Trust Fund Board (Social and Rehabilitation Services)		
Ms. Gail Flack, Hardin	Governor	1/1/1994
Qualifications (if required): member		
Ms. Karen Ortman, Glasgow	Governor	1/1/1994
Qualifications (if required): member		
Developmental Disabilities Planning and Advisory Council (Social and Rehabilitation Services)		
Senator Delwyn Gage, Cut Bank	Governor	1/1/1994
Qualifications (if required): state senator		
Rep. Betty Lou Kasten, Brockway	Governor	1/1/1994
Qualifications (if required): state representative		
Employment of People with Disabilities Advisory Council (Social and Rehabilitation Services)		
Mr. Lowell Bartels, Helena	Governor	2/2/1994
Qualifications (if required): none listed		
Mr. Scott Birkenbuel, Bozeman	Governor	2/2/1994
Qualifications (if required): none listed		

VACANCIES ON BOARDS AND COUNCILS -- January 1, 1994 through March 31, 1994

Board/current position holder	Appointed by	Term end
Employment of People with Disabilities Advisory Council (Social and Rehabilitation Services) cont.		
Mr. James A. Edgcomb, Helena Qualifications (if required): none listed	Governor	2/2/1994
Mr. Ron Garbarino, Butte Qualifications (if required): none listed	Governor	2/2/1994
Mr. Gary Garlock, Billings Qualifications (if required): none listed	Governor	2/2/1994
Ms. Judy Harris, Helena Qualifications (if required): none listed	Governor	2/2/1994
Mr. William F. Heinecke, Belgrade Qualifications (if required): none listed	Governor	2/2/1994
Mr. Richard James, Bozeman Qualifications (if required): none listed	Governor	2/2/1994
Ms. Sherry James, Great Falls Qualifications (if required): none listed	Governor	2/2/1994
Mr. Wade Johnston, Missoula Qualifications (if required): none listed	Governor	2/2/1994
Mr. Robert LeMieux, Great Falls Qualifications (if required): none listed	Governor	2/2/1994
Mr. Joel Mathews, Helena Qualifications (if required): none listed	Governor	2/2/1994

Board/current position holder	Appointed by	Term end
Employment of People with Disabilities Advisory Council (Social and Rehabilitation Services) cont.		
Mr. Ron McDonald, Helena Qualifications (if required): none listed	Governor	2/2/1994
Mr. Tom Rolfe, Helena Qualifications (if required): none listed	Governor	2/2/1994
Mr. John Shea, Anaconda Qualifications (if required): none listed	Governor	2/2/1994
Ms. Linda Valentine, Billings Qualifications (if required): none listed	Governor	2/2/1994
Mr. James Whealon, Helena Qualifications (if required): none listed	Governor	2/2/1994
Mr. James Wheat, Helena Qualifications (if required): none listed	Governor	2/2/1994
Judicial Nomination Commission (Judicial)		
Ms. Charmaine R. Fisher, Billings Qualifications (if required): lay member	Governor	1/1/1994
Mr. Robert F. James, Great Falls Qualifications (if required):	Director	1/1/1994
Mr. C. W. Leaphart, Jr., Helena Qualifications (if required):	Director	1/1/1994
Mr. M. James Sorte, Wolf Point Qualifications (if required):	Chief Justice	1/1/1994

VACANCIES ON BOARDS AND COUNCILS -- January 1, 1994 through March 31, 1994

Board/current position holder	Appointed by	Term end
Low-Income Energy Programs Advisory Council (Social and Rehabilitation Services)		
Ms. Olga F. Erickson, Fort Benton	Director	3/1/1994
Qualifications (if required): none specified		
Ms. Kathleen M. Fleury, Helena	Director	3/1/1994
Qualifications (if required): none specified		
Mr. Van C. Jamison, Helena	Director	3/1/1994
Qualifications (if required): none specified		
Mr. Dale Mahugh, Butte	Director	3/1/1994
Qualifications (if required): none specified		
Mr. Jim Morton, Missoula	Director	3/1/1994
Qualifications (if required): none specified		
Mr. James Nolan, Helena	Director	3/1/1994
Qualifications (if required): none specified		
Ms. Myrna Omholt-Mason, Helena	Director	3/1/1994
Qualifications (if required): none specified		
Ms. Kate Whitney, Helena	Director	3/1/1994
Qualifications (if required): none specified		
Management Development Advisory Council (Administration)		
Mr. David Darby, Helena	Director	1/1/1994
Qualifications (if required): state employee member		

VACANCIES ON BOARDS AND COUNCILS -- January 1, 1994 through March 31, 1994

Board/current position holder	Appointed by	Term end
Montana Science and Technology Advisory Council (Commerce)		
Dr. John Brower, Butte Qualifications (if required): none specified	Governor	2/24/1994
Mr. Ernest "Sonny" Butts, Miles City Qualifications (if required): none specified	Governor	2/24/1994
Professor Walter Hill, Missoula Qualifications (if required): none specified	Governor	2/24/1994
Mr. Robert E. Ivy, Hamilton Qualifications (if required): none specified	Governor	2/24/1994
Mr. Hartwig Moeller, Great Falls Qualifications (if required): none specified	Governor	2/24/1994
Mr. James Orser, Billings Qualifications (if required): none specified	Governor	2/24/1994
Mr. Richard K. Quisenberry, Wilmington Qualifications (if required): none specified	Governor	2/24/1994
Mr. Carl E. Russell, Helnea Qualifications (if required): none specified	Governor	2/24/1994
Mr. Clarence Speer, Bozeman Qualifications (if required): none specified	Governor	2/24/1994
Mr. David Toppen, Helena Qualifications (if required): none specified	Governor	2/24/1994
Mr. Ken S. Walker, Boise Qualifications (if required): none specified	Governor	2/24/1994

VACANCIES ON BOARDS AND COUNCILS -- January 1, 1994 through March 31, 1994

Board/current position holder	Appointed by	Term end
Montana State Lottery Commission (Commerce)		
Mr. David Kasten, Brockway Qualifications (if required): public member	Governor	1/1/1994
Mr. Loren J. O'Toole II, Plentywood Qualifications (if required): attorney	Governor	1/1/1994
Mr. Gary Rebal, Great Falls Qualifications (if required): public member	Governor	1/1/1994
Mr. Ward Shanahan, Helena Qualifications (if required): attorney	Governor	1/1/1994