MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 1

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of Rules 2.5.202, 2.5.301, 2.5.302, 2.5.601, 2.5.603 and 2.5.604 relating to state purchasing.	)	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On February 14, 1994, the Department of Administration proposes to amend rules 2.5.202, 2.5.301, 2.5.302, 2.5.601, 2.6.603, and 2.5.604, relating to state purchasing.

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

2.5.202 DEPARTMENT OF ADMINISTRATION RESPONSIBILITIES

(1)-(5) Remain the same.

(6) Delegation of authority.

(a) Except for controlled items, authority is hereby delegated to all agencies for the procurement of supplies and services under ~~$2,000~~ $5,000.

(b) The department's procurement and printing division may delegate to agencies, authority to purchase supplies and services equal to or greater than ~~$2,000~~ $5,000. The division may also revoke this authority. Factors to be considered in making the decision to delegate include:

(i)-(iv) Remain the same.

(c) Delegation equal to or greater than ~~$2,000~~ $5,000 will be given through a written delegation agreement with the purchasing bureau. The written delegation shall specify:

(i)-(iv) Remain the same.

(d)-(e) Remain the same.

(7) Remains the same.

(AUTH. 18-4-221 MCA; Imp. 18-4-221 and 18-4-222 MCA.)

2.5.301 DELEGATION OF PURCHASING AUTHORITY (1) Agencies ~~shall~~ may exercise authority to purchase non-controlled items under ~~$2,000~~ $5,000. Agencies ~~shall~~ may exercise delegated purchasing authority equal to or greater than ~~$2,000~~ $5,000 and for exigency purchases in accordance with written delegation agreements described in ARM 2.5.202, with the Montana Procurement Act and with these rules.

(2) Remains the same.

(3) Unless specifically addressed in a delegation agreement, agencies must buy controlled items through the division except office supply items (as defined in ARM 2.5.201 ~~(15)~~(17)) supplied by central stores or purchased through term contracts. These items may be purchased directly from vendors if the ~~supplier's~~ vendor's price is a publicly advertised listing or established catalog price and is less than the price

from the central stores program or a term contract and the specifications, terms, conditions, and delivery of these items meet or exceed the central stores program.

(4) Delegation is not necessary for the following purchases: salaries; fees for consulting services described in 18-8-101, MCA, et. seq. or those services exempted by 18-8-103, MCA~~,~~; travel and per diem; insurance; retirement and social security payments; freight; landfill charges; ~~licenses, dues to associations,~~ supplies or services whose prices are regulated by the public service commission or other governmental authority; and fresh fruits and vegetables.

(AUTH. 18-4-221 MCA; Imp. 18-4-221 and 18-4-222 MCA.)

2.5.302 REQUISITIONS FROM THE AGENCIES TO THE DIVISION

(1) Remains the same.

(2) Agencies must obtain written approval as required for equipment described in ARM 2.5.202~~(6)~~(5). Written approval must accompany the requisition.

(3)-(5) Remain the same.

(AUTH. 18-4-221 MCA; Imp. 18-4-221 MCA.)

2.5.601 COMPETITIVE SEALED BIDS (1) "Sealed bid" is the preferred method of competitive procurement for state supply contracts and service contracts ~~over $2,000~~ equal to or greater than $5,000. Sealed bids shall be solicited with an Invitation for Bid.

(2)-(13) Remain the same.

(AUTH. 18-4-221 MCA; Imp. 18-4-303 MCA)

2.5.603 SMALL PURCHASES OF SUPPLIES AND SERVICES

(1) The division or state agency may procure supplies or services costing less than ~~$2,000~~ $5,000 under this rule. However, purchases between $2,000 and $4,999 must be documented to have been selected through a competitive process which involved a minimum of three telephone or written quotations from the division's suppliers' list.

(2) For purchases under $2,000, the ~~The~~ procurement officer may choose a purchase technique that best meets the agency's needs. The purchasing bureau suggests that agencies follow prudent ~~good~~ purchasing practices and receive competitive telephone or written quotations where practicable.

~~(2)~~(3) This rule does not apply to controlled items for the state purchased through term contracts, requisition time schedules, the central stores program or the publications and graphics bureau; however, if a state agency's ~~annual aggregate total procurement of an item on the division's~~ anticipated usage per requisition time schedule call is ~~anticipated to be~~ less than $500, the state agency may purchase the item according to the provisions of this rule.

~~(3)~~ (4) Procurements shall not be artificially divided or sequenced to avoid using the other source selection methods set forth in Title 18, chapter 4, MCA.

(AUTH. 18-4-221 MCA; Imp. 18-4-305 MCA.)

2.5.604 SOLE SOURCE PROCUREMENT

(1)-(2) Remain the same.

(3) For purchases $4,999 or less, the determination as to whether a procurement shall be made as a sole source shall be made by the agency. For purchases of $5,000 or greater, the determination shall be made by the division. The determination and the basis therefore must be in writing. In cases of reasonable doubt, competition should be solicited. A request by a state agency to the division that a procurement be restricted to one vendor must be accompanied by a written justification.

(4)-(5) Remain the same.

(6) The following items do not require sole source justification and shall be purchased directly by the agency regardless of delegated authority:

(a) licenses;

(b) dues to associations;

(c) renewal of software license agreements; or

(d) renewal of software maintenance agreements.

(AUTH. 18-4-221 MCA; Imp. 18-4-306 MCA)

3. It is reasonably necessary to amend these rules because of changes in the business practices of state purchasing. ARM 2.5.202 is amended to increase the efficiency of procurements under $5,000.

The language in 2.5.301 (1) was changed from "shall" to "may" to make it permissible for the agencies to send requisitions for non-controlled items within their delegated authority to the purchasing bureau.

ARM 2.5.301 (3) corrects a citation error.

ARM 2.5.301 (4) removes two items from a list of items which do not require delegation authority and moves them to ARM 2.5.604 to clarify that they are also sole source purchases.

The amendment to ARM 2.5.302 corrects a citation error.

The amendment to ARM 2.5.601 raises the amount at which purchases must be made through a sealed bid procedure from $2,000 to $5,000 to enhance the cost-effectiveness of this purchasing procedure.

ARM 2.5.603 (1) is amended to require agencies to solicit a minimum of three telephone or written quotes prior to making a purchase between $2,000 and $5,000, thereby insuring an adequate level of competition for the purchase.

The amendments to ARM 2.5.603 (2) clarify that agencies only need to purchase from a Requisition Time Schedule (RTS) when they anticipate the expenditures for a RTS call to exceed $500.00.

ARM 2.5.604 is amended to give agencies the authority to determine sole source purchases $4,999 or less.

The new language in ARM 2.5.604 (6), includes a list of items which have been determined to always be sole source and do not require further written justification or delegation authority.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendments in writing to Marvin Eicholtz, Administrator, Procurement and Printing Division, Department of Administration, Room 165, Sam W. Mitchell Building, Helena, Montana, 59620. Any comments must be received no later than February 14, 1994.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for hearing and submit this request along with any written comments he has to Marvin Eicholtz, Administrator, Procurement and Printing Division, Department of Administration, Room 165, Sam W. Mitchell Building, Helena, Montana, 59620. A written request for hearing must be received no later than February 14, 1994.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the administrative code committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 800 persons based on 8000 vendors interested in submitting bids for supplies and services to the state of Montana.

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Lois A. Menzies, Director
Department of
Administration

Certified to the Secretary of State January 3, 1994.

BEFORE THE BOARD OF HOUSING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of a rule pertaining to income limits and loan amounts	))))	NOTICE OF PROPOSED AMENDMENT OF 8.111.405 INCOME LIMITS AND LOAN AMOUNTS NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On February 12, 1994, the Board of Housing proposes to amend the above-stated rule.

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

"8.111.405 INCOME LIMITS AND LOAN AMOUNTS (1) through (1)(c) will remain the same.

(2) A loan amount may not exceed 80% of the appraised value of the property. ~~The maximum dollar amount of a loan is $40,000.00.~~ The board will set the maximum dollar amount of a loan which amount may be changed by the board. The minimum dollar amount of a loan is $15,000.00."

Auth: Sec. 90-6-104, 90-6-106, MCA; IMP, Sec. 90-6-104, 90-6-106, MCA

REASON: The board is proposing to amend ARM 8.111.405 to achieve adequate flexibility to periodically change the maximum dollar amount of a loan dependent upon current economic conditions in the market place.

3. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Housing, 2001 11th Avenue, Helena, Montana 59620, to be received no later than 5:00 p.m., February 10, 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 Housing, 2001 11th Avenue, Helena, Montana 59620, to be received no later than 5:00 p.m., February 10, 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, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

BOARD OF HOUSING
BOB THOMAS, CHAIRMAN

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

Certified to the Secretary of State, January 3, 1994.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE & PARKS
OF THE STATE OF MONTANA

In the matter of the proposed amendments to 12.3.116 and 12.3.118 pertaining to application and drawing of moose, sheep, and goat licenses	NOTICE OF PROPOSED AMENDMENT TO RULES 12.3.116 AND 12.3.118 PERTAINING TO APPLICATION AND DRAWING OF MOOSE, SHEEP AND GOAT LICENSES NO PUBLIC HEARING CONTEMPLATED

TO: All interested persons

1. On February 25, 1994, the Department of Fish, Wildlife and Parks proposes to amend rules 12.3.116 and 12.3.118 pertaining to the application and drawing of moose, sheep, and goat licenses.

2. The department proposes to amend the rules as follows:

12.3.116 MOOSE, SHEEP, GOAT LICENSES (1) ~~Manner of drawings.~~ The department shall issue moose, sheep, and goat licenses as described in sections 87-2-701 and 87-2-506, MCA, according to the following policy and procedures:

(a) Applicants for moose and goat must specify one choice for a hunting district. However, for bighorn sheep, an applicant may specify a second choice.

(b) Application for unlimited sheep must be postmarked no later than ~~June~~ May 1. The deadline may be extended by the department if necessary to provide adequate time for the applicants to apply.

(2) ~~Nonresident license allocations for moose, sheep and goat.~~ The following procedure will be used when allocating 10% license opportunities for nonresidents in moose, sheep and goat drawings:

(a) through (e) remain the same.

AUTH: 87-1-304 and 87-2-701, MCA
IMP: 87-1-304, 87-2-506 and 87-2-701, MCA

12.3.118 APPLICATION FOR DRAWINGS (1) ~~Application for special permit/license drawings -- location of drawings.~~ The deadline date for the moose, sheep and goat special drawings is on or before May 1. The deadline date for elk, deer and antelope special drawings is on or before June 1. All applications for participation in any special permit/license drawing, except drawings under ARM 12.9.801 (damage hunts) provided for by these regulations must be postmarked by the U.S. Postal Service on or before ~~June 1,~~ the deadline date of the current license year, or delivered by private mail service on or before ~~June 1,~~ the deadline date; or if personally delivered, received in the Helena fish, wildlife and parks

office by 5:00 p.m., ~~June 1,~~ on the deadline date of the current license year. If the deadline date for application for any license or drawings, as set by the department, falls on a Sunday or state holiday, that date shall be automatically extended to 5:00 p.m. of the next full work day. The deadline may be extended by the department if necessary to provide adequate time for the applicants to apply. No corrections or changes may be made after the department has received the drawing application, except that the department will accept corrections on the applications of those seeking landowner preference. Unless otherwise provided by these rules, all drawings will take place in Helena.

(2) ~~Application for miscellaneous drawings.~~ All applications for participation in buffalo, spring grizzly bear, swan and turkey drawings must be postmarked by the U.S. Postal Service by the advertised deadline date, or delivered by private mail service on or before the date to the address indicated for the particular drawing which is being applied for.

(3) ~~Procedure for application for drawings.~~ Applications must be made on the current form provided by the department or a photocopy of this form. The applicant must fill in the required information, sign the application, and submit the proper fee. Phoned-in requests and wired-in money will not be accepted. The department will not accept personal checks from nonresidents for nonresident licenses and drawing fees. Applications that are required to be submitted on a current year, department approved form, include nonresident combination licenses, special drawings, buffalo, unlimited sheep, surplus special license, mountain lion, fall grizzly and youth, landowner and general trapper.

AUTH: 87-1-304, 87-2-701, 87-2-705 and 87-2-706, MCA
IMP: 87-1-304, 87-2-701, 87-2-705, and 87-2-706, MCA

3. The department is proposing these amendments because moose, sheep and goat licenses are mailed to hunters in mid-August. The hunting season starts in early September. This period of time is inadequate to properly plan for a hunt. Hunters have requested that we conduct the moose, sheep and goat drawings earlier to provide additional time to plan the hunt. The moose, sheep and goat final quotas are set in early June. The ARM rule change is being proposed to change the application deadline to May 1. The change would allow the licenses to be mailed in mid-June. This would provide about 10 weeks for planning.

4. Interested parties may submit their data, views or arguments, either orally or in writing, to Nancy Kraft, Department of Fish, Wildlife and Parks, 1420 East Sixth, Helena, P.O. Box 200701, Montana 59620-0701, no later than February 11, 1994.

5. If a person who is directly affected by the proposed

adoption wishes to express his or her data, views and arguments orally or in writing at a public hearing, he or she must make written request for a hearing and submit this request along with any written comments to Nancy Kraft, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana 59620-0701, no later than February 11, 1994.

6. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from any 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 and mailed to all interested persons.

Robert N. Lane
Rule Reviewer

Patrick J. Graham, Director
Montana Department of Fish, Wildlife and Parks

Certified to the Secretary of State January 3, 1994.

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

In the matter of the proposed adoption of new rules related to groups of business entities joining together for the purchase of workers' compensation insurance	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF RULES I THROUGH IX (TRADE GROUP DISCOUNTS)

TO ALL INTERESTED PERSONS:

1. On February 18, 1994, at 10:00 a.m., a public hearing will be held in the first floor conference room at the Walt Sullivan Building (Dept. of Labor Building), 1327 Lockey Street, Helena, Montana, to consider the adoption of new rules related to the certification of groups and business entities for the purpose of obtaining volume discounts for the purchase of workers' compensation insurance.

The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you request an accommodation, contact the Department by not later than 5:00 p.m., February 14, 1994, to advise us of the nature of the accommodation that you need. Please contact the Employment Relations Division, Attn: Ms. Linda Wilson, P.O. Box 8011, Helena, MT 59604-8011; telephone (406) 444-6531; TDD (406) 444-5549; fax (406) 444-4140.

2. The Department of Labor and Industry proposes to adopt new rules as follows:

RULE I PURPOSE (1) The purpose of these rules is to implement the provisions of section 39-71-433, MCA by adopting a procedure to allow two or more business entities to join together to purchase workers' compensation insurance policies which cover the group members.

(2) There are two certification processes contained in these rules. The first process is for certification of groups that wish to form. The second is for certification of individual businesses that wish to join existing groups. The fact that a group has been certified, however, does not guarantee the group will be able to obtain workers' compensation insurance coverage on terms that are more favorable than policies issued to individual business members.

AUTH: Sec. 39-71-203, MCA IMP: Sec. 39-71-433, MCA

RULE II DEFINITIONS (1) "Business entity" means the same as defined by 39-71-432, MCA.

(2) "Department" means the Department of Labor and Industry, State of Montana.

(3) "Governing class code" means the workers' compensation insurance classification code, other than a standard exception,

which produces the greatest amount of payroll for the business entity. Standard exceptions are certain classifications common to many businesses, such as clerical employees [code 8810] and outside salespersons [code 8742].

(4) "Group" means the same as defined by 39-71-432, MCA.

(5) "Individual applicant" means a business entity seeking approval of the department to join a group.

(6) "Insurer" means an authorized admitted insurance carrier which has complied with the deposit requirements of the Workers' Compensation Act, or the state compensation insurance fund.

(7) "Same as" or "similar to the business pursuits of the other entities" means that:

(a) the governing class code is the same for each business entity in the group;

(b) the group members are governed by the same first two digits of the industry classification code as specified in the 1987 Standard Industrial Classification Manual (SIC); or

(c) the group members consist of business entities that provide significant ancillary services to an established industry, as well as business entities in the industry itself, if the proposed insurer for the group advises the department in writing that the group is sufficiently homogeneous so as to be an appropriate underwriting risk.

AUTH: Sec. 39-71-203, MCA IMP: Sec. 39-71-433, MCA

RULE III CERTIFICATION OF A GROUP (1) To be certified by the department as a group, the group must file with the department:

(a) a plan of operation as set forth in [Rule IV]; and

(b) organizational information pertaining to the group as set forth in [Rule V].

(2) The department does not charge a fee for certification of a group.

AUTH: Sec. 39-71-203, MCA IMP: Sec. 39-71-433, MCA

RULE IV PLAN OF OPERATION (1) The group plan of operation must contain the following information:

(a) the composition of the group governing board and a description of the process for the selection of the board members;

(b) a definition of the parameters of the type of business entities which will be eligible to become members of the group, which must include the following:

(i) the specific criteria which define the parameters of the group (i.e. governing class code, the first two digits of the SIC group, or certification of the insurer); and

(ii) any other requirements for membership in the group (e.g. membership in a particular trade association, minimum number of employees, etc.);

(c) provisions for group members to withdraw and provisions for the group to expel a member;

(d) a description of the administration of the group insurance program;

(e) guidelines for obtaining workers' compensation insurance coverage, which must include:

(i) payment of premium;

(ii) distribution of discounts or dividends;

(iii) risk management; and

(iv) a safety and loss control program; and

(f) an internal group process for resolving disputes within the group.

(2) The establishment of membership eligibility criteria is the responsibility of the group governing body, as is the acceptance, declination or termination of certified business entities from eligibility in the group.

(3) Certification of a group by the department is valid until revoked or terminated. A group that is aggrieved by a decision of the department may request administrative review of the decision or request a contested case hearing.

(4) Once certified, changes in the operating plan must be approved by the department and no change is effective without such prior approval.

(5) The group must notify the department of any change in coverage or cancellation of coverage by the group's insurer. Such notice must be given the department not less than 15 days prior to the effective date of such change or cancellation.

AUTH: Sec. 39-71-203, MCA IMP: Sec. 39-71-433, MCA

RULE V ORGANIZATIONAL STRUCTURE (1) The group must submit the following information about its organizational structure:

(a) the type of business entity of the group;

(b) proof of its legal existence by copy of articles of incorporation, partnership, etc.;

(c) the name and address of a Montana resident who is the group's authorized representative for service of process; and

(d) the name, address and telephone number of a contact person who can provide information to the department and business entities about the group.

AUTH: Sec. 39-71-203, MCA IMP: Sec. 39-71-433, MCA

RULE VI ANNUAL REPORT (1) Once certification of the group by the department has been completed, the group or its insurer must file an annual report with the department within 60 days of the anniversary date of certification. The annual report shall contain the following information:

(a) the group's membership list;

(b) identification of the insurer;

(c) identification of any third party administrator being used;

(d) the name, address and telephone number of a contact person who can provide information to the department and business entities about the group;

(e) a statement of the annual aggregate premium savings which are due to the group program. The amount may be estimated if the actual amount is not know when the report is made; and

(f) a statement of the group's:

(i) total annual number of lost time claims; and
(ii) total annual hours worked.
(2) The department may, upon request and for good cause, extend the filing time beyond the due date.
(3) Failure to timely file the annual report may result in the group losing its certification.
AUTH: Sec. 39-71-203, MCA IMP: Sec. 39-71-433, MCA

RULE VII DECERTIFICATION OF A GROUP (1) The department may revoke the certification of a group for cause.
(2) Grounds for revoking certification include, but are not limited to:
(a) material misrepresentation of facts to the department;
(b) failure to adhere to the plan of operation;
(c) failure to timely file reports required by these rules;
(d) including uncertified members in the group; and
(e) violation of department rules or applicable statutes.
(3) A group that is aggrieved by a decision of the department may request administrative review of the decision or request a contested case hearing.
AUTH: Sec. 39-71-203, MCA IMP: Sec. 39-71-433, MCA

RULE VIII INDIVIDUAL APPLICANTS (1) A new or existing group may, on behalf of an individual applicant, apply to have the individual certified as being eligible to join the group.
(2) The group must submit the following to the department for each individual applicant:
(a) the name of the group;
(b) the name and address of the individual applicant;
(c) the federal employer identification number or social security number of the individual applicant; and
(d) information that shows that the individual applicant is engaged in the business pursuits that are the same as or similar to the business pursuits of the other entities in the group, in accordance with the group's plan of operation.
(3) Certification of an individual applicant by the department is valid until revoked or terminated. A group or an individual applicant or member that is aggrieved by a decision of the department may request administrative review of the decision or request a contested case hearing. The following list provides examples of reasons why certification may be revoked or terminated:
(a) change of SIC code;
(b) change of the governing class code; or
(c) materially false or misleading information supplied to the department in the individual application.
(4) The department does not charge a fee for certification of an individual applicant.
AUTH: Sec. 39-71-203, MCA IMP: Sec. 39-71-433, MCA

RULE IX DISPUTES (1) The department has original jurisdiction over all disputes arising under 39-71-433, MCA and

the administrative rules adopted pursuant to that statute except the following:

(a) disputes within the trade group; or

(b) proper insurer classification code for purposes of premium collection which is a dispute for which the classification and rating committee of the office of the state commissioner of insurance has original jurisdiction.

(2) Appeals from department final orders shall be heard by the Workers' Compensation Court.

(3) Appeals from final orders of the classification and rating committee shall be heard by the District Court.

AUTH: Sec. 39-71-203, MCA IMP: Sec. 39-71-433, MCA

Rationale: Section 39-71-433 (4), MCA, requires the Department to adopt rules to establish the forms, criteria, and procedures to certify groups and business entities for the purpose of obtaining volume discounts for the purchase of workers' compensation insurance. These rules are reasonably necessary to establish the regulatory functions delegated to the Department by the Legislature for the certification process and to monitor certified groups for compliance with the law and these rules.

3. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to:

Dennis Zeiler, Bureau Chief
Workers' Compensation Regulations Bureau
Employment Relations Division
Department of Labor and Industry
P.O. Box 8011
Helena, Montana 59604-8011

and must be received by no later than 5:00 p.m., February 25, 1994.

4. The Department proposes to make these new rules effective April 1, 1994. The Department reserves the right to adopt these rules so that they become effective on a later date. The Department also reserves the right to adopt less than all of the proposed rules, or to adopt none of the proposed rules.

5. The Hearing Unit of the Legal Services Division of the Department has been designated to preside over and conduct the hearing.

David A. Scott
Rule Reviewer

Laurie Ekanger, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: January 3, 1994.

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

In the Matter of Proposed Repeal of a Rule Pertaining to Tariff Fee and Amendments to Rules Pertaining to Tariff Symbols, all Relating to Motor Carriers.	))))))	NOTICE OF PROPOSED REPEAL OF RULE 38.3.2504 AND AMENDMENT OF RULES 38.3.2603, 38.3.2604, 38.3.2605, 38.3.2607 and 38.3.2806 NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On February 15, 1994 the Department of Public Service Regulation proposes to repeal and amend rules identified in the above title and described in the following paragraphs, all related to motor carriers. The proposed rule to be repealed is located at page 38-217, Administrative Rules of Montana.

2. The rule proposed to be repealed is as follows.

38.3.2504 FILING FEE DUE AUTH: Sec. 69-12-201, MCA; IMP, Title 69, Chapter 12, Part 5, and Sec. 69-12-423, MCA

Rationale: This repeal is reasonably necessary as the Commission has, in practice, not collected the fee for several years as it has not even covered the costs of administering it and an increased fee cannot be justified at this time.

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

38.3.2603 CHANGES TO BE INDICATED IN TARIFF OR SUPPLEMENTS (1) All tariff publications and supplements thereto must indicate changes ~~thereby made in~~ to existing rates or charges, rules, regulations or practices, or classifications by use of ~~the following uniform~~ the appropriate symbols provided in the tariff's approved symbols page pursuant to ARM 38.3.2607(g). ~~in connection with such change:~~

~~(D) to denote reductions~~

~~(I) to denote increases~~

~~(C) to denote changes in wording which result in neither increases nor reductions in charges.~~

(2) Explanation of such symbols must be provided in the approved symbols page and in the tariff or supplement in which used, and these symbols shall not be used for any other purpose. AUTH: Sec. 69-12-201, MCA; IMP, Title 69, Chapter 12, Part 5, MCA

38.3.2604 ALTERNATE FORM FOR DELINEATING GENERAL CHANGES (1) Remains the same.

(2) Under this rule ~~a boldface dot, "•",~~ the appropriate symbol from the tariff's approved symbols page must be used to symbolize a rate in which no change has been made. This symbol must not be used for any other purpose. AUTH: Sec. 69-12-201, MCA; IMP, Title 69, Chapter 12, Part 5, MCA

38.3.2605 OMISSIONS FROM PREVIOUS TARIFFS (1) When a tariff or supplement cancelling a previous issue omits points of origin or destination, or rates, ratings, rules or regulations, or routes which were contained in such previous issue, the new tariff or supplement shall indicate the cancellation, and if such omissions effect changes in charges or service that fact shall be indicated by the use of the ~~uniform symbols prescribed in ARM 38.3.2607(g)~~ appropriate symbol provided in the tariff's approved symbols page. AUTH: Sec. 69-12-201, MCA; IMP, Title 69, Chapter 12, Part 5, MCA

38.3.2607 CONTENTS OF TARIFF (1) Tariff shall contain in the order named:

(a) through (f) Remain the same.

(g) Explanation of symbols, reference marks, and abbreviations of technical terms used in the tariff or supplement, except that the explanation of a reference mark or symbol used only in connection with particular items or rates shall also be shown on the page on which used. The ~~following~~ symbols shall be used for the purposes indicated and shall not be used for any other purpose in any tariff. Symbols will be a distinct single character, readily identifiable, and not unduly duplicative of common letters or numerals used to designate items or lines in the tariff. Industry standard symbols may be used. At the minimum, symbols will be developed for each of the following purposes:

(i) —●— to denote reductions;

(ii) —◆— to denote increases;

(iii) —▲— to denote changes in wording which result in neither increases nor reductions in charges;

(iv) —○— to denote no change in rate;

(v) —✳— to denote prepay stations or points;

(vi) —+— to denote intrastate application only;

(vii) —□— to denote reissued matter.

(h) through (l) Remain the same. AUTH: Sec. 69-12-201, MCA; IMP, Title 69, Chapter 12, Part 5, MCA

38.3.2806 REISSUED MATTER (1) Matter brought forward without change from a tariff which has not been in effect 30 days, also matter brought forward without change from one supplement to another, must be designated "Reissued" in distinctive type and must show the original effective date and the number of the supplement or tariff from which it is reissued; or must be uniformly indicated by the letter T ~~in a square~~ followed by the symbol for "reissued" when reissued from another tariff or from a supplement to another tariff and by numerals commencing with 1 ~~in squares~~ followed by the symbol for

"reissued" when reissued from a prior supplement to the same tariff, printed in distinctive type and shown in a conspicuous manner, and the explanation thereof must be made in the tariff or supplement in which the symbols are used. Examples: "T _____ Reissued from PSC No. _____, or (Supplement No. _____ to PSC No. _____), effective (date upon which item became effective in former tariff or supplement to another tariff) _____, 19 ____"; "T _____ Reissued from Supplement No. 1, effective _____, 19____," and so on numerically, the figures of the symbols always representing the number of the supplement to the same tariff from which the reissued item is brought forward. If items in a tariff or supplement are made effective on dates other than the general effective date shown on the title page, reissue of such items may be indicated in later publications by showing a letter suffix or other symbol in connection with, and as a part of, the letter T or the numerals ~~in squares~~ followed by the symbol for "reissued" as herein authorized. When the reissued item became effective in a supplement to another tariff, the PSC number of that tariff must also be given. The letter T ~~in a square~~ and numerals commencing with 1, ~~in a square~~ both followed by the symbol for "reissued," shall not be used as reference marks or symbols for any other purpose in any tariff or supplement. AUTH: Sec. 69-12-201, MCA; IMP, Title 69, Chapter 12, Part 5, MCA

Rationale: The amendment to the above rules is reasonably necessary to accommodate flexibility in individual carriers in developing symbols that can be reproduced and printed from standard computer programs without undue effort.

4. Interested parties may submit their data, views or arguments concerning the proposed repeal and amendments in writing (original and 10 copies) to Martin Jacobson, Public Service Commission, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601 no later than February 15, 1994.

5. If a person who is directly affected by the proposed repeal and amendments wishes to express his/her data, views and arguments orally or in writing at a public hearing, he/she must make written request for a public hearing and submit this request along with any written comments he/she has (original and 10 copies) to Martin Jacobson, Public Service Commission, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601, no later than February 15, 1994.

6. If the agency receives requests for a public hearing on the proposed repeal and amendments from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed repeal and amendments; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be in excess of 25 based upon the 500 carriers having tariffs filed with the Commission.

7. The authority of the agency to make rules as proposed and the statutes being implemented are set forth following each rule above.

8. The Montana Consumer Counsel, 34 West Sixth Avenue, P.O. Box 201703, Helena, Montana 59620-1703, (406) 444-2771, is available and may be contacted to represent consumer interests in this matter.

Bob Anderson
Bob Anderson, Chairman

CERTIFIED TO THE SECRETARY OF STATE JANUARY 3, 1994.

Ron A. McKay
Reviewed By

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

In the Matter of Proposed Adoption of Rules Pertaining to the Exclusion from Motor Carrier Regulation for Transportation Incidental to a Principal Business.	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION OF NEW RULES I THROUGH V

TO: All Interested Persons

1. On Thursday, February 17, 1994 at 9:00 a.m. at the offices of the Montana Public Service Commission, 1701 Prospect Avenue, Helena, Montana, the Commission will hold a hearing to consider the proposals identified in the above titles and described in the following paragraphs, all related to the exclusion from motor carrier regulation for transportation that is incidental to a principal business.

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

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

RULE I. EXCLUSION FROM THE DEFINITION OF MOTOR CARRIER FOR TRANSPORTATION INCIDENTAL TO PRINCIPAL BUSINESS

(1) Except as may be limited by law or these rules, a person who is otherwise within the definition of "motor carrier" under section 69-12-101, MCA, and related provisions, and not otherwise exempt from regulation under section 69-12-102, MCA, or related or similar provisions, is not a "motor carrier" if the transportation activities of the person are incidental to a principal business of that person.

(2) Transportation is incidental to a principal business when the transportation is in furtherance of, in the scope of, and subordinate to that principal business, as provided in these rules.

(3) The evaluation used to determine whether transportation is incidental under these rules may be referred to as the "primary business test."

AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-101, MCA

RULE II. SUBSTANTIVE DEFINITION OF KEY WORDS AND PHRASES

(1) For the purposes of these rules, the following terms have the meanings assigned unless the context dictates otherwise:

(a) "Principal business" means a business which, in relation to the transportation which is purported to be incidental, is clearly the predominant undertaking or enterprise. It must have a clear economic purpose or objective, identifiable with certainty, in terms of supplying goods or services.

(b) "In the furtherance of" means directly benefiting the principal business by transporting materials, goods, or other property, personnel, customers, clients, or other passengers, when such transportation assists the principal business in achieving its economic purpose or objective. It does not include a benefit to the principal business through transportation merely generating additional profit or like thing.

(c) "In the scope of" means directly within the bounds of the economic purpose or objective of the business. It does not include a transportation activity that is merely a tangent or appendage.

(d) "Subordinate to" means lesser than, minor in comparison to, dependent on, existing because of, and controlled by. It can include transportation important to, even essential to, the principal business. It does not include transportation which is a significant enterprise itself.

(2) A determination on whether these definitions are met or not is a question of law.

AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-101, MCA

RULE III. FACTORS (1) When considering whether transportation is incidental to a principal business the commission may consider any and all factors that have a reasonable bearing on the required ultimate determination of whether a principal business actually exists and whether the transportation activities in question are actually in furtherance of, in the scope of, and subordinate to the principal business.

(2) Factors having a reasonable bearing on whether a principal business exists, whether transportation is "in the furtherance of," and whether transportation is "in the scope of" are those which tend to establish that the definitions of these are met or not met.

(3) The primary factor having a reasonable bearing on whether transportation is "subordinate to" will be comparative financial data, including a listing of assets at risk, revenues generated, and expenses incurred, including payroll, separately stated for the transportation and nontransportation aspects of the business. In this regard the commission will compare the transportation aspects with the nontransportation aspects. Factors that are clearly represented by financial data will generally not be separately considered, but may be for good cause.

(4) No single factor, whether designated "primary," "having a reasonable bearing," "general," or other, will be determinative. The commission will consider all factors and related evidence and arguments as a whole.

(5) General factors which may also be considered include, but are not limited to:

(a) time devoted to transportation -- if the time devoted to transportation is extensive in comparison to the time devoted to other aspects of the business, it tends to indicate motor carriage;

(b) ownership of property transported -- if ownership is in one other than the principal business, it tends to indicate motor carriage, unless the transportation is direct delivery

from the principal business's place of business after retail or wholesale sale;

(c) preexisting orders by customers -- if the principal business transports property from the point of manufacture or wholesale sale, other than the principal business's place of business, to a customer having a preexisting order, it tends to indicate motor carriage;

(d) storage facilities -- if the principal business has no reasonable storage facilities for property transported from a point of manufacture or wholesale sale, it tends to indicate motor carriage;

(e) transportation charge -- if the principal business assesses a transportation charge, it tends to indicate motor carriage;

(f) advertising or holding out to transport for others -- if the principal business advertises or holds itself out to transport for others, it tends to indicate motor carriage.

AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-101, MCA

RULE IV. EFFECT OF COMPETITION WITH REGULATED MOTOR CARRIERS (1) Transportation incidental to a principal business, as provided in these rules, remains not regulated even though it may compete with regulated motor carriage.

AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-101, MCA

RULE V. EXCLUSION INAPPLICABLE IN CERTAIN PRINCIPAL BUSINESSES (1) The exclusion for transportation incidental to a principal business, as provided in these rules, does not apply when:

(a) the principal business is waste landfilling and the transportation in question is transportation of waste; or

(b) the principal business is a transportation business.

AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-101, MCA

3. Rationale: These rules are a codification of a legal principle established in Board of Railroad Commissioners v. Gamble-Robinson Co., 111 Mont. 441, 111 P.2d 306 (1941), and applied in numerous subsequent rulings of the Commission. The principle excludes certain transportation, transportation that is merely incidental to a principal business, from the definition of "motor carrier" in Section 69-12-101, MCA. Codification is reasonably necessary to provide a means of readily conveying the law and related information to all interested persons and to serve as the basis for consistent rulings by the Commission. Additionally, in regard to proposed Rule V(1)(a), Montana Solid Waste Contractors v. Public Service Commission, First Judicial District, Cause No. BDV-92-448 (1993), held that application of the exclusion is not feasible when the principal business is landfilling waste.

4. To facilitate a thorough understanding of written comments before hearing, the Commission would appreciate written comments to be submitted (original and 10 copies) by interested persons at least ten days prior to hearing. This is a

request, not a requirement. Under this request the date for written comments is February 7, 1994.

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 (original and 10 copies) to Martin Jacobson, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601, phone (406) 444-6178, no later than February 17, 1994.

6. The Commission, a Commissioner, or a duly appointed presiding officer may preside over and conduct the hearing.

7. The authority of the agency to make rules as proposed and the statutes being implemented are set forth following each rule above.

8. The Montana Consumer Counsel, 34 West Sixth Avenue, P.O. Box 201703, Helena, Montana 59620-1703, (406) 444-2771, is available and may be contacted to represent consumer interests in this matter.

Bob Anderson, Chairman

CERTIFIED TO THE SECRETARY OF STATE JANUARY 3, 1994.

Reviewed By

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 2.21.1812 relating to Exempt Compensatory Time	))))	NOTICE OF AMENDMENT OF ARM 2.21.1812 RELATING TO EXEMPT COMPENSATORY TIME

TO: All Interested Persons.

1. On October 28, 1993, the Department of Administration published notice of the proposed amendment to ARM 2.21.1812, pertaining to Exempt Compensatory Time at page 2462 of the 1993 Montana Administrative Register, issue number 20.

2. The agency has amended the rule as proposed.

3. One comment was received.

COMMENT: A commenter requested that the rules be amended to state that unused exempt compensatory time would not be forfeited at the end of the year, but instead would be made available to other employees who might need additional leave for medical reasons.

RESPONSE: Exempt compensatory time is not a form of leave granted to state employees. Its purpose is merely to enable scheduling flexibility for employees exempt from the provisions of the federal Fair Labor Standards Act. Unlike sick leave, there is no statutory entitlement for its accrual or redistribution to other employees. The Department did not adopt the proposed amendment.

By: _____
Lois Menzies, Director
Department of Administration

_____
Dal Smilie, Chief Legal Counsel
Rule Reviewer

Certified to the Secretary of State January 3, 1994

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 2.21.3607, 2.21.3609 and 2.21.3616 relating to Veterans' Employment Preference	))))	NOTICE OF AMENDMENT OF ARM 2.21.3607, 2.21.3609 AND 2.21.3616 RELATING TO VETERANS' EMPLOYMENT PREFERENCE

TO: All Interested Persons.

1. On October 28, 1993, the Department of Administration published notice of the proposed amendment to ARM 2.21.3607, 2.21.3609 and 2.21.3616 pertaining to Veterans' Employment Preference at page 2464 of the 1993 Montana Administrative Register, issue number 20.

2. The agency has adopted ARM 2.21.3607 and 2.21.3609 as proposed, and has amended ARM 2.21.3616 with the following changes:

2.21.3616 CLAIMING PREFERENCE -- DOCUMENTATION AND VERIFICATION

(1) - (7)(d) Remain the same.

(e) from an eligible mother of a deceased veteran or disabled veteran, a document from the U.S. veteran's administration certifying that the veteran, as provided in 39-29-101, MCA, "lost his life under honorable conditions while serving in the armed forces," or a document certifying, as required in 39-29-101, MCA, that the veteran has a service-connected permanent and total disability. The veteran's mother ~~shall~~ must also certify in writing that ~~her husband~~ the mother's spouse is permanently and totally disabled or that her ~~husband~~ spouse is deceased and she has not remarried;

(7)(f) - (11) Remain the same.

(Auth. 39-29-112, MCA; Imp. 39-29-103, MCA)

By Lois Menzies
Lois Menzies, Director
Department of Administration

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Certified to the Secretary of State January 3, 1994.

BEFORE THE DEPARTMENT OF AGRICULTURE
STATE OF MONTANA

In the matter of the adoption of Rule I, Civil Penalties - Enforcement for Nursery and Rule II, Civil Penalties - Matrix for Nursery; amendment of ARM 4.12.1405, 4.12.1407, 4.12.1409 and 4.12.1419, and Repeal of 4.12.1401, 4.12.1402) 4.12.1403, 4.12.1404 and 4.12.1406	NOTICE OF ADOPTION OF NEW RULES, AMENDMENT AND REPEAL OF RULES RELATING TO THE SALE, DISTRIBUTION AND INSPECTION OF NURSERY STOCK IN MONTANA

TO: All Interested Persons:

1. On November 10, 1993, the Department of Agriculture published a notice of proposed adoption, amendment and repeal of the above-stated rules at page 2580-2585 of the 1993 Montana Administrative Register, issue no. 21.

2. The department has adopted, amended and repealed the rules as proposed. However, Rule I (4.12.1430) and Rule II (4.12.1431) have had FOR NURSERY added to their catchphrases for clarification.

3. No comments were received.

LEO A. GIACOMETTO, DIRECTOR
DEPARTMENT OF AGRICULTURE

TIMOTHY J. MELOY
RULE REVIEWER

Certified to the Secretary of State, January 3, 1994.

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

In the matter of the amendment of a rule pertaining to unprofessional conduct	)))	NOTICE OF AMENDMENT OF 8.35.408 UNPROFESSIONAL CONDUCT

TO: All Interested Persons:

1. On October 28, 1993, the Board of Occupational Therapists published a notice of proposed amendment of the above-stated rule at page 2483, 1993 Montana Administrative Register, issue number 20.

2. The Board has amended the rule exactly as proposed.

3. One comment was received in support of the proposed amendment. No other comments or testimony were received.

BOARD OF OCCUPATIONAL THERAPY PRACTICE
LYNN DAVIS, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, January 3, 1994.

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 licensure requirements for social workers and professional counselors and application procedure for social work	CORRECTED NOTICE 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 of 8.61.402, 8.61.403 and 8.61.1201 at page 2296, 1993 Montana Administrative Register, issue number 19. The Board published a notice of adoption at page 3015, 1993 Montana Administrative Register, issue number 24, adopting the rules exactly as proposed.

2. The new language in ARM 8.61.402(1)(b) was inadvertently not underlined. The new language "supervision, on a form ... with the following information" should have been underlined. The proposed notice should also have stated that subsection 8.61.402(2) would remain the same.

3. The original proposal should have stated that subsection (3) in ARM 8.61.403 would remain the same.

4. ARM 8.61.1201(4) should have read as follows in the original notice:

"(4) If an applicant fails the examination, ~~he/she~~ the applicant may retake the examination upon payment of the ~~exam~~ examination fee ~~of $75.00~~."

5. The replacement pages for this notice have been submitted for the December 31, 1993, filing date.

BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, January 3, 1994.

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

In the matter of the adoption of Rule 24.5.306 and amendment of Rules 24.5.301, 24.5.302 24.5.303, 24.5.308, 24.5.309, 24.5.310, 24.5.311, 24.5.316, 24.5.317, 24.5.318, 24.5.326, 24.5.334, 24.5.343, and 24.5.344, and repeal of Rule 24.5.304 of the Workers' Compensation Court.	NOTICE OF ADOPTION, AMENDMENT AND REPEAL OF RULES OF THE WORKERS' COMPENSATION COURT

TO: All Interested Persons

1. On November 24, 1993, the Workers' Compensation Court published a Notice of Proposed Amendment of Rules ARM 24.5.301, 24.5.302, 24.5.303, 24.5.308, 24.5.309, 24.5.310, 24.5.311, 24.5.316, 24.5.317, 24.5.318, 24.5.326, 24.5.334, 24.5.343, and 24.5.344; adoption of Rule ARM 24.5.306 and repeal of Rule ARM 24.5.304 at page 2747, Montana Administrative Register, Issue No. 22 of 1993.

2. No public hearing was held but interested parties were asked to submit their data, views or arguments to the court in writing by December 22, 1993. The court has considered all written commentary received subsequent to the original notice date and responds to those comments as follows:

COMMENT: ARM 24.5.301 PETITION FOR TRIAL, subsection (1)(f). The use of "pertinent" may lead to disputes over what that means. The use of "pertinent" creates an inconsistency with ARM 24.5.317, which does not refer to the exchange of "pertinent" medical records. The Court may wish to add text to state that it will liberally construe what records are "pertinent", if the Court does not strike the word.

RESPONSE: The purpose of including the word "pertinent" in this rule and in ARM 24.5.302(1)(e) was to exclude those records which are clearly not relevant to the injury, e.g., records regarding a pregnancy in a case involving an elbow injury. If there is an issue as to the relevancy of a medical record the Court must and will decide the issue on a case by case basis. The inconsistency with ARM 24.5.317 is noted and we have added the adjective "pertinent" in that rule where appropriate.

COMMENT: ARM 24.5.302 RESPONSE TO PETITION, subsections (1) and (1)(e). (1) The Court's use of the term "respondent" needs to be broad enough to accommodate situations where there are allegations against multiple persons or entities that must file a response. One situation arises when there are two insurers named. Another situation arises in the context of Uninsured Employer's Fund cases, where the employee, employer,

and the UEF are all actively participating in the case. Perhaps the Court's rule is adequate, but the Court staff should be alert for petitions where somebody other than the claimant is the petitioner, or the UEF or the Department of Labor and Industry is a party. (1)(e) Same comments as to the use of the word "pertinent" as noted above for ARM 24.5.301(1)(f).

RESPONSE: The Court agrees with the comment and amends the rule to include reference to more than one respondent, plus including the requirement that the responses be served on all parties not just the petitioner. As to suggestion regarding (1)(e), see discussion of ARM 24.5.301(1)(f).

COMMENT: ARM 24.5.303 SERVICE AND COMPUTATION OF TIME, subsections (1) and (7). (1) This rule may be made clearer by inserting "party" for "claimant". (7) In the fourth sentence, the proposed changes require that the signature of an attorney or party constitutes a certificate that "the attorney" has read the pleading, etc., and that it has merit. If the obligation should rest upon the person who signs the pleading (be they attorney or a party), the phrasing should be "the person", rather than "the attorney".

RESPONSE: The Court agrees with these comments and has made the necessary changes.

COMMENT: ARM 24.5.308 JOINING THIRD PARTIES, subsection (2). The timing of the motion should be 30 days after service, not filing, of the petition. The Court's Advisory Committee on rules made that suggestion for other rules that the Court may be amending in the near future. Use of the date of service would be consistent with the timing of other provisions, such as discovery. Use of the service date would also make the provision internally consistent with the use of the service date for the answer brief.

RESPONSE: This rule will be amended to indicate that the timing for the filing of the motion to join a third party must be 30 days from the **service of the petition by the Court**.

COMMENT: ARM 24.5.309 INTERVENTION, subsection (2). The timing of the motion should be 30 days after service, not filing, of the petition. See comments to 24.5.308, above.

RESPONSE: Same discussion as for ARM 24.5.308, above.

COMMENT: ARM 24.5.343 ATTORNEY FEES, subsection (2)(b). The timing of the objection should be 20 days from service, not filing, of the claim, for the same reasons as discussed above.

RESPONSE: The Court agrees with this comment and will amend its rule.

COMMENT: NEW RULE I (ARM 24.5.306) FORM OF PAPER, subsections (3), (4) and (7). (3) The Department suggests that the rule should permit the use of either white or unbleached paper. White or unbleached paper is easily recyclable. The Department notes that the current proposal does not expressly prohibit use of colored paper, such as pink or blue, and that language requiring either white or unbleached paper would eliminate the use of other colors of paper. (4) The Department notes that there are no margin requirements stated. If for no other reason than to ensure that there is adequate room to two-hole punch at the top of papers, perhaps the Court should consider specific margin requirements. The Montana Supreme Court [Rule 27] requires top, bottom and right hand margins of at least 1 inch, and a left hand margin of at least 1½ inches. (7) The double negative is confusing and the Court may want to make a change to make this rule clearer. Changing "or" to "except" may help to clarify this rule.

RESPONSE: The Court agrees with these comments and will amend the rule.

COMMENT: It would be beneficial to encourage parties to file more concise pleadings. This could be accomplished by emphasizing the Court's preference for brevity and giving the Court express authority to return pleadings which are rambling or verbose. It is hoped that this general statement and the potential threat of having pleadings returned will make it unnecessary for the Court to consider more drastic measures, such as imposing page limits.

RESPONSE: The court will adopt this suggestion regarding brevity. It will be included in **NEW** RULE ARM 24.5.306 by amending the catch phrase to read BREVITY OF PLEADINGS AND FORM OF PAPER PRESENTED FOR FILING. The language is inserted as subparagraph (1) with all subsequent paragraphs being renumbered.

3. The Office of the Workers' Compensation Judge has adopted, amended and repealed the rules as proposed with the following changes:

ARM 24.5.302 RESPONSE TO PETITION (1) Within 20 days after the service of a petition by the court, the respondent(s) ~~a response~~ shall ~~be~~ served upon the petitioner and all other parties, and ~~filed~~ with the court, a response ~~by the respondent. The response~~ which shall include the following information:

(a) through (e) remain the same.

AUTH: Sec. 2-4-201, MCA IMP: 2-4-201, 39-71-2901, MCA

ARM 24.5.303 SERVICE AND COMPUTATION OF TIME (1) The court will serve the furnished copies of the petition upon adverse parties and others, as designated in the petitioner's instructions, by mailing them at Helena, Montana, with first class

postage prepaid. If the respondent is an unrepresented ~~claimant~~ party or anyone other than an insurer, then the petition shall be mailed by certified mail with return receipt requested. Where service is made by certified mail and a signed return receipt is not received by the court within 14 days, the court may order the petitioner to serve the petition in accordance with Rule 4(B) M. R. Civ. P. The petitioner is responsible for providing correct names and addresses of all parties to be served.

(2) through (6) remain the same.

(7) Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in his/her individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the pleading, motion, or other paper and state his/her address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate that the person ~~attorney~~ has read the pleading, motion, or other paper; that to the best of his/her knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney fee.

AUTH: Sec. 2-4-201, MCA IMP: Sec. 2-4-201, 39-71-2901, MCA

ARM 24.5.308 JOINING THIRD PARTIES (1) remains the same.

(2) Unless otherwise permitted by order of the court, a motion to join a third party must be ~~made~~ served within 30 days of the service ~~filing~~ of the petition by the court. The motion shall be filed and served on all parties and the proposed third party. Any party and the proposed third party shall have 10 days from the date of service to file objections to the motion. The court may, for good cause shown, grant joinder on such terms and conditions as are necessary to protect the interests of the existing parties, including the interest of a speedy remedy.

(3) remains the same.

AUTH: Sec. 2-4-201, MCA IMP: Sec. 2-4-201, 39-71-2901, MCA

ARM 24.5.309 INTERVENTION (1) remains the same.

(2) Unless otherwise permitted by order of the court, a motion to intervene must be ~~filed~~ served within 30 days of the

~~filing~~ service of the petition by the court. The motion shall state the grounds upon which intervention is sought. A copy of the motion, supporting brief and any affidavits shall be served upon all parties. Any party to the dispute shall have 10 days following service to file an answering brief. The court, in its discretion, will determine whether or not to allow intervention.

(3) remains the same.

AUTH: Sec. 2-4-201, MCA IMP: Sec. 2-4-201, 39-71-2901, MCA

ARM 24.5.317 MEDICAL RECORDS (1) Prior to any scheduled trial and within the time set by the scheduling or other order of the court, the parties shall exchange all pertinent medical records in their possession relating to the claimant's condition, other than records of professional consultants who have not examined the claimant and who will not be witnesses at trial or whose records a party does not intend to offer into evidence. Failure to exchange any medical record by the exchange deadline shall preclude its use at trial, except by stipulation of the parties or for good cause.

(2) and (3) remain the same.

AUTH: Sec. 2-4-201, MCA IMP: Sec. 2-4-201, 39-71-2901, MCA

ARM 24.5.343 ATTORNEY FEES (1) through (2)(a) remain the same.

(b) Within 20 days, following the ~~filing~~ service of a claim for costs and attorney fees, any party to the dispute may file an objection to the reasonableness of the claimed costs and fees, specifically identifying the objectionable portions of the claim and stating the reasons for the objection. General allegations to the effect that the award is unreasonable shall not be sufficient.

(c) through (e) remain the same.

AUTH: Sec. 2-4-201, MCA IMP: Sec. 2-4-201, 39-71-2901, MCA

NEW RULE ARM 24.5.306 BREVITY IN PLEADINGS AND FORM OF PAPER PRESENTED FOR FILING (1) The court encourages brevity in all pleadings and other documents. Documents which in the court's opinion are rambling or verbose may be returned to the party who submitted the document, with instructions to correct any deficiencies and make the document more concise.

(~~1~~2) and (~~2~~3) remain the same.

(~~3~~4) All documents shall be on standard quality, ~~opaque~~ white or unbleached, unglazed, acid-free recycled paper, and be a minimum of 25% cotton fiber content and a minimum of 50% recycled content, of which 10% shall be post-consumer waste.

(~~4~~5) All documents filed with the court shall be single spaced with double spacing between paragraphs, ~~and~~ printed on one side ~~only~~ of the paper, and with margins of 1 inch on all sides except the top margin which shall be 1½ inches.

(~~5~~6) and (~~6~~7) remain the same.

(~~7~~8) Nonconforming papers may not be filed without leave of the court ~~or~~ except in the case of an unrepresented ~~claimant~~ party.

AUTH: Sec. 2-4-201, MCA IMP: Sec. 2-4-201, 39-71-2901, MCA

The amendments to, adoption of and repeal of these rules are necessary in order to comply with Supreme Court decisions regarding procedures and those changes to the Workers' Compensation Act which were made during the 1987 and 1989 legislative sessions.

4. These rules become effective January 14, 1994.

CLARICE BECK
RULE REVIEWER

MIKE McCARTER, JUDGE

December 30, 1993
CERTIFIED TO THE SECRETARY OF STATE

BEFORE THE DEPARTMENT OF STATE LANDS
AND BOARD OF LAND COMMISSIONERS
OF THE STATE OF MONTANA

In the matter of the amendment of A.R.M. 26.3.157, pertaining to the posting of state lands to prevent trespass.	)))	CORRECTED NOTICE OF AMENDMENT OF A.R.M. 26.3.157

TO: All Interested Persons

1. On July 15, 1993, the Department of State Lands and Board of Land Commissioners published notice of proposed amendment of A.R.M. 26.3.157 at page 1471 of the 1993 Montana Administrative Register, Issue No. 13. On October 28, 1993, the agency published notice of adoption of amendment to the rule, with certain changes made in response to comments, at page 2536 of the 1993 Montana Administrative Register, Issue No. 20.

2. In the notice of adoption the words "or grazing licensee," which the Board included on the fifth line of 26.3.157(3) as part of its amendments, were inadvertently omitted.

3. The correct text of the amendments to 26.3.157(3) is as follows:

(3) The state reserves the right to sell or otherwise dispose of any interest other than that for which the lessee or licensee has leased or licensed the premises, including hunting or fishing access privileges on state land; however, the lessee OR GRAZING LICENSEE may post state land using blue paint to prevent trespass by unauthorized persons. ~~The lessee~~ BUT may not use any other method, including orange paint, to post the land. POSTING WITH BLUE PAINT MUST MEET THE SAME REQUIREMENTS AS ARE IMPOSED BY 45-6-201, MCA, FOR POSTING OF PRIVATE LAND WITH FLUORESCENT ORANGE PAINT.

4. Replacement pages for the corrected notice of amendment were submitted to the Secretary of State on December 31, 1993.

Reviewed by

John F. North
Chief Legal Counsel

Arthur R. Clinch
Commissioner

Certified to the Secretary of State January 3, 1994.

BEFORE THE DEPARTMENT OF STATE LANDS
AND BOARD OF LAND COMMISSIONERS
OF THE STATE OF MONTANA

In the matter of the adoption of a new rule pertaining to rental rates for grazing leases and licenses, rental rates for cabinsite leases and fees for general recreational use licenses.	))))))	NOTICE OF ADOPTION

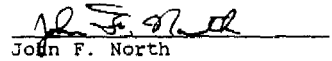
To: All Interested Persons

1. On October 28, 1993, the Department of State Lands and Board of Land Commissioners published notice of proposed adoption of a new rule setting the minimum rental rates for state grazing leases and licenses, at page 2496 of the 1993 Montana Administrative Register, Issue No. 20.

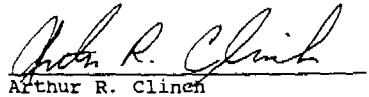
2. The agency has adopted the rule as proposed and has designated it as ARM 26.3.166.

3. The agency received two substantive comments. The State Land Board Advisory Council advised the agency that it is working on recommended permanent lease and fee rates and recommended adoption of the proposed rule to be in effect in the interim until the Council has completed its work. Mr. Bill Donald recommended that the recent expansion of general recreational use to include hiking and birdwatching should result in a one dollar per AUM decrease in the grazing rental rate and a five dollar increase in the price of a recreational use license. The agency rejected the proposed change because there is no study or data to indicate that the expansion of general recreational use has increased the value of its recreational use license or decreased the value of grazing leases.

Reviewed by:



John F. North
Chief Legal Counsel



Arthur R. Clinch
Commissioner

Certified to the Secretary of State January 3, 1994.

BEFORE THE DEPARTMENT OF STATE LANDS
AND BOARD OF LAND COMMISSIONERS
OF THE STATE OF MONTANA

In the matter of the adoption of a new rule pertaining to the assessment of fire protection fees for private lands under direct state fire protection.	)))))	NOTICE OF ADOPTION

TO: All Interested Persons

1. On August 12, 1993, the Department of State Lands and Board of Land Commissioners published notice of proposed adoption of a new rule regulating the assessment of fire protection fees on owners of classified forest land, or of the timber located on such land, for which the Department of State Lands has wildland fire protection responsibility, at page 1881 of the 1993 Montana Administrative Register, Issue No. 15.

2. The agency has adopted the rule as proposed with one non-substantive modification to clarify ambiguous language. The rule is adopted and reads as follows:

RULE I (26.6.261) FORMULA TO SET LANDOWNER ASSESSMENTS FOR FIRE PROTECTION

(1) Same as proposed rule.

(2) The individual assessments must be established using the following criteria:

(a) Same as proposed rule.

(b) A person who owns more than 20 acres of land for which the Department provides protection shall, in addition to the fee assessed pursuant to (a), pay a per acre fee for each whole acre that the person owns in excess of 20 acres. The total of all ~~acreage~~ assessments statewide from persons who own more than 20 acres must be as close as administratively possible to 50% of the total statewide assessment.

(3) Same as proposed rule.

3. The agency received no substantive comments on the proposed rule.

Reviewed by:

John F. North
Chief Legal Counsel

Arthur R. Clinch
Commissioner

Certified to the Secretary of State January 3, 1994.

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

In the matter of the amendment of rule 46.12.3002 pertaining to determination of eligibility for medicaid disability aid	))))	NOTICE OF THE AMENDMENT OF RULE 46.12.3002 PERTAINING TO DETERMINATION OF ELIGIBILITY FOR MEDICAID DISABILITY AID

TO: All Interested Persons

1. On November 24, 1993, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rule 46.12.3002 pertaining to determination of eligibility for medicaid disability aid at page 2758 of the 1993 Montana Administrative Register, issue number 22.

2. The Department has amended rule 46.12.3002 as proposed.

3. No written comments or testimony were received.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State January 3, 1994.

VOLUME NO. 45 OPINION NO. 20

INITIATIVE AND REFERENDUM - Power to amend law pending referendum election;
INITIATIVE AND REFERENDUM - Power to repeal law subject to pending referendum election;
STATUTES - Effective date of law approved by referendum after suspension by referendum petition;
MONTANA CODE ANNOTATED - Sections 1-2-109, 1-2-201(1), 13-27-105; MONTANA CONSTITUTION OF 1889 - Article V, section 1;
MONTANA CONSTITUTION OF 1972 - Article III, section 5;
MONTANA LAWS OF 1993 - Chapter 634;
OPINIONS OF THE ATTORNEY GENERAL - 45 Op. Att'y Gen. No. 18 (1993), 42 Op. Att'y Gen. No. 21 (1987).

HELD: 1. The Legislature lacks the power to modify the measure upon which the voters will vote in the election on IR 112. That measure is HB 671, as codified in 1993 Mont. Laws, ch. 634.

2. The Legislature retains the power to enact measures prior to the referendum election on IR 112 which change the taxation of income and corporate licenses. Such measures may be enacted contingent upon the approval of HB 671.

3. The Legislature lacks the power to repeal legislation whose effectiveness has been suspended by referendum petition under Mont. Const. art. III, § 5, until the legislation has become effective following a vote of the people.

4. If approved by the voters, HB 671 becomes effective upon the completion of the canvass of the election results.

5. Approval of HB 671 would include approval by the people of its retroactive application to tax years beginning after December 31, 1992.

December 16, 1993

Hon. Fred Van Valkenburg
President
Montana State Senate
Capitol Station, 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 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 amend HB 671? If so, what effect would the amendment have on the referendum election?

3. 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?

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 asked that I answer the questions you pose serially rather than in a single opinion, due to the exigencies of the current special legislative session. I have earlier submitted a response to question 1 under separate cover. 45 Op. Att'y Gen. No. 18 (1993). My responses to questions 2, 3 and 4 follow herein.

I.

The Montana Supreme Court has described the referendum as a species of legislative action, akin to submission of a bill to a third house of the legislature for its concurrence prior to its finally becoming law. State ex rel. Hay v. Alderson, 49 Mont. 387, 407, 142 P. 210, 213 (1914). However, the analogy between the referendum and a third house of the legislature is not perfect, since the people lack the ability, which a legislative chamber has, to enact amendments to a referred law. Their choice, rather, is to approve or reject it as is. The referendum is, in effect, a popular veto of the actions of the legislative assembly. Id.

Your second question asks whether and to what extent the legislature may amend HB 671 prior to the referendum election. The reference to amendments to HB 671 lends itself to confusion. HB 671's effectiveness is suspended, and it will not become effective until that suspension is lifted through an affirmative vote of the people. Technically, there is nothing for the legislature to amend until such time as HB 671 is in effect or finally approved by the voters. There is, however, a referendum petition which will be the subject of a public vote at some time in the future. There is also a body of law with reference to income and corporate license taxes. Your inquiry deals with the extent of the legislature's power to enact laws which either affect the wording of the pending referendum ballot issue or change the laws with respect to income and corporate license taxes.

Your question must be divided into two parts. First, does the legislature have the power to change the text of the law which will be referred to the voters in the IR 112 election? Second, does the legislature retain the power, prior to the IR 112 election, to make changes in the income and corporate license tax laws, either as interim measures to be in effect prior to the election or as changes in the law to become effective contingent upon approval of IR 112 by the voters?

The power of the legislature is plenary, such that the legislature may enact laws on any subject not forbidden by the constitution. See, e.g., State ex rel. Bonner v. Dixon, 59 Mont. 58, 76, 195 P. 841, 844 (1921). The constitutions of some states have affirmatively removed initiated or referred laws from the legislature's power. See, e.g., Ward v. Industrial Comm'n, 70 Ariz. 271, 219 P.2d 765 (1950) (applying art. IV, pt. 1, § 1(6) of the Arizona Constitution, which prohibits the legislature from amending or repealing initiated or referred laws which have been approved by the voters). Montana's constitution has no such language, and the Montana Supreme Court has clearly held that the legislature retains the power to modify referred laws. State ex rel. Goodman v. Stewart, 57 Mont. 144, 150-51, 187 P. 641, 643 (1920); 42 Op. Att'y Gen. No. 21 (1987). In First Continental Sav. & Loan v. Director, 229 Md. 293, 183 A.2d 347, 350-51 (1962), the Maryland Court of Appeals followed this reasoning in rejecting a claim that the filing of referendum petitions divested the legislature of the power to adopt a measure pending the referendum election.

I find the reasoning of the court in Ginsburg v. Kentucky Util. Co., 83 S.W.2d 497 (Ky. Ct. App. 1935), persuasive on this point as well. The case concerned a local ordinance providing for construction of a municipal electric utility. The voters petitioned for a referendum election on the ordinance, and they were granted an injunction against the sale of the bonds contemplated by the ordinance until such time as the measure was approved by the voters. After the petition was filed, the town council repealed the ordinance. The court held that the

repealer did not violate the injunction, nor did it unlawfully evade the referendum process. The voters sought the referendum specifically to prevent the ordinance from taking effect. The town council gave them the result they sought by repealing the ordinance. As long as the repealer was not a subterfuge under which the town sought to reenact a similar ordinance and evade the referendum election, the court found no impropriety in the repealer.

The holding in Ginsburg is consistent with what appears to be the majority rule in other jurisdictions, that a legislative body retains the power to amend a law pending a referendum election, so long as the legislative body acts in good faith and does not seek to evade the referendum process by repealing and subsequently reenacting the referred law without significant change. See, e.g., Wicomico County v. Todd, 260 A.2d 328 (Md. 1970); Gilbert v. Ashley, 209 P.2d 50, 51 (Cal. Ct. App. 1949); Utah Power & Light Co. v. Ogden, 79 P.2d 61 (Utah 1938); Keighly v. Bench, 63 P.2d 262, 265 (Utah 1936); Megnella v. Meining, 157 N.W. 991, 992 (Minn. 1916); see also Annotation, 33 A.L.R.2d 1118, 1130-34 (1953) (collecting cases); but see Oklahoma Tax Comm'n v. Smith, 610 P.2d 794, 806 (Okla. 1980) (contra); In re Referendum Pet. No. 1, 220 P.2d 454, 459 (Okla. 1950) (contra); Opinion of the Justices, 174 A. 853, 854 (Me. 1933) (contra). The Montana Supreme Court has not had occasion to decide this issue, but I believe it would follow the majority rule.

In Oklahoma Tax Comm'n v. Smith, 610 P.2d 794 (Okla. 1980), the Oklahoma Supreme Court dealt with a related but distinct issue, holding that the legislature retained the power to adopt laws dealing with subject matter which was before the voters in a pending initiative election. The court distinguished the situation presented by your request for opinion, suggesting that the rule with respect to a referendum would be different and that the legislature could not amend the law in an area in which a referendum election was pending. Id. at 806, citing In re Referendum Pet. No. 1, 220 P.2d 454 (Okla. 1950).

The latter observation is dictum, and for the reasons discussed herein I do not find it persuasive. I do agree with the Smith court as to one aspect of its opinion, however. In reaching its conclusion, the Oklahoma court held that the legislature lacks the power to change the terms of the measure upon which the people will vote. 610 P.2d at 806. The issue which will be submitted to the voters in the referendum election currently scheduled for November 8, 1994, will be the terms of HB 671 as enacted by the Fifth-third Legislative Assembly and codified in 1993 Mont. Laws, ch. 634. That is the "act of the legislature" upon which the people have exercised their power of referendum, see Mont. Const. art. III, § 5, and the legislature does not have the power to require submittal of a different issue in the IR 112 referendum election. A bill requiring that the referendum election be conducted with respect to a different amended act would clearly infringe the people's right of

referendum. Thus, it is my opinion that the legislature does not have the power to enact a bill changing HB 671 as it will be submitted to the voters.

However, the ordinary powers of the legislature have not been otherwise diminished by the referendum power found in article III, section 5 of the constitution. The legislature remains free to adopt legislation dealing with income and corporate license taxes. Thus, the legislature would have the power to enact a law providing that, upon the contingency of HB 671 becoming effective following a referendum election, its provisions will be amended in some regard, or even repealed entirely. Cf. 2 Sutherland Statutory Construction § 33.07 & n.6 (5th ed. 1993) (collecting cases holding that legislation may be made effective contingent upon a vote of the people). As noted above, the Montana Supreme Court has clearly held that the legislature has the power to amend laws adopted by initiative or referendum. State ex rel. Goodman v. Stewart, 57 Mont. 144, 150-51, 187 P. 641, 643 (1920); 42 Op. Att'y Gen. No. 21 (1987).

The legislature could also make changes in the income and corporate license tax laws, including changes effective only during the period when HB 671's effectiveness is suspended by the current referendum petitions. If the law were otherwise, the legislature would be powerless to act in the face of an emergency situation which could conceivably arise either from the people's power to suspend the effectiveness of laws pending a referendum or from other unrelated exigencies.

A hypothetical example illustrates the point. HB 671, in addition to adopting changes in the tax laws, repealed the existing provisions for itemized deductions for income tax purposes. 1993 Mont. Laws, ch. 634, § 22. Suppose, for example, the legislature had placed the repealer language from HB 671 in a separate bill rather than incorporating it in HB 671. The suspension of HB 671 effectively reinstated the income tax laws previously in effect, to the extent they had been changed by HB 671. However, the referral of HB 671, and the suspension of its effectiveness, would not of itself supplant a separately enacted repeal of the existing tax deduction laws. Under this hypothetical state of facts, if the referendum on HB 671 were to have the effect of divesting the legislature of the power to act in this area pending the election, Montana would have an income tax structure with no provisions for itemized deductions from income. Nothing would preclude the legislature from enacting provisions allowing itemized deductions pending the referendum election in such a case.

The universe of potential amendments to existing corporate and income tax law is endless, and an attempt to evaluate all of them quickly enters the realm of speculation and conjecture. The legislature should be aware, however, that courts in other jurisdictions have held that amendments may not be used to

infringe the people's power of referendum. Consequently, legislation whose effect was to undo the suspension of HB 671 prior to the referendum election might be vulnerable to a successful court challenge, and could not be relied upon to obviate the need for an election on IR 112. See Citizens for Financially Responsible Gov't v. Spokane, 99 Wash. 2d 413, 662 P.2d 845, 852 (1983).

In sum, the legislature retains the power to enact laws dealing with the subject matter of income and corporate license taxes, despite the pending referendum election on HB 671. The enactment of legislation in this area cannot change the text of the measure to be submitted to the voters and any enactments of the legislature in this area will not affect the necessity of holding a referendum election on IR 112.

II.

Your third question deals with the legislature's power to repeal HB 671 prior to the referendum election. Because of the peculiar status of HB 671 as a law suspended by referendum petition, it is my opinion that the Legislature does not have the power to repeal it.

A bill may not be "repealed" prior to its enactment by the legislative authority. Repeal signifies the abrogation of one statute by another. Butte & Boston Consol. Mining Co. v. Montana Ore Purchasing Co., 24 Mont. 125, 133, 60 P. 1039, 1042 (1900). HB 671 has not been finally enacted by the legislative authority of the State of Montana, and it is therefore not a "statute." It lacks the concurrence of the people, and pursuant to the terms of Mont. Const. art. III, § 5(2), it becomes operative as law "only after it is approved at an election." See also Mont. Code Ann. § 13-27-105(3). Because its effectiveness is suspended pending further legislative action through the referendum process, it is not a statute and it may not be repealed by the legislature until after the people have given it their approval.

If HB 671 had not been suspended by the referendum petitions, different considerations would come into play. Article III, section 5, provides that a law which has not been suspended "is in effect." The Montana Supreme Court, in interpreting the predecessor provision of the 1889 constitution, held that a law which has not been suspended is in effect until the result of the election disapproving it is proclaimed as provided by law. Lodge v. Ayers, 108 Mont. 527, 534-35, 91 P.2d 691, 694-95 (1939); Fitzpatrick v. Board of Examiners, 105 Mont. 234, 240-41, 70 P.2d 285, 287-88 (1937). I express no opinion here on the issue, which your opinion request does not present, of whether the legislature may repeal a law which is the subject of a pending referendum election but whose effectiveness has not been suspended under Mont. Const. art. III, § 5.

There is authority in other states for the proposition that repeal of a law subject to a pending referendum election obviates the need for the election to be held. See, e.g., Yakima v. Huza, 407 P.2d 815 (Wash. 1965). Since it is my opinion that the legislature may not repeal HB 671 prior to its final enactment by the people, I need not address the issue of whether repeal would obviate the need for an election.

However, the legislature retains the power to withdraw its consent to a law it has enacted which has been the subject of a successful referendum petition. Just as the concurrence of the people is required to sustain such a law, the continued concurrence of the legislature is required to maintain its effectiveness. The legislature retains the power to repeal laws enacted by initiative or referendum. State ex rel. Goodman v. Stewart, 57 Mont. 144, 150-51, 187 P. 641, 643 (1920); 42 Op. Att'y Gen. No. 21 (1987). If HB 671 were to be approved by the people, the legislature would retain the power to call itself into session the day after the election results were official and repeal the law in its entirety, if it chose to do so. The only lawful check on such activity, other constitutional requirements having been observed, is in the responsibility of the legislators to answer to the voters at the ballot box for their actions. See Oklahoma Tax Comm'n v. Smith, 610 P. 794, 806 (Okla. 1980).

III.

Your fourth question deals with the effective date of HB 671 if it is approved by the voters in the referendum election. You inquire whether HB 671 can have any effect on the tax liability of a Montana taxpayer before the time it is approved by the voters.

With regard to this question, the language of the 1889 constitution is clearer than that of its 1972 counterpart. Article V, section 1 of the 1889 constitution provided, in pertinent part:

> Any measure referred to the people shall still be in full force and effect unless such petition be signed by fifteen per cent. of the legal voters of a majority of the whole number of the counties of the state, *in which case the law shall be inoperative until such time as it shall be passed upon at an election, and the result has been determined and declared as provided by law*.

(Emphasis added.) The intent of this language is clear. It holds "inoperative" a suspended law "until" it has been approved by the people in a referendum election.

Article III, section 5(2) of the 1972 constitution contains the following language on the effectiveness of a law subject to a referendum:

> An act referred to the people is in effect until suspended by petitions signed by at least 15 percent of the qualified electors in a majority of the legislative representative districts. If so suspended the act shall become operative only after it is approved at an election, the result of which has been determined and declared as provided by law.

While the first sentence of the 1972 constitutional provision, read in isolation, would appear to allow a construction that a suspended law is effective with respect to transactions which occur "until" petitions bearing sufficient signatures have been filed to suspend it, in my opinion this would be an erroneous construction for two reasons. First, and most important, it would not give full effect to the second sentence of the section, which states that a suspended provision "shall become operative only after it is approved at an election." (Emphasis added.) This sentence clearly contemplates that a suspended provision is "inoperative" in the same sense as that intended by the 1889 constitution, i.e., it is of no force and effect until approved at an election.

Second, there is no indication in the constitutional convention proceedings that the change in language between the 1889 and 1972 constitutions was intended to work a change in the law. Rather, the transcripts and committee reports with respect to the provision which became article III, section 5 clearly suggest that the convention thought it was using clearer and more modern language to express the same legal concepts which were found in the 1889 constitution. See, e.g., II 1972 Mont. Const. Conv. 820 (1981) (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 (1981) (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 legislature has specifically addressed the effectiveness of initiatives and referenda in Mont. Code Ann. § 13-27-105, which provides in pertinent part:

> (3) Unless specifically provided by the legislature in an act referred by it to the people or until suspended by a petition signed by at least 15% of the qualified electors in a majority of the legislative representative districts, an act referred to the people is in effect as provided by law until it is approved or rejected at the election. An act that is

> rejected is repealed effective the date the result of the canvass is filed by the secretary of state under 13-27-503. An act referred to the people that was in effect at the time of the election and is approved by the people remains in effect. *An act that was suspended by a petition and is approved by the people is effective the date the result of the canvass is filed by the secretary of state under 13-27-503.*

(Emphasis added.) In my opinion, HB 671 is currently not "in effect," and will not be "in effect" until the results of an election approving it are established by canvass, as provided in Mont. Code Ann. § 13-27-105.

If HB 671 were silent with respect to its effective date, the above discussion would be dispositive, and HB 671, if approved by the voters, would be applicable to income earned after it becomes effective as provided in Mont. Code Ann. § 13-27-105. However, HB 671 contains a peculiar effective date provision which, in my opinion, compels a different result for this piece of legislation.

All legislation has an effective date, either a date particularly stated in the bill itself, or, if no date is specified, either January 1, July 1 or October 1 following passage and approval, depending on the nature of the statute. Mont. Code Ann. § 1-2-201(1). Further, legislation may be made to operate retroactively in some cases if the legislature expressly so declares. Mont. Code Ann. § 1-2-109.

HB 671 contains the following effective date provision:

> [This act] is effective on passage and approval and applies retroactively within the meaning of 1-2-109, to tax years beginning after December 31, 1992.

1993 Mont. Laws, ch. 634, § 23. This provision is part of HB 671, and will be among the provisions submitted to the voters for approval pursuant to IR 112. The voters will not be given the option of amending HB 671 to change its effective date, since the referendum process envisions only a choice between approval, in toto, of the legislative enactment, or disapproval. If the voters approve HB 671, it is my opinion that they will have approved its retroactive application to tax years beginning after December 31, 1992.

You have not asked my opinion as to the specific issue of whether the legislature, or the people through referendum, may, consistent with the federal or state constitutions, enact a bill changing the tax rate applied to income earned in earlier tax years, as HB 671 would do if approved by the voters. I express no opinion herein on that question, in keeping with the longstanding practice of this office to avoid expressing opinions on the constitutionality of proposed legislation,

especially when no opinion on the constitutional issue has been requested.

IV.

The discussion in Parts I and II above refers only to the existence of legislative power under our constitution to repeal HB 671 prospectively or to change the income and corporate license tax laws pending the referendum election. I express no opinion as to the advisability of any substantive amendments to Montana's tax laws pending the outcome of the referendum election. I note, however, that the Montana Supreme Court has been vigilant in protecting the people's right of initiative and referendum, and any legislation touching these issues certainly will, if challenged, receive exacting scrutiny by the courts to ensure that it does not interfere with the right of the people to express their will with reference to HB 671.

THEREFORE, IT IS MY OPINION:

1. The Legislature lacks the power to modify the measure upon which the voters will vote in the election on IR 112. That measure is HB 671, as codified in 1993 Mont. Laws, ch. 634.

2. The Legislature retains the power to enact measures prior to the referendum election on IR 112 which change the taxation of income and corporate licenses. Such measures may be enacted contingent upon the approval of HB 671.

3. The Legislature lacks the power to repeal legislation whose effectiveness has been suspended by referendum petition under Mont. Const. art. III, § 5, until the legislation has become effective following a vote of the people.

4. If approved by the voters, HB 671 becomes effective upon the completion of the canvass of the election results.

5. Approval of HB 671 would include approval by the people of its retroactive application to tax years beginning after December 31, 1992.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/cdt/dm

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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