# RESERVE MONTANA ADMINISTRATIVE REGISTER



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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 5

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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BEFORE THE BOARD OF FUNERAL SERVICE
DEPARTMENT OF COMMERCE
STATE OF MONTANA

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| In the matter of the proposed amendment of rules pertaining to reciprocity, fees, definitions, continuing education, and sponsors; repeal of rules pertaining to standards for approval, prior approval of activities, post approval of activities, review of programs, hearings, attendance record report, disability or illness, hardship exception and other exceptions; and adoption of rules pertaining to crematory operators and technicians | NOTICE OF PROPOSED AMENDMENT, REPEAL AND ADOPTION OF RULES PERTAINING TO THE FUNERAL SERVICE INDUSTRY |

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On April 16, 1995, the Board of Funeral Service proposes to amend ARM 8.30.404, 8.30.407, 8.30.501, 8.30.502 and 8.30.504; repeal ARM 8.30.503, 8.30.505 through 8.30.509, and 8.30.511 through 8.30.513; and adopt new rules pertaining to the funeral service industry.

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

"8.30.404 RECIPROCITY ~~QUALIFICATIONS~~ (1) Upon payment of the proper license fee, the board may issue a license to a person who, at the time of application, holds a current, active license in good standing, as a funeral director, mortician or crematory operator, issued by the proper authority of any state. When a person applies for licensure under this provision, the applicant shall provide information from the other state(s), and the board shall determine whether the requirements for obtaining such other license(s) are substantially equivalent to or stricter than the requirements of Montana law.

(2) Verification of applicant's current license in good standing shall be requested by the applicant to be sent directly from the other state. Applicant shall also submit to the board information concerning the nature of the prior examination, with their completed application forms.

(3) "License" shall mean only those granted by other states under statutory provisions.

(4) A completed application form shall be required from the applicant to initiate consideration for licensing.

(5) All applicants for licensure under this rule shall be required to pass a jurisprudence examination, on Montana laws and rules, administered by the board.

~~(1)~~ (6) ~~A mortician~~ An applicant originally licensed in another state which ~~has~~ requires a reciprocal agreement with Montana may be licensed in Montana ~~after passing a written examination on Montana rules~~ only if a reciprocal agreement has been entered with Montana."

Auth: Sec. 37-19-202, MCA; IMP, Sec. 37-19-305, MCA

REASON: The proposed amendment will outline the procedure to be followed by licensees from other states and clarify that reciprocal agreements are necessary only where the other state requires this.

"8.30.407 FEE SCHEDULE

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| (1) Morticians, ~~application,~~ crematory operator, crematory technician application | | $75.00 |
| (2) Original mortician license fee | | 60.00 |

(2) through (4)(c) will remain the same, but will be renumbered (3) through (5)(c).

| | | |
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| (d) Crematory operator~~, crematory technician~~ | ~~40.00~~ | 60.00 |
| (e) Crematory technician | | 30.00 |

(e) and (f) will remain the same, but will be renumbered (f) and (g).

(5) through (11) will remain the same, but will be renumbered (6) through (12)."

Auth: Sec. 37-1-134, 37-19-202, 37-19-703, MCA; IMP, Sec. 37-1-134, 37-19-301, 37-19-304, 37-19-306, 37-19-402, 37-19-403, 37-19-702, 37-19-703, MCA

REASON: The proposed amendments will establish a mortician original license fee, which is charged to cover the costs of issuing a new license, and create separate fees for crematory operator and crematory technician renewals, as the licenses are not equivalent, and do not represent similar training, responsibility or pay.

"8.30.501 DEFINITIONS (1) through (b) will remain the same.

~~(c) "Approved program or activity" means a continuing education program meeting the standards set forth in these rules, which program has received advance approval by the board pursuant to these rules.~~

~~(d) "Accredited sponsor" means a person or organization sponsoring continuing education activities which has been approved by the board as a sponsor pursuant to these rules.~~

(e) through (g) will remain the same, but will be renumbered (c) through (e)."

Auth: Sec. 37-19-202, 37-19-316, MCA; IMP, Sec. 37-19-316, MCA

REASON: The proposed amendments will delete prior approval references which are no longer appropriate.

"8.30.502 CONTINUING EDUCATION REQUIREMENTS

(1) ~~Beginning June 30, 1984, e~~Each licensee in this state shall submit with his or her renewal application, satisfactory proof of completion of a minimum of 6 clock-hours of continuing education courses ~~approved by the board~~ per year ~~or 12 clock hours of continuing education courses for a two year period. Credit may be given for board approved continuing education programs completed between January 1, 1983 and the effective date of these rules~~.

(a) will remain the same.

~~(b) For those morticians newly licensed in January or February of a given year, the fulfillment of the continuing education requirements will not be required for an 18 month period from the date of licensure.~~

~~(c) For those morticians newly licensed in July of a given year, the fulfillment of the continuing education requirements will not be required for a 12 month period from the date of licensure.~~

(2) Hours of continuing education credit may be obtained by attending and participating in continuing education courses, workshops, seminars or other ~~accepted~~ activities ~~either previously accredited by the board or otherwise~~ meeting the requirements herein ~~and approved by the board~~.

(3) ~~During the time an organization, educational institution, or person is an accredited sponsor, all continuing education programs of such organization or person must have board approval.~~ The board/staff will not preapprove continuing education programs or sponsors. Qualifying criteria for continuing education are specified in these rules. It is the responsibility of the licensees to select quality programs that contribute to their knowledge and competence which also meet these qualifications.

(a) The continuing education program must meet the following criteria:

(i) The activity must have significant intellectual or practical content. The activity must deal primarily with substantive funeral service issues. In addition, the board may accept continuing education activities from other professional groups or academic disciplines if the licensee demonstrates that the activity is substantially related to his or her role as a mortician or crematory operator. A continuing education program is defined as a class, institute, lecture, conference, workshop, tested home study course, cassette, or videotape.

(ii) The activity itself must be conducted or written by an individual or group qualified by practical or academic experience.

(iii) All acceptable continuing education courses must provide the licensee with documentation of program and attendance, containing at least the following information: full name and qualifications of the presentor; title of the presentation attended; number of hours and date of each presentation attended; name of sponsor; and description of the presentation format.

(b) Implementation for continuing education shall be as follows:

(i) One continuing education credit shall be granted for each hour of participation in the continuing education activity. A maximum of three credits per year by cassette, videotape or tested home study will be allowed.

(ii) No continuing education is required for morticians or crematory operators renewing their license for the first time.

(iii) All licensed morticians and crematory operators must submit to the board, on the appropriate year's renewal, a report on a form prescribed by the board summarizing their obtained continuing education credits. The board will review these reports within six months of their receipt, and notify the licensee regarding his/her noncompliance. Licensees found to be in noncompliance with the requirement will be asked to submit to the board for approval a plan to complete the continuing education requirements for licensure. Prior to the next consecutive year's license renewal deadline, those licensees who were found to be in noncompliance will be formally reviewed to determine their eligibility for license renewal. Licensees, who at this time have not complied with continuing education requirements, will not be granted license renewal until they have fulfilled the board-approved plan to complete the requirements. Those not receiving notice from the board regarding their continuing education should assume satisfactory compliance. Notices will be considered properly mailed when addressed to the last known address on file in the board office. No continuing education used to complete delinquent continuing education plan requirements for licensure may be used to meet the continuing education requirements for the next continuing education reporting period.

(iv) If a licensee is unable to acquire sufficient continuing education credits to meet the requirements, he or she may request a waiver. All requests for waiver will be considered by the board of funeral service and evaluated on an individual basis.

(v) It is the responsibility of the licensee to establish and maintain detailed records of continuing education compliance (in the form of programs and documentation of attendance) for a period of two years following submission of a continuing education report.

(vi) From the continuing education reports submitted each year, the board will randomly audit 5% of the reports and request documentation of completion for continuing education credits reported.

(4) A licensee desiring to obtain credit for completing more than 12 hours of ~~approved~~ continuing education credits during any two licensure years shall report such carry-over credit to the board ~~on or before the expiration of his or her current license year~~ with the annual renewal. Such carry-over credit shall be limited to no more than six clock hours.

(5) will remain the same."

Auth: Sec. 37-19-202, 37-19-316, MCA; IMP, Sec. 37-19-316, MCA

REASON: The proposed amendments will implement a new continuing education reporting program and eliminate the previous cumbersome and time-consuming program of prior approval of sponsors and continuous reporting of continuing education hours throughout the year. The new program will put the burden on the licensees to attend programs which meet Board requirements; keep records of programs and their attendance; submit the reports with their renewal form annually; and be subject to a random audit to test compliance.

"8.30.504 ~~ACCREDITATION OF~~ SPONSORS (1) ~~The board may require of an organization or person not previously accredited by the board, which desires accreditation as a sponsor of courses, programs, or other continuing education activities, its education history for the preceding 2 years, including approximate dates, subjects offered, total hours of instruction presented, and the names and qualifications of instructors. By January 1 of each year, commencing January 1984, accredited sponsors may be required to report to the board in writing the education programs conducted during the preceding calendar year, on a form approved by the board. The board may at any time reevaluate an accredited sponsor. If after such reevaluation, the board finds there is a basis for consideration of revocation of the accreditation of a sponsor, the board shall give notice in writing to that sponsor of the hearing on the revocation of accreditation at least 30 days prior to such hearing.~~ The board will recognize courses, programs or other continuing education activities sponsored by Montana funeral directors association (MFDA), national selected morticians (NSM), national funeral directors association (NFDA), independent funeral directors association (IFA), federated funeral directors of America, Montana coroner's association, order of golden rule, Montana department of justice coroner's training programs and funeral industry supplier programs. All other programs must meet the criteria established in ARM 8.30.502."

Auth: Sec. 37-19-202, 37-19-316, MCA; IMP, Sec. 37-19-316, MCA

REASON: The proposed amendment will set forth the sponsors the Board considers as appropriate to meet the continuing education criteria without further review, to aid licensees in determining which CE programs they may wish to attend.

3. The Board is proposing to repeal ARM 8.30.503, 8.30.505, 8.30.506, 8.30.507, 8.30.508, 8.30.509, 8.30.511, 8.30.512 and 8.30.513. These rules appear at pages 8-932 through 8-934.1, Administrative Rules of Montana. The authority sections are 37-19-202, 37-19-316, MCA, and the implementing section is 37-19-316, MCA. The reason for the proposed repeal is the implementation of a new continuing education program.

4. The proposed new rules will read as follows:

"I DESIGNATION AS CREMATORY OPERATOR OR TECHNICIAN (1) A person already holding a current Montana mortician license in good standing may be designated as crematory operator or crematory technician without application or fee for a separate crematory operator or crematory technician license. An application for crematory licensure shall note the current mortician license status and number as designation as crematory operator responsible for operations, or crematory technician. A separate renewal fee for this designation shall not be charged.

(2) A licensed crematory shall notify the Board office promptly of any change of crematory operator, and indicate whether the new crematory operator is currently licensed as a Montana mortician in good standing, and will only require a designation as crematory operator, or whether a separate full crematory operator license will be obtained."

Auth: Sec. 37-19-202, MCA; IMP, Sec. 37-19-702, MCA

"II LICENSURE AS A CREMATORY OPERATOR (1) Applicants for original licensure as a crematory operator shall submit an application, on a form prescribed by the board, and the application fee.

(2) The application shall require evidence that:

(a) applicant is at least 18 years of age;

(b) applicant is a high school, or equivalency program graduate, as shown by certified transcripts, degrees, or certificates of completion;

(c) applicant is of good moral character, as shown by two letters of reference, one of which must be from a licensed mortician."

Auth: Sec. 37-19-202, MCA; IMP, Sec. 37-19-703, MCA

"III LICENSURE AS A CREMATORY TECHNICIAN (1) Applicants for original licensure as a crematory technician shall submit an application, on a form prescribed by the board, and the application fee.

(2) The application shall require:

(a) name of licensed crematory facility where applicant will be employed;

(b) name of supervising licensed crematory operator or mortician;

(c) summary of training to be completed by applicant, including subject areas, method of testing, length of training, and name of person providing training."

Auth: Sec. 37-19-202, MCA; IMP, Sec. 37-19-702, 37-19-703, MCA

REASON: The proposed new rules will set forth the method of obtaining a crematory operator or technician designation, including waiver of separate crematory operator or technician licenses or fees, for licensed morticians. The proposed new rules will also set forth procedures for obtaining an original crematory operator or crematory technician license, to ensure compliance with all requirements set forth in the statutes.

5. Interested persons may submit their data, views or arguments concerning the proposed amendment, repeal and adoption in writing to the Board of Funeral Service, Lower Level, Arcade Building, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513, to be received no later than 5:00 p.m., April 13, 1995.

6. If a person who is directly affected by the proposed amendment, repeal and adoption 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 Funeral Service, Lower Level, Arcade Building, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513, to be received no later than 5:00 p.m., April 13, 1995.

7. If the Board receives requests for a public hearing on the proposed amendment, repeal and adoption from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed amendment, repeal and adoption, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 24 based on the 235 licensees in Montana.

BOARD OF FUNERAL SERVICE
JOHN MICHELOTTI, CHAIRMAN

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

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, March 6, 1995.

BEFORE THE BOARD OF OPTOMETRY
DEPARTMENT OF COMMERCE
STATE OF MONTANA

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| In the matter of the proposed amendment of a rule pertaining to general practice requirements | ) ) ) ) | NOTICE OF PROPOSED AMENDMENT OF 8.36.406 GENERAL PRACTICE REQUIREMENTS |

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On April 15, 1995, the Board of Optometry proposes to amend the above-stated rule.

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

"8.36.406 GENERAL PRACTICE REQUIREMENTS (1) will remain the same.

(a) the practice must be owned and under the direct supervision of an optometrist with valid Montana certificate of registration, except that a duly licensed optometrist is not prohibited from associating ~~himself~~ with other duly licensed optometrists and/or medical doctors for the purpose of practicing optometry ~~within the scope of his license~~ in the following manners:

(i) a professional corporation, pursuant to 35-4-101, et seq., MCA;

(ii) a professional limited liability company, pursuant to 35-8-1301, et seq., MCA, in which all managers or shareholders are licensed to practice optometry or medicine;

(iii) a trust in which both the trustor and any trustees are licensed to practice optometry or medicine.

(b) through (3) will remain the same."

Auth: Sec. 37-10-301, 37-10-311, MCA; IMP, Sec. 37-10-301, 37-10-311, MCA

REASON: This amendment is being proposed to acknowledge the option of operating in a limited liability company, professional corporation, or a trust mechanism in which all principals are licensed as optometrists or physicians.

3. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Optometry, Lower Level, Arcade Building, 111 North Jackson, P.O. Box 200513, Helena, Montana 59620-0513, to be received no later than 5:00 p.m., April 13, 1995.

4. If a person who is directly affected by the proposed amendment wishes to present his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request along with any comments he has to the Board of Optometry, Lower Level, Arcade Building, 111 North Jackson, P.O. Box 200513, Helena,

Montana 59620-0513, to be received no later than 5:00 p.m., April 13, 1995.

5. If the Board receives requests for a public hearing on the proposed amendment from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed amendment, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 23 based on the 233 licensees in Montana.

BOARD OF OPTOMETRY
PAUL KATHREIN, CHAIRMAN

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

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, March 6, 1995.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

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| In the matter of the amendment of Accreditation) | ) | NOTICE OF PROPOSED AMENDMENT OF ARM 10.55.601 ACCREDITATION STANDARDS: PROCEDURES |
| | ) | NO PUBLIC HEARING CONTEMPLATED |

To: All Interested Persons

1. On April 17, 1995 the Board of Public Education proposes to amend 10.55.601 Accreditation Standards: Procedures.

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

10.55.601 ACCREDITATION STANDARDS: PROCEDURES (1) through (3) will remain the same.

(4)(a) Effective on January 1, 1992, schools unable, for financial reasons, to meet the requirements of ARM 10.55.705 (1)(d), 10.55.712 ~~(2)~~(1)(a), or 10.55.904 (4)(h) may file an initial notice of deferral with the office of public instruction.

(b) through (f) will remain the same.

AUTH: Sec. 20-2-114 IMP: Sec. 20-2-121

3. The board is proposing this amendment to the rule in order to correct language that has been amended in ARM 10.55.712 by the board.

4. Interested parties may submit their data, views or arguments in writing to Wilbur Anderson, Chairman, Board of Public Education, 2500 Broadway, Helena, MT 59620, no later than April 14, 1995.

5. If a person who is directly affected by the proposed amendment wishes to express their data, views or arguments orally or in writing at a public hearing, they must make written request for a hearing along with any written comments they have to Wilbur Anderson of the Board of Public Education, 2500 Broadway, Helena, MT 59620, no later than April 14, 1995.

6. If the board receives request for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; 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 the those directly affected has been

determined to be 51 as there are 511 active school districts in Montana.

WAYNE BUCHANAN, Executive Secretary
Board of Public Education

Certified to the Secretary of State on 3/6/95.

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

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| In the matter of proposed amendment of ARM 12.6.904 relating to public access below Rainbow Dam and Madison Dam | ) ) ) ) ) | NOTICE OF PROPOSED AMENDMENT<br><br>No Public Hearing Contemplated |

To: All Interested Persons

1. On April 28, 1995, the Fish, Wildlife & Parks Commission (commission) proposes to adopt amendments to ARM 12.6.904 extending the public access closure below Rainbow Dam on the Missouri River and shortening the stretch of the Madison River below Madison Dam where recreational use is limited.

2. The rule, as proposed to be amended, appears as follows:

12.6.904 USE RESTRICTIONS AT MONTANA POWER COMPANY DAMS

(1) In the interest of public health, safety, or protection of property, the following regulations concerning the public use of certain waters of the state of Montana are hereby adopted and promulgated by the Montana fish ~~and game~~, wildlife and parks commission.

(a) The following waters near Montana power company owned and operated hydroelectric dams are closed to all boating, sailing, floating and swimming:

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|---|---|---|
| (i) | Black Eagle: | 500 feet above the dam to 100 feet below the waterfalls; |
| (ii) | Cochrane: | 500 feet above the dam to 500 feet below the dam; |
| (iii) | Flint Creek: | 100 feet above the dam to 150 feet below the dam; |
| (iv) | Hauser: | 250 feet above the dam to 600 feet below the dam; |
| (v) | Hebgen: | 100 feet above the dam and 100 feet below the outlet works; |
| (vi) | Holter: | 150 feet above the dam to 900 feet below the dam; |
| (vii) | Madison: | 600 feet above the dam to ~~900~~ 700 feet below the dam; |
| (viii) | Milltown: | 200 feet above the dam to 200 feet below the dam; |
| (ix) | Morony: | 500 feet above the dam to 500 feet below the dam; |
| (x) | Mystic: | 100 feet above the dam to the dam; |
| (xi) | Rainbow: | 600 feet above the dam to 100 feet below the waterfalls; |
| (xii) | Ryan: | 500 feet above the dam to 100 feet below the waterfalls; |

(xiii) Thompson Falls: 1,020 feet above main channel dam to 500 feet below powerhouse;
(xiv) West Rosebud: 100 feet above the dam to the dam.

~~(ii)~~ (xv) The above closed waters will be identified and delineated by positive boat restraining systems or signs.

(b) The following river and stream channel areas near Montana power company owned and operated dams are closed to all public access below the ordinary high-water mark as defined by 23-2-301, MCA:

(i) Black Eagle: the dam to 100 feet below the waterfalls;
(ii) Hauser: the dam to 100 feet below the dam from December 1 through April 1 annually;
(iii) Mystic: the south side of West Rosebud Creek from the powerhouse to the USGS concrete weir;
(iv) Rainbow: the dam to ~~100 feet below the waterfalls;~~ 4,400 feet below the dam to the east end of the tailrace island adjacent to the Rainbow dam powerhouse;
(v) Ryan: the dam to the east end of Ryan Island.

~~(i)~~ (vi) The above closed areas will be identified by signs or fences installed by Montana power company.

AUTH: 87-1-303, MCA; IMP: 87-1-303 MCA

3. Rationale for the changes are as follows: The proposed rule would close the Missouri River below the ordinary high-water mark to all public access for a distance of 4,400 feet down river from Rainbow Dam. The closure is being considered because of concerns for the safety of the public. New equipment installed by Montana Power Company in 1993 at Rainbow Dam releases water automatically. Spills trigger a light and sound alarm system and water in the river below the dam can rise rapidly. Persons within the high-water marks of the river channel who ignore warning sirens are in danger of being washed down river. The commission, with the support of region 4 of the Department of Fish, Wildlife & Parks, has determined that prohibiting public access to a stretch of the river below the dam is warranted to protect the safety of the public.

The proposed rule also would shorten the recreational restrictions below Madison Dam on the upper Madison from 900 feet to 700 feet below the dam. The shorter stretch is considered adequate to protect public safety.

4. Interested parties may submit their data, views or arguments, either orally or in writing, to Michael Aderhold, Region 4 Supervisor, 4600 Giant Springs Rd, P.O. Box 6610, Great Falls, Montana 59406, no later than April 13, 1995.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he or she must make written request for a hearing and submit this request along with any written comments to Michael Aderhold, Region 4 Supervisor, 4600

Giant Springs Rd, P.O. Box 6610, Great Falls, Montana 59406, no later than April 13, 1995.

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 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.

FISH, WILDLIFE & PARKS
COMMISSION

Robert N. Lane
Rule Reviewer

Patrick J. Graham, Secretary

Certified to the Secretary of State on March 6, 1995.

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

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| In the matter of the proposed adoption of new rules related to the operation of traction engines | ) NOTICE OF PUBLIC HEARING ON ) PROPOSED ADOPTION OF NEW ) RULES |

TO ALL INTERESTED PERSONS:

1. On April 10, 1995, at 10:00 a.m., a public hearing will be held in the first floor conference room at the Beck Building, 1805 Prospect Ave., Helena, Montana, to consider the adoption of new rules related to the operation of traction engines.

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., April 4, 1995, to advise us of the nature of the accommodation that you need. Please contact the Employment Relations Division, Safety Bureau, Attn: Mr. Tim Gottsch, P.O. Box 1728, Helena, MT 59624-1728; telephone (406) 444-6420; TDD (406) 444-5549; fax (406) 444-4140. Persons with disabilities who need an alternative accessible format of this document in order to participate in this rule-making process should contact Mr. Gottsch.

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

RULE I SCOPE OF RULES (1) The department, recognizing the unique historic and educational nature of historic steam traction engines and historic models that are operated only for display purposes, finds that it is not appropriate for historic traction engines to be subject to the same rules that apply to boilers that are in regular productive use throughout Montana.

(2) This subchapter is promulgated in order to provide definitions and rules for the safe operation, inspection, repair and reproduction of historic traction engines covered by Title 50, chapter 74, MCA.

AUTH: Sec. 50-74-101 MCA IMP: Title 50, chapter 74 MCA

RULE II DEFINITIONS APPLICABLE TO TRACTION ENGINES For the purposes of this subchapter, the following definitions apply:

(1) "ASME" means the American society of mechanical engineers.

(2) "ASME code" means the boiler and pressure vessel code of the ASME, as adopted by the department in [RULE III].

(3) "Boiler" means a closed vessel in which water is heated, steam is generated, steam is superheated, or any combination thereof, under pressure or vacuum, for use external

to itself, by the direct application of heat.

(4) "Chief inspector" means the chief state boiler inspector designated by the commissioner of the department.

(5) "Department" means the Montana department of labor and industry.

(6) "Historic model" means a free-lance or scale model boiler built by one or more individuals and not bearing an ASME stamp.

(7) "Historic power boiler" means a standard or non-standard power boiler, including historic models, owned by publicly operated museums, non-profit organizations and individuals who preserve, maintain, exhibit and only occasionally operate these boilers on a not-for-profit basis and for the primary purpose of perpetuating the agricultural and pioneer heritage of Montana.

(8) "National board" means the National Board of Boiler and Pressure Vessel Inspectors.

(9) "National board inspection code" means the manual for boiler and pressure vessel inspectors published by the national board.

(10) "Nonstandard boiler" means a boiler that does not bear the ASME stamp, or the stamp of any jurisdiction which has adopted a standard of construction equivalent to that required by the national board.

(11) "Portable steam engine" or "steam traction engine" means a boiler on wheels which is used solely for show at county fairs and other exhibitions in which the public is invited to attend.

(12) "Standard boiler" means a boiler which bears the stamp of the state of Montana or of another state which has adopted a standard of construction equivalent to that required by the state of Montana, or bears the stamp of the ASME or the national board.

(13) "State inspector" means a person employed by the department for the purpose of inspecting boilers.

(14) "Traction engine" means a historic model, historic power boiler, portable steam engine or steam traction engine.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-101 MCA

RULE III ADOPTION BY REFERENCE OF CERTAIN PUBLICATIONS, CODES AND STANDARDS (1) The department hereby adopts by reference the following documents published by the ASME:

(a) ASME code, 1971 edition but only as to Section I, power boilers;

(b) ASME code, 1992 edition, with 1993 and 1994 addenda, (referred to as the current ASME code), but only as to the following sections:

(i) Section I, power boilers;

(ii) Section II, parts a, b, c, and d, material specifications;

(iii) Section V, nondestructive examination;

(iv) Section VII, rules for care of power boilers; and

(v) Section IX, welding and brazing qualifications.

(c) Copies of ASME documents are available from the American Society of Mechanical Engineers, 345 East 47th Street, New York, NY 10017.

(2) The department hereby adopts by reference the national board inspection code, 1992 edition with 1993 and 1994 addenda. Copies are available from the National Board of Boiler and Pressure Vessel Inspectors, 1055 Crupper Avenue, Columbus, OH 43229.

(3) The ASME codes and the national board inspection code may also be viewed at the office of the chief boiler inspector, 1805 Prospect Avenue, Helena, Montana 59624.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-101 MCA

RULE IV TRACTION ENGINE LICENSE REQUIRED (1) All operators of traction engines shall be licensed in accordance with Title 50, chapter 74, MCA. A license to operate traction engines is not a license to operate stationary boilers. A stationary engineer's license is not a license to operate traction engines.

(2) A traction engine operator may not operate a traction engine while the operator is under the influence of alcohol or drugs. Operation of a traction engine under the influence of alcohol or drugs may result in the loss of the operator's license.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-306 and 50-74-314 MCA

RULE V LICENSED OPERATOR TO REMAIN IN ATTENDANCE WHEN TRACTION ENGINE IS IN OPERATION (1) A traction engine may not be left unattended when it is in operation and members of the public are present. For purposes of this rule, a traction engine is not in operation when all of the following conditions exist:

(a) the water level is one-third or above in the water gage glass;

(b) the header or dome valve is in a closed position;

(c) the draft doors are closed;

(d) the fire is banked or extinguished; and

(e) the boiler pressure is at least 20 pounds per square inch below the safety valve relieving pressure.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-314 MCA

RULE VI SAFETY EQUIPMENT REQUIRED (1) Fire actuated fusible plugs must be used on all steam engine boilers and all hand fired boilers in accordance with Section I of the current ASME code. The fusible plugs must be constructed to meet the requirements of the current ASME code adopted in [RULE III], and bear the stamping of the ASME.

(2) The safety valve must bear the stamping of the ASME and be set at the maximum allowable working pressure and sealed in a manner so as to not allow tampering with the valve setting without destroying the seal. Safety valves may only be repaired, or set by the manufacturer or the manufacturers representative who holds an ASME "VR" stamp.

(3) Each boiler with a grate area of more than 6 square feet must be equipped with two adequate means of supplying feedwater.

(4) Full size traction engines (as opposed to historic models) that are operating belt driven equipment or machinery must be roped off to prevent public access within 6 feet of any part of the equipment or machinery that is not fully visible to the operator, when the operator is in the normal position for operating the traction engine.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-102 MCA

RULE VII TRACTION ENGINE OPERATION LOG BOOK REQUIRED

(1) Every owner or operator of a traction engine shall maintain a log book as to operating hours and repairs on the boiler. The log must also note any defects that occur or adverse operating conditions such as low water.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-101 MCA

RULE VIII SCHEDULING INSPECTIONS OF TRACTION ENGINES

(1) At least 60 days before expiration of the operating certificate all traction engine owners shall contact the department or state boiler inspector to schedule an inspection date.

(2) At least 30 days before a public gathering or show of traction engines, the show promoter, manager and/or fair board shall report to the department all traction engines that are intended to be operated at the show and that do not have a current operating certificate issued by the department.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-206 MCA

RULE IX INITIAL CERTIFICATE INSPECTION--ANNUAL INSPECTIONS

(1) A traction engine that has not been certified in Montana for a period of more than 3 years must successfully complete an initial certificate inspection before being operated. The initial certificate inspection consists of:

(a) an ultrasonic examination for metal thickness for the purpose of calculating the maximum allowable working pressure. If a thin reading is found, an average reading will be determined as specified in [RULE XI], and used in the calculation;

(b) a hydrostatic examination that may not exceed 1.5 times the maximum allowable working pressure; and

(c) verification of the certification of the safety valve set pressure. If this certification is not available at the time of the inspection, the owner may later send the certification from a "VR" stamp shop/manufacturer. A state inspector may not issue the boiler inspection certificate until receipt and approval of the certified safety valve set pressure.

(2) A traction engine that has not been certified in Montana during the past 2 or 3 years must successfully complete the initial certification inspection unless the initial certification inspection requirement is waived. An initial certification inspection may be waived at the discretion of the inspector if the traction engine has been laid up clean and dry,

or has a current inspection certificate from another jurisdiction.

(3) Annual inspections will be completed on a 3-year cycle after the initial certificate inspection:

(a) For year 1, the boiler will be steamed up to the safety valve set point, and the safety valve relieved (a "steam test").

(b) For year 2, hydrostatic testing of the boiler.

(c) For year 3, the boiler must be dried and opened for internal inspection and ultrasonic testing.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-206 and 50-74-209 MCA

RULE X INTERNAL INSPECTION OF BOILERS (1) A boiler must be properly prepared for an internal inspection by the owner or operator. If a boiler is not properly prepared the inspector may refuse to make the inspection, and the operating or inspection certificate must be withheld until the owner properly prepares the boiler. If the inspector must make another visit to inspect a boiler that was not properly prepared, the inspector may charge the owner a fee as provided by 50-74-219, MCA. The owner shall prepare a boiler for internal inspection by:

(a) removing all handhole plates, washout plugs and inspection plugs;

(b) thoroughly washing the water side of the boiler;

(c) cleaning the fire side of the boiler parts (including the flues) of all loose soot and ashes; and

(d) removing excessive scale or other deposits by chemical or mechanical means.

(2) An internal inspection consists of all of the following procedures:

(a) All inspection openings into a boiler must be examined for evidence of defects. Where possible, the openings for water glass connections, safety valves, steam gages and blowoff valves must be inspected during each internal inspection.

(b) An examination of the boiler for signs of overheating. Overheating is one of the most serious causes of boiler deterioration. This is especially true in the firebox area. Oxidation and deforming of the metal and possible rupture of the overheated parts may result. The inspector shall determine whether or not any part of the boiler or the boiler tubes exposed to the fire have been deformed by bulging or blistering. If a bulge or blister is of sufficient size to seriously weaken the tube or plate, and especially when there is evidence of leakage, the damaged area must be repaired before the boiler is fired again.

(c) An examination of flues, for cleanliness on the fireside and for scale buildup on the waterside. Excessive buildup should be removed before the boiler is fired again. When flues have been rerolled or replaced, the inspector shall check the workmanship and insure that the flues have been beaded over on the firebox end.

(d) An examination of areas where cracks are most likely to occur (i.e., between the tubes holes in the flue sheet, around rivets holes, along longitudinal seams and around welding pipe and flue connections).

(e) Where feasible, a check on the extent to which corrosion has progressed in the boiler metal. Corrosion can be localized in the form of pitting or it can affect large areas. Isolated shallow pitting is not considered serious unless it is active. When corrosion has affected a large area, the thickness of the remaining metal must be determined by using ultrasonic equipment as outlined in [RULE XI].

(f) A test of the firebox staybolts, made by tapping one end of each bolt with a hammer and where possible, a hammer or other heavy tool should be used to "back-up" on the opposite end. A serviceable bolt will give a ringing sound while a broken bolt will give a hollow sound. Staybolts with a telltale hole must be examined for evidence of leakage which indicates a broken or cracked staybolt. Broken staybolts must be replaced.

(g) An examination of the fastened ends of stays to determine whether cracks exist where the stays are punched or drilled.

(h) A visual inspection of fusible plug threads in crown sheet. The existing fusible plugs must be removed and replaced with new fusible plugs bearing the stamping of ASME.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-214, 50-74-215, 50-74-217 and 50-74-219 MCA

RULE XI ULTRASONIC TESTING OF BOILERS AND MAWP CALCULATIONS (1) Ultrasonic testing is a method that provides indications of surface and subsurface discontinuities, the depth of which can be determined by the use of the proper techniques. Since normally there is no record of the results other than electronic indicators on a screen, the skill, and experience of the personnel performing the test are of prime importance.

(2) Ultrasonic testing is used to determine the thickness of the boiler structures, and that information is used to determine the maximum allowable working pressure ("MAWP"). The MAWP of a boiler must be determined by the strength of the weakest part of the boiler.

(a) The MAWP for the shell, drum or barrel is determined by the following formula:

$$MAWP = \frac{TS \times t \times E}{R \times FS}$$

where:
- TS = 55,000 (lbs/sq in)
- t = minimum thickness of the plate (in inches)
- E = efficiency of the joint (non-dimensional) = 0.75
- R = inside radius of the shell (in inches)
- FS = safety factor of 5.0 (non-dimensional) for butt strap boilers
- FS = safety factor of 6.0 (non-dimensional) for lap seam boilers

(b) The MAWP for stayed flat surfaces (firebox) is determined by the following formula:

$$MAWP = \frac{t^2 \times SC}{p^2}$$

where: SC = 28,980 (lbs/sq in)
t = minimum thickness of the plate (in inches)
p = pitch between staybolts (in inches)

(c) When an ultrasonic thickness reading is below a desired value, the average thickness of the area around that reading must be determined. The average thickness is determined as follows:

(i) Using the low reading point as the center, superimpose an 8 inch by 8 inch square on the area.

(ii) Take 20 readings spaced on 2 inch centers on the perimeter and within the square.

(iii) The average of the 20 readings is used as the minimum boiler thickness in the 8 inch square area.

(d) The MAWP for traction engine boilers may not exceed that allowed in Section I of the 1971 ASME code for new boilers of the same construction.

AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-218 MCA

RULE XII HYDROSTATIC INSPECTION OF BOILERS (1) Before a boiler is placed under pressure for the hydrostatic test, the boiler and related accessories meet the following requirements:

(a) All pipe and pipe fittings 1/2 inch or larger must meet the requirements of the current ASME code adopted in [RULE III], including the requirement that pipe must be black schedule 80 up to and including the first stop valve.

(b) Each boiler must have a steam gage connected to the steam space by a siphon or equivalent device of sufficient capacity to keep the gage tube from filling with steam. The connection must be arranged so that the gage cannot be shut off from the boiler except by a cock placed near the gage. The cock must be provided with a tee or lever type handle. When the cock is open the tee or lever must be parallel to the pipe in which the cock is located.

(c) The capacity of the pressure gage must be approximately double the pressure at which the safety valve is set and in no case may it be less than 1.5 times the MAWP.

(d) Each boiler must be equipped with an ASME approved safety valve which will discharge all the steam that can be generated by the boiler without allowing the pressure to rise more than six percent above the MAWP. No safety valve may be set higher than the MAWP.

(e) Each threaded steam outlet from a power boiler (except to the water column, the fusible soft plug and the safety valve connections) must be fitted with a stop valve located as close as practicable to the boiler. If a globe valve is used, the inlet pressure must be under the disk of the valve.

(f) Each locomotive and vertical type boiler must have a blowoff pipe in direct connection with the lowest water space practicable. The pipe must be fitted with a stop valve and run full size without reducers or bushings.

(g) The feed water pipe of a boiler must be provided with a check valve. There must also be a stop valve between the boiler and the check valve. Both of the valves must be located as close as practical to the boiler.

(h) Each steam boiler with a grate area of more than 6 square feet must have two means of feeding water into the boiler.

(i) Each boiler must be equipped with at least one water glass. In addition, each boiler with more than 6 square feet of grate must have one additional water glass or be equipped with try-cocks. The lowest visible part of the water glass may not be less than 2 inches above the crown sheet. The lowest try-cock must be at least 2 inches above the crown sheet.

(2) If the inspector determines that the boiler meets the requirements of (1) above (and, if the inspection is the initial certificate inspection, also the requirements of [RULES X and XI]), the inspector may proceed with the hydrostatic test. The test must be conducted according to the following procedures:

(a) The hydrostatic test pressure may not exceed 1.5 times the MAWP calculated pursuant to [RULE XI].

(b) The temperature of the water used during the hydrostatic test may not be less than 70 degrees F (16 degrees C), and the maximum temperature during inspection may not exceed 120 degrees F (49 degrees C).

(c) During the initial portion of the hydrostatic test the steam gage may be left in place to see if it functions properly. It may be removed and tested separately. The safety valve must be removed during the hydrostatic test. In no event may the safety valve spring be compressed to prevent the valve from opening.

(d) The hydrostatic test pressure must be held long enough for the inspector to thoroughly examine the boiler for leaks and any evidence of failure. All sheets, plates and seams must be examined for leaks and bulging and all piping and accessories examined for leaks and evidence of failures.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-216 and 50-74-217 MCA

RULE XIII EXTERNAL INSPECTION OF BOILERS (1) A boiler must be properly prepared for an external inspection by the owner or operator. If a boiler is not properly prepared the inspector may refuse to make the inspection, and the operating or inspection certificate will be withheld until the owner properly prepares the boiler. If the inspector must make another visit to inspect a boiler that was not properly prepared, the inspector may charge the owner a fee as provided by 50-74-219, MCA. The owner shall prepare a boiler for external inspection by:

(a) installing all the handhole plates, washout plugs, and inspection plugs;

(b) filling the boiler with water to a desirable level in preparation for firing the boiler;

(c) installing the safety valve, steam gage and other essential equipment needed to build up and maintain normal operating pressure; and

(d) removing all lagging and insulation as required by the inspector.

(2) An external inspection consists of all of the following procedures:

(a) An observation of the general cleanliness of the boiler and its auxiliary equipment. The boiler fittings, valves and piping must be checked for compliance with [RULE XII(1)].

(b) An investigation of any steam or water leaks. Leakage coming from under supports must be thoroughly investigated.

(c) Early in the external inspection, the water and steam passageways must be blown down separately to ensure that both connections are clear. The inspector shall witness the blowdown of the water glass and observe the prompt return of water in the glass. A sluggish return of water may indicate an obstruction in the passageways to the boiler. If repeating the blowdown procedure does not obtain the proper results the boiler must be shut down. The procedure for blowing down the glass is as follows:

(i) Close the lower valve then open the drain cock and blow the glass down.

(ii) Close the drain cock and open the lower valve. Water should return to the glass immediately.

(iii) Close the upper valve then open the drain cock and allow the water to flow until it runs clear.

(iv) Close the drain cock and open the upper valve. Water should return to the glass immediately.

(d) The safety valve must be tested by allowing the pressure in the boiler to rise to the popping pressure and observing the results. When the results indicate that a safety valve is leaking or that it is not operating properly by failing to open and close promptly, or show signs of sticking or not stopping further pressure build-up, adequate steps must be taken to prevent further pressure build-up. The boiler must be taken out of service until the defective valve is repaired or replaced.

(e) The blowdown of the boiler must be demonstrated to the inspector by discharging a sufficient amount of water to ensure that the blowoff valve is functioning properly. The valve must be attached as described in [RULE XII], or the boiler must be equipped as original.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-214, 50-74-215, 50-74-216 and 50-74-219 MCA

RULE XIV REPAIRS TO HISTORIC POWER BOILERS (1) [RULES XV through XVII] govern repairs to riveted or welded historic power boilers. Where specific provision is not made by these rules, it is intended that, subject to the approval of state inspector, all welded repairs conform insofar as possible to the national board inspection code as adopted in [RULE III], with

consideration being given to preserving the original appearance and intended function of the boiler as safety will permit. The repair standard selected must be one that is compatible with the nature of the repair, the original construction and the present operating conditions.

(2) All weld repairs must be completed in accordance with Section IX of the current ASME code and the national board inspection code as adopted in [RULE III]. All welding must be performed by an ASME certified welder.

(3) Any longitudinal cracks found in riveted longitudinal seams require that the boiler be condemned. A boiler with such crack is not approved for use in this state.

AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-101, 50-74-102 and 50-74-207 MCA

RULE XV REPAIRS TO HISTORIC POWER BOILERS (1) In general, a repair involving the removal and replacement of areas of the boiler that are under pressure must be discussed with a state inspector prior to starting the work. The inspector must approve both the materials and the methods to be used.

(a) The inspector may inspect the repair work while it is in progress. For example, the inspector may want to see flush patches tacked in place prior to the final welding in order to check the overall fit of the patch and to see if the edges to be welded have been properly beveled.

(2) A record must be kept of all materials used in major repairs to any portion of the boiler that is under pressure. The record must include the type of welding rod and welding equipment used, the source of the boiler plate, rivets, and other materials used, and the thickness of the material used.

(3) After the boiler repairs have been completed, a state inspector may require performance of a hydrostatic pressure test or other tests acceptable to the inspector. Such tests must be carried out as described in [RULE XI] for ultrasonic tests and [RULE XII] for hydrostatic tests.

(4) Repairs that must be discussed with a state inspector include, but are not limited to the following:

(a) removal and replacement of any portion or all of the flue sheet, whether stayed or unstayed;

(b) removal and replacement of any stayed or unstayed boiler plate;

(c) replacement of staybolts or seal welding on staybolts;

(d) repair of cracks radiating from rivet or staybolts holes;

(e) repairs to welding butt joints;

(f) welding in flush patches;

(g) buildup of wasted areas by welding; and

(h) welding to restore the edges of butt straps, plated laps or of connections attached by riveting; and

(i) installing doughnuts to repair threaded openings.

(5) A state inspector shall be consulted for any welding done on a boiler's pressure components. If there is doubt as whether a repair requires consultation with a state inspector, a state inspector should be consulted.

(6) An inspector does not need to be consulted concerning:
(a) replacement of boiler flues, pipe and pipe fittings;
(b) the welding of non-pressure attachments to the pressure vessel when the procedure does not involve any removal or undercutting of the metal; or
(c) repairs to a threaded opening in the boiler, provided that the procedure does not require removing more metal than would be necessary to accommodate the next larger size pipe.
AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-101, 50-74-102 and 50-74-207 MCA

RULE XVI REPAIR METHODS FOR HISTORIC POWER BOILERS
(1) The following methods and procedures must be followed when repairing historic power boilers:
(a) Defects such as a crack in a welded joint or deep pitting must be completely removed before repair. If the defect penetrates the full thickness of the material, the repair must be made with a complete penetration weld such as a double butt weld or a single butt weld, with or without backing.
(b) Before repairing a cracked area, care must be taken to determine the cause of the crack and its extent. If it appears that the crack is likely to reoccur, consideration must be given to removing the cracked area and installing a flush patch or taking other corrective action.
(c) Minor cracks, isolated pits and small plate imperfections must be examined to determine the extent of the defect and whether or not repair by welding is required. Prior to repair by welding, the defects must be removed to sound metal.
(d) Cracks radiating from staybolts or rivet holes may be repaired if the plate is not seriously damaged.
(e) Welded butt joints must have complete penetration and fusion for the full length of the weld. The surfaces of the weld may be left "as welded" provided they are sufficiently free from coarse ripples and valleys so as to avoid stress concentration points.
(f) Wasted surfaces in stayed or unstayed areas may be built up by welding if, in the judgement of the inspector, the structural strength will be adequate after welding.
(g) The weld around a flush patch must be a full penetration weld and the accessible surfaces must be ground flush. Overlaying a weakened area with a lap patch is not authorized.
(h) Welding may be used to restore the original dimensions of the edges of butt straps, plated laps, or of connections attached by riveting. Prior approval of an inspector is required.
(i) Threaded staybolts may be replaced by welding-in stays, if, in the judgement of the inspector, the area adjacent to the staybolt has not been seriously weakened by deterioration.
(2) Completed welds must be inspected for appearance and unsatisfactory conditions such as cracks, excessive reinforcement and/or undercutting. The weld inspection must be

made in accordance with the national board inspection code adopted in [RULE III].
AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-101, 50-74-102 and 50-74-207 MCA

RULE XVII CONSTRUCTION AND INSPECTION OF HISTORIC MODELS (1) Historic models may not be operated in this state unless the construction plans, material specifications, and operating pressure calculations have been submitted to and approved by the chief boiler inspector.

(2) New construction must conform to the current ASME code adopted in [RULE III]. The construction plans must be discussed in detail with a state inspector prior to starting construction.

(3) A record must be kept of all materials used in construction of any portion of the boiler that is under pressure. The record must include the type of welding rod and welding equipment used, the source of the boiler plate, rivets, and other materials used, and the thickness of the material used.

(4) Inspection of the construction will be as outlined by the inspector at the time the plan is approved. Such inspection may include periodic inspections during the construction process, as well as inspection and testing at the completion of construction. The weld inspection must be made in accordance with national board inspection code adopted in [RULE III], which requires X-ray inspection of welded seams.

(5) A newly constructed historic model must undergo the initial certificate inspection provided by [RULE IX] before it may be operated.
AUTH: Sec. 50-74-101 MCA
IMP: Sec. 50-74-101, 50-74-102 and 50-74-206 MCA

RULE XVIII TEST RESULTS AND INSPECTION REPORT (1) Any defects or deficiencies in boiler construction, condition, repairs, maintenance practices, operational practices, or auxiliary equipment noted during an inspection must be discussed with the owner during or immediately following an inspection. Recommendations for the correction of defects or deficiencies must be made at that time and noted on the inspection report.

(2) A copy of the inspection report will be sent to the owner of the boiler, the chief boiler inspector and the secretary of the Montana Steam Association.
AUTH: Sec. 50-74-101 MCA IMP: Sec. 50-74-101 MCA

Rationale: There is reasonable necessity for the proposed rules because recently proposed boiler rules (MAR Notice No. 24-30-64, published February 9, 1995, Issue No. 3, at pages 188-202) set inappropriate standards for the historical steam engines covered by these rules. The historical steam engines (known as traction engines) covered by these proposed rules are operated only on an occasional basis, such as county fairs and historical exhibitions, and are not in daily productive use. The proposed rules strike a reasonable balance between maintaining historical integrity and the needs of public safety, which would not have

been feasible if the standard boiler rules were to apply to traction engines.

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:

John Maloney, Bureau Chief
Safety Bureau
Employment Relations Division
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

and must be received by no later than 5:00 p.m., April 17, 1995.

4. The Department proposes to make these rules effective June 1, 1995; however, the Department reserves the right to make these rules effective at a later date, or to adopt only some of the proposed rules.

5. The Hearings Bureau of the Legal/Centralized Services Division of the Department has been designated to preside over and conduct the hearing.

Laurie Ekanger, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

David A. Scott
Rule Reviewer

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

Certified to the Secretary of State: March 6, 1995.

BEFORE THE TEACHERS' RETIREMENT BOARD
OF THE STATE OF MONTANA

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| In the matter of the adoption of new rule, and amending Rule 2.44.518, and repeal of Rule 2.44.514 relating to the Teachers' Retirement System | NOTICE OF ADOPTION OF NEW RULE, AMENDMENT, AND REPEAL OF RULES RELATING TO THE TEACHERS' RETIREMENT SYSTEM |

TO: All Interested Persons.

1. On December 8, 1994, the Teachers' Retirement Board published notice of a public hearing on the proposed adoption of a new rule, amendment and repeal of rules concerning the Teachers' Retirement System in Administrative Register, Issue number 23, starting at page 3057 and inclusive of page 3059.

2. On January 5, 1995 at 10:00 a.m. at the Teachers' Retirement System, 1500 Sixth Avenue, Helena, Montana, a public hearing was held pursuant to the December 8, 1994 notice. Tom Bilodeau, representing the Montana Education Association attended the hearing.

3. No comments were received by the Board.

4. The Teachers' Retirement Board has adopted the proposed rules as noticed.

5. The new rule which has been adopted will be numbered as follows: Rule I ARM 2.44.308

By:

Dal Smilie, Chief Legal Counsel
Rule Reviewer

David L. Senn, Administrator
Teachers' Retirement System

Certified to the Secretary of State March 2, 1995

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

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| In the matter of the amendment of rule 2.55.404 pertaining to scheduled rating - high loss modifier. | NOTICE OF AMENDMENT |

TO: All Interested Persons:

1. On January 12, 1995, the State Compensation Insurance Fund published notice of the amendment to rule 2.55.404 concerning scheduled rating - high loss modifier at page 1 of the 1995 Montana Administrative Register, issue number 1. ,

2. The board has amended rule 2.55.404 as proposed.
AUTH: Sec. 39-71-2315 and 39-71-2316
IMP: Sec. 39-71-2316 and 39-71-2341

3. No comments or testimony were received.

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Rick Hill
Chairman of the Board

Nancy Butler, General Counsel
Rule Reviewer

Certified to the Secretary of State March 6, 1995.

BEFORE THE CLASSIFICATION AND RATING COMMITTEE
OF THE STATE OF MONTANA

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| In the matter of the amendment of ARM 6.6.8301, updating references to the NCCI Basic Manual for Workers' Compensation and Employers' Liability Insurance, 1980 ed. | ) ) ) ) ) ) | NOTICE OF AMENDMENT OF RULE 6.6.8301 |

TO: All Interested Persons.

1. On September 22, 1994, the classification and rating committee published a notice of proposed amendment to rule 6.6.8301 concerning updating references to the NCCI Basic Manual for Workers' Compensation and Employers' Liability Insurance at page 2570, 1994 Montana Administrative Register, issue number 18.

2. The classification and rating committee has approved the amendment as proposed.

3. No comments or requests for hearing were received regarding the proposed amendment.

4. The amendment becomes effective March 17, 1995.

Robert Carlson, Chairperson
Classification and Rating Committee

Gary Spaeth
Rule Reviewer
State Auditor's Office

Certified to the Secretary of State March 7, 1995.

BEFORE THE BOARD OF ARCHITECTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

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| In the matter of the amendment of a rule pertaining to examination, seals and professional conduct | ) ) ) ) ) | NOTICE OF AMENDMENT OF 8.6.407 EXAMINATION, 8.6.409 INDIVIDUAL SEAL AND 8.6.412 STANDARDS FOR PROFESSIONAL CONDUCT |

TO: All Interested Persons:

1. On October 27, 1994, the Board of Architects published a notice of proposed amendment of the above-stated rules at page 2771, 1994 Montana Administrative Register, issue number 20.

2. The Board has amended 8.6.409 and 8.6.412 exactly as proposed. The Board has amended 8.6.407 as proposed, but with the following change:

"8.6.407 EXAMINATION (1) through (4) will remain the same as proposed.

(5) An applicant failing to pass the examination is entitled to re-examination on divisions of the examination that ~~he~~ THE APPLICANT failed to pass. Re-examination may be at the next scheduled examination. A re-examination fee will be charged. If the entire examination is not successfully completed within ~~4~~ FOUR consecutive years, the applicant must reapply and retake the entire examination, unless the board, in its sole discretion, provides an exception to the applicant. Such exceptions shall be provided only upon proof of medical hardship or other extraordinary circumstances."

Auth: Sec. 37-1-131, 37-65-204, 37-65-303, MCA; IMP, Sec. 37-65-303, MCA

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

COMMENT NO. 1: Two comments were received stating support for implementing gender neutral verbiage, but suggesting the Board should be more fully committed to the job, as 8.6.407(5) still contains the pronoun "he."

RESPONSE: The Board concurs with the comment and has amended the subsection as shown above, substituting the gender neutral words "the applicant" for the masculine pronoun "he."

COMMENT NO. 2: One comment was received stating 8.6.609 on Individual Seals does not clarify whether a title strip, which has the place of business on it, and spaces for the seal, would be sufficient under the rule; or whether a supplementary stamp with the place of business could be stamped adjoining the seal; or whether a new seal with all the information should be obtained.

RESPONSE: The Board is not changing the current requirement of the individual seal rule, and all the outlined situations in the comment which in any way indicate a place of business would be sufficient for the rule requirements.

COMMENT NO. 3: One comment was received stating that 8.6.409 does not clarify the requirement when the engineer on a project is not licensed in Montana, and the architect's seal had been used in the past.

RESPONSE: The Board is not changing the current requirement of the individual seal rule through this proposed amendment. The current requirements under this rule remain. See response to Comment 2 above.

COMMENT NO. 4: One comment was received stating 8.6.409 does not note if original signatures are to be required with the stamp on prints, rather than to stamp and sign the tracings, so it is reproduced on every print. This is currently a requirement in Billings, and should be clarified if this is a State requirement as well.

RESPONSE: The Board is not addressing this issue through the proposed rule amendment. All licensees must comply with local requirements on all work produced.

BOARD OF ARCHITECTS
KEITH RUPERT, CHAIRMAN

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

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, March 6, 1995.

BEFORE THE BOARD OF PSYCHOLOGISTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of a rule pertaining to required supervised experience and fees | ) | NOTICE OF AMENDMENT OF 8.52.606 REQUIRED SUPERVISED EXPERIENCE AND 8.52.616 FEE SCHEDULE |

TO: All Interested Persons:

1. On November 23, 1994, the Board of Psychologists published a notice of proposed amendment of the above-stated rules at page 3001, 1994 Montana Administrative Register, issue number 22.

2. The Board has amended 8.52.616 exactly as proposed and amended 8.52.606 as proposed, but with the following changes:

"8.52.606 REQUIRED SUPERVISED EXPERIENCE (1) through (4) will remain the same as proposed.

(5) Individual SOLO private practice shall not be considered as acceptable professional experience for purposes of the experience requirement.

(6) An acceptable post-doctoral training setting shall have two other licensed mental health professionals participating in ~~training~~ THE PROVISION OF TRAINING OF THE CANDIDATE, as and approved by the Board, in addition to the licensed psychologist supervisor. The supervisee must be a salaried employee receiving both administrative and clinical supervision from the supervisor.

(7) through (7)(f) will remain the same as proposed."

Auth: Sec. 37-1-131, 37-17-202, MCA; IMP, Sec. 37-17-302, MCA

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

COMMENT NO. 1: One comment was received stating that if a person has to have a post doctoral training setting with two other licensed mental health professionals and a licensed psychologist supervisor, why would teleconferencing as provided in 8.52.606(2), ever be necessary.

RESPONSE: In a rural setting, some applicants have demonstrated a need to use teleconferencing as the actual face-to-face supervision, since travel can be prohibitive to any other form of supervision. Teleconferencing would only be allowed upon showing of special circumstances, and with prior approval of the Board.

COMMENT NO. 2: One comment was received stating ARM 8.52.606(5) makes a change from "independent" to "individual" private practice, but does not define "individual." The comment suggested that if solo practice is being prohibited for supervised experience, it should be stated more clearly.

RESPONSE: The Board concurs with the comment and has amended the rule as shown above.

COMMENT NO. 3: One comment was received stating ARM 8.52.606(6) refers to "two other licensed mental health professionals participating in training," but does not clarify whether the others are receiving training at the same time, or also providing training along with the supervisor. Also, should the rule read "as approved by the board" or "and approved by the board"?

RESPONSE: The Board concurs with the first part of the comment and will amend the rule as shown to state "participating in the provision of training of the candidate." The Board will amend the rule to use "and".

COMMENT NO. 4: One comment was received stating ARM 8.52.606(7) should clarify whether only those dual relationships which compromise the supervisory setting are being prohibited, or any dual relationship is prohibited which may tend to do this.

RESPONSE: The Board's rule amendment would prohibit a dual relationship which specifically allows compromise of the supervisory setting, and is not intended to address all dual relationships.

BOARD OF PSYCHOLOGISTS
PASTOR JEFF OLSGAARD, CHAIRMAN

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

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, March 6, 1995.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the repeal, amendment and adoption of rules pertaining to special education school funding | ) ) ) ) ) ) | NOTICE OF REPEAL, AMENDMENT AND ADOPTION OF RULES RELATING TO SPECIAL EDUCATION SCHOOL FUNDING |

To: All interested persons

1. On September 22, 1994, the Superintendent of Public Instruction published notice of public hearing on the proposed repeal, amendment and adoption of the rules referenced above at page 2576 of the 1994 Montana Administrative Register, issue number 18.

2. A public hearing was held on November 1, 1994. Oral and written comments were received at the hearing and prior to the closing of the comment period.

3. The following rules are being repealed as proposed: ARM 10.16.1302, 10.16.1303, 10.16.1304, 10.16.1306, 10.16.1307, 10.16.1804, 10.16.1805, 10.16.1806, 10.16.1807, 10.16.1808, 10.16.2101, 10.16.2110, 10.16.2502, 10.16.2603, 10.16.2606. The following rules are being repealed as proposed, but with the following changes.

10.16.2001 BUDGET AND PROGRAM
(AUTH: ~~20-9-161, 20-9-167~~ 20-7-402, MCA; IMP: 20-7-403, MCA)

10.16.2003 ROOM AND BOARD APPROVAL
(AUTH: ~~20-9-161, 20-9-167~~ 20-7-402, MCA; IMP: 20-7-403, MCA)

10.16.2004 PRESCHOOL PROGRAMS
(AUTH: ~~20-9-161, 20-9-167~~ 20-7-402, MCA; IMP: 20-7-403, MCA)

10.16.2005 EXTENDED YEAR PROGRAMS
(AUTH: ~~20-9-161, 20-9-167~~ 20-7-402, MCA; IMP: 20-7-403, MCA)

10.16.2105 EXPANSION OR IMPLEMENTATION OF PROGRAM DURING A GIVEN SCHOOL TERM
(AUTH: ~~20-7-403~~ 20-7-402, MCA; IMP: 20-7-403, ~~20-9-147, 20-9-321,~~ MCA)

COMMENT: The Administrative Code Committee commented that the authority for rule making (20-9-161, 20-9-167 and 20-7-403 MCA) cited in five repealed rules (10.16.2001, 10.16.2003, 10.16.2004, 10.16.2005, and 10.16.2105) was wrong.

RESPONSE: The cite to authority in the repealed rules is changed.

COMMENT: The Administrative Code Committee commented that the statement of authority for rule making should cite to the specific bill or chapter being implemented.

RESPONSE: Revision of special education rules are necessary to implement the changes in special education funding statutes found at Chapters 633, 466 and 356, L 1993.

4. The following rules are being amended as proposed: ARM 10.16.2106, 10.16.2501, 10.16.2503, 10.16.2602, 10.16.2604, 10.16.2605. No comments were received.

5. After consideration of the comments received, the following rules are being adopted as proposed and codified as follows: RULE VI (10.16.2208), RULE VIII (10.16.2210), RULE XI (10.16.2213), RULE XII (10.16.2214), RULE XIII (10.16.2215), RULE XV (10.16.2217), RULE XVI (10.16.2218).

COMMENT: Whitefish School District commented that expenditures for providing services to Section 504-eligible students should be included as special education allowable costs for IDEA students.

RESPONSE: State law prevents this change. Special Education is defined as instruction to children with disabilities, 20-7-401(14) MCA, identified under the Individuals with Disabilities Education Act (IDEA) and state statute, 20-7-401(4) MCA.

6. After consideration of the comments received, the following rules are being amended as proposed with those changes given below, new material underlined, deleted material interlined.

10.16.2107 TRANSPORTATION FOR SPECIAL EDUCATION STUDENTS WITH DISABILITIES

(1) remains the same as proposed.

(AUTH: ~~20-7-403~~ 20-7-402, MCA; IMP: 20-7-403, 20-10-145, MCA)

COMMENT: The Administrative Code Committee commented that the cite to authority for rule making in Rule 10.16.2107 should be 20-7-402 not 20-7-403 MCA. The Administrative Code Committee also questioned whether the Board of Public Education has adopted a policy by rule to implement 20-7-402 MCA.

RESPONSE: The cite to authority is changed. The rule stating the Board of Public Education's policy is ARM 10.60.101.

10.16.2303 INDIVIDUALS WITH DISABILITIES EDUCATION ACT, PART B

(1) - (3) remain the same as proposed.

(AUTH: ~~20-7-403~~ 20-7-402, MCA; IMP: 20-7-403, MCA)

COMMENT: The Administrative Code Committee commented that the cite to authority for rule making in Rule 10.16.2303 should be 20-7-402 not 20-7-403 MCA.

RESPONSE: The cite to authority is changed.

10.16.2601 DURATION OF COOPERATIVE (1) The interlocal agreement creating a special education cooperative must require participating districts to remain members for a term of at least three state fiscal years which have an effective date of July 1.

~~(2) Interlocal agreements must specify and uniformally apply one of the following participation options:~~

~~(a) districts are required to make a three-year commitment, which is automatically renewed at the end of the first fiscal year and subsequent fiscal years thereafter unless a district provides notice to withdraw. Under this option, notification of intent to withdraw must be provided three fiscal years in advance of the withdrawal date.~~

~~(b) districts are required to make a commitment not to withdraw except after every third fiscal year of membership. This commitment is automatically renewed at the end of every third fiscal year unless the district provides notice to withdraw.~~

(~~3~~ 2) ~~Under this option,~~ nNotification of intent to withdraw from a cooperative shall be provided no later than October 1 of every third fiscal year of the district's commitment of participation.
(AUTH: 20-7-457, MCA; IMP: 20-7-452, MCA)

COMMENT: Montana School Boards Association and St. Regis Public Schools commented that school districts should not be required to provide a three-year notice of withdrawal from a cooperative.

RESPONSE: The Superintendent of Public Instruction agrees with the comment and has rewritten ARM 10.16.2601 to eliminate the three-year notice of withdrawal.

7. After consideration of the comments received, the following rules are being adopted as proposed with those changes given below, new material underlined, deleted material interlined.

RULE I (10.16.2203) DEFINITIONS The following definitions apply to rules affecting the funding of special education programs:

(1) - (13) remain the same as proposed.

(14) "Special education allowable cost expenditures" means expenditures for certain allowable costs associated with the provision of special education services to a child with disabilities as defined in 20-7-401, MCA. ~~State special education allowable cost payments are permitted to fund these expenditures, and they qualify as local matching funds.~~
(AUTH: 20-7-402, 20-7-431, 20-7-457 MCA; IMP: 20-7-414, 20-7-431, 20-7-457, 20-9-321 MCA)

COMMENT: Bozeman School District commented that the second sentence of definition (14) "Special education allowable cost expenditures" implies that state special education allowable cost payment can be used as local matching funds - this should be deleted since it does not add to the definition and is better explained in RULE II (1)(e).

RESPONSE: The Superintendent of Public Instruction agrees with the comment. The last sentence of subsection 14 is deleted.

RULE II (10.16.2204) GENERAL PRINCIPLES OF SPECIAL EDUCATION FUNDING (1) Legislative appropriations for special education are administered by the superintendent of public instruction. Expenditures of funds received from the legislative appropriations are limited to certain allowable costs associated with the provision of educational services to children with disabilities. The following general provisions apply to these funds:

(a) - (e) remain the same as proposed.

~~(f) Funds are distributed in the same manner as district state aid.~~

(g) remains the same as proposed, relettered (f).

(2) and (3) remain the same as proposed.

(AUTH: 20-7-431, 20-9-321, MCA; IMP: 20-7-431, 20-9-321, MCA)

COMMENT: Bozeman School District commented that (1)(f) of this RULE is repeated in RULE XV(1).

RESPONSE: The Superintendent of Public Instruction agrees with this comment. Subsection (1)(f) of this RULE is deleted.

RULE III (10.16.2205) SPECIAL EDUCATION ALLOWABLE COST LIMITATIONS (1) Allowable costs for public school districts for purposes of determining payments are limited to instructional and related service costs and do not include the entire cost of operating a special education program. Allowable costs specifically do not include:

(a) the cost of the teachers' retirement system, the public employees' retirement system, or the federal social security system;

(b) the cost for unemployment compensation insurance;

(c) the cost for any administrative, instructional, or teacher aide personnel necessary to meet Montana school accreditation standards;

(d) salaries and benefits for transportation aides employed for assisting students with disabilities;

(e) the on-schedule and over-schedule costs of transportation for special education purposes;

(f) the cost of administrative support personnel, such as clerks and clerical personnel, with the exception of ARM 10.16.2207 (1)(c) and 10.16.2208 (1)(a); and

(f g) any overhead costs of operations and maintenance. Examples of overhead costs include, but are not limited to, heat, electricity, repairs and maintenance of building and equipment, minor remodeling, service contracts on equipment, and security services.

(2) Allowable costs for expenditures for salaries and benefits of personnel who serve both regular and special education must be directly proportionate to the time dedicated to ~~activities associated with~~ special education allowable costs outlined in ARM 10.16.2206 and 10.16.2207. To support the proportion of time charged to special education, districts and cooperatives must maintain documentation such as time and effort reports, class schedules, job descriptions or other support information that will verify the time each person devotes to activities associated with special education allowable costs. (AUTH: 20-7-431, MCA; IMP: 20-7-431, MCA)

COMMENT: Special Education Division commented that an addition to subsection (1) is needed to eliminate confusion regarding the ability for administrative support personnel, such as clerks and clerical personnel, to be included in allowable cost.

RESPONSE: The Superintendent of Public Instruction agrees with the comment and has added the subsection.

COMMENT: Special Education Division commented that "activities associated with" should be eliminated to avoid confusion regarding the ability for distantly related activities that are not clearly specified as a special education allowable cost or administrative support personnel, such as clerks and clerical personnel, to be considered an allowable cost.

RESPONSE: The Superintendent of Public Instruction agrees with the comment and has deleted the phrase.

COMMENT: Florence Carlton School District commented that this Rule exceeds statutory authority because the concept of allowable cost has been eliminated from statute.

RESPONSE: The Superintendent of Public Instruction does not agree with this comment. Allowable costs remain part of statute. See, for example, 20-7-431 and 20-9-321 MCA.

COMMENT: Florence Carlton School District commented that transportation aides should be included in allowable costs.

RESPONSE: The Superintendent of Public Instruction does not agree. The Commission on Special Education recommended that transportation costs not be included in allowable costs because the expense is related to transportation, not education.

RULE IV (10.16.2206) SPECIAL EDUCATION ALLOWABLE COSTS--INSTRUCTIONAL BLOCK GRANT

(1) remains the same as proposed.

(AUTH: 20-7-431, MCA; IMP: 20-7-431, MCA)

COMMENT: Special Education Division commented that the title should be changed to clarify that this section details which expenditures will be counted toward the instructional block grant and does not specify which accounting codes are being addressed.

RESPONSE: The Superintendent of Public Instruction agrees and has made the change.

COMMENT: The Montana Association of School Psychologists commented that interventions recommended through structured student assistance teams are a regular education responsibility that should not be included as an allowable costs.

RESPONSE: State statute includes interventions as an allowable cost. 20-7-431 (1)(a)(iv) MCA.

RULE V (10.16.2207) SPECIAL EDUCATION ALLOWABLE COSTS -- RELATED SERVICES BLOCK GRANT (1) Allowable costs associated with the provision of related services to students with disabilities include:

(a) Salaries and benefits, not excluded in ARM 10.16.2205 for licensed or certified professional support personnel who meet the qualifications in ~~10.16.1715~~ ARM 10.16.1713 for supervisors of special education, speech language pathologists, audiologists, counselors, social workers, school psychologists, physicians, nurses, physical and occupational therapists, and other professional persons meeting the requirements for the profession or discipline responsible for delivery of a special education related service for the proportion of time spent:

(i) - (iv) remain the same as proposed.

(b) - (f) remain the same as proposed.

(g) Transportation costs for~~+~~ professional support personnel who:

(i) ~~professional support personnel who~~ travel on an itinerant basis from school to school or district to district for the provision of related services;

(ii) - (iv) remain the same as proposed.

(h) Equipment purchase, rental, repair, and maintenance required to:

(i) implement the related service portion of a student's individualized education program~~.~~; and

(ii) fulfill reporting and record keeping requirements of evaluation and the provision of related services.

(AUTH: 20-7-431, MCA; IMP: 20-7-431, MCA)

COMMENT: Special Education Division commented that the title should be changed to include the term "block grant" to clarify that this section details which expenditures will be counted toward the related services block grant and does not specify accounting codes.

RESPONSE: The Superintendent of Public Instruction agrees with the comment and has changed the title.

COMMENT: Prickly Pear Education Cooperative commented that ARM 10.16.1713 should be referenced instead of 10.16.1715.

RESPONSE: The Superintendent of Public Instruction agrees with the comment and the reference has been changed.

COMMENT: Bozeman School District commented that subsection (1)(g) would be more precise if "professional support personnel who" were moved to the beginning of this subsection.

RESPONSE: The Superintendent of Public Instruction agrees with this comment and the wording has been changed.

COMMENT: The Special Education Division commented that subsection (1)(h) should be amended to allow the purchase of equipment which would enable related service personnel to meet reporting and record keeping requirements of evaluation and the provision of related service rather than limiting purchases only to equipment necessary to implement a student's IEP.

RESPONSE: The Superintendent of Public Instruction agrees with the comment and has made the change.

RULE VII (10.16.2209) COOPERATIVE BOUNDARIES

(1) - (3) remain the same as proposed.

(4) After June 1, 1995, Rrequest for change must be provided to the superintendent of public instruction no later than October 1 to be in effect for the ensuing fiscal year.

(5) remains the same as proposed.

(6) After June 1, 1995, the superintendent must approve any boundary changes prior to January 1 in order to be in effect for the ensuing fiscal year.

(6 7) All changes must comply with the conditions in (1).

(7 8) Unless boundary line changes result in the creation of a new cooperative, ~~or~~ the merging of existing cooperatives, or are approved by a majority of the trustees in each school district directly affected and the majority of the management board of each affected cooperative, boundary changes for districts already participating in a cooperative must occur on timelines consistent with the district's ~~three fiscal year~~ commitment for participation in the cooperative as specified in the interlocal agreement.

(AUTH: 20-7-457, MCA; IMP: 20-7-457, MCA)

COMMENT: The Missoula County Superintendent and the Missoula Area Education Cooperative recommended changes to the cooperative boundary line rules which change certain dates for notification of withdrawal, and provide the opportunity to adjust boundaries prior to the end of the current fiscal year.

RESPONSE: The Superintendent of Public Instruction has made changes to address these concerns.

RULE IX (10.16.2211) GENERAL PRINCIPLES OF THE SPECIAL EDUCATION ALLOWABLE COST PAYMENT CALCULATION (1) The superintendent of public instruction will use ~~current~~ ensuing fiscal year ANB and other school district and special education cooperative information available on February 1 of the current fiscal year ~~to calculate~~ as the basis for calculating the special education allowable cost payments for the ensuing fiscal year. ANB will be used in the payment calculation for the purpose of reflecting relative district and program size. Use of ANB does not limit the age range for fund expenditures.

(2) - (4) remain the same as proposed.

(AUTH: 20-9-321, MCA; IMP: 20-9-321, MCA)

COMMENT: Bozeman School District commented that it will not be possible in legislative years to calculate cost payments using information available on February 1st; however, preliminary special education costs could be calculated using information available on February 1st.

RESPONSE: The Superintendent of Public Instruction agrees and has made changes accordingly.

RULE X (10.16.2212) CALCULATION OF SPECIAL EDUCATION ALLOWABLE COST PAYMENTS

(1) - (6) remain the same as proposed.

(7) The superintendent of public instruction calculates an eligible district's special education allowable cost payment for the ensuing fiscal year by multiplying the final instructional block grant rate by the district's ~~current~~ ensuing fiscal year ANB, adding the final related services block grant rate multiplied by the district's ~~current~~ ensuing fiscal year ANB, adding a district's final reimbursement for disproportionate costs, if applicable, and rounding to the nearest whole dollar. If the district is a participating member of a cooperative, the special education allowable cost payment will not include the related services block grant.

(8) remains the same as proposed.

(AUTH: 20-9-321, MCA; IMP: 20-9-321, MCA)

COMMENT: OPI Operations Division commented that "current fiscal year" in subsection (7) should be changed to ensuing fiscal year to be consistent with existing rules and statutes. This comment also applies to Rule IX (10.16.2211).

RESPONSE: The Superintendent of Public Instruction agrees with this comment and has made the change.

COMMENT: Miles City School District commented that subsection (3) should be amended to allow a district's special grants, such as start up money for day treatment programs, to be included in the calculation of its reimbursement for disproportionate costs for the ensuing fiscal year.

RESPONSE: The Superintendent of Public Instruction disagrees with this comment. Reimbursement is to compensate in the ensuing fiscal year for disproportionate general fund expenditure. Federal incentive grants are not a general fund expenditure. Including the grant in the reimbursement calculation would overstate prior year general fund expenditure. Also, this type of expenditure is not readily identifiable in Fund 15.

RULE XIV (10.16.2216) SPECIAL EDUCATION TRANSFERS AND PAYMENTS TO OTHER DISTRICTS AND COOPERATIVES (1) To meet its obligation to provide services for students with disabilities, a ~~A~~ district may establish its own special education program, ~~or meet its obligation to provide services for students with disabilities by participating~~ participate in a cooperative or enter into an interlocal agreement~~.~~, as defined in Title 7, Chapter 11, Part 1, with another district.

(2) If the district chooses to participate in a cooperative or ~~interlocal agreement~~ have another district provide special education services, it may pay its state special education allowable cost payment, required block grant match~~,~~ and additional costs of providing services to the ~~district or~~ cooperative or district on a reimbursement basis.

(a) The payment must be deposited to the miscellaneous programs fund or the interlocal agreement fund of the district providing services or to the interlocal agreement fund of the ~~district or~~ cooperative providing services.

(b) ~~When a district is the recipient, t~~The receipt and expenditure of the money by the district providing special education services must be identified on the accounting records using a project reporter number.

(i) The accumulated balance in the project account must be zero by June 30th of each fiscal year. That is, receipts must equal total expenditures.

(ii) Any amounts received but not obligated must be returned to the paying district ~~or cooperative~~ by June 30th and recorded as an expenditure abatement~~.~~ by the paying district and a revenue abatement by the district providing the service.

(3) When a cooperative contracts with a district to provide special education instructional and related services:

(a) payment received by a district from a cooperative must be deposited in the district's miscellaneous programs fund or interlocal agreement fund; and

(b) the receipt and expenditure of the money must be identified on the accounting records using a project reporter number.

(i) The accumulated balance in the project account must be zero by June 30th of each fiscal year. That is, receipts must equal expenditures.

(ii) Any amounts received but not obligated must be returned to the paying ~~district or~~ cooperative by June 30th and recorded as an expenditure abatement~~.~~ by the cooperative and a revenue abatement for the district providing the service.

(4) remains the same as proposed.

(5) In accordance with 20-9-507, MCA, any special education resource transferred from a district or cooperative to another district and deposited in the miscellaneous program fund must be used for special education. In no event may the transfer from a cooperative to a district circumvent the match requirement.

AUTH: 20-7-431, MCA; IMP: 20-7-431, MCA)

COMMENT: Bozeman School District commented that amounts returned to the paying district or cooperative should be an expenditure abatement for the paying district and a revenue abatement for the district providing the service. Therefore, subsections (2)(b)(ii) and (3)(b)(ii) should be amended. Bozeman also commented that the term interlocal agreement as used in these rules was unclear.

RESPONSE: The Superintendent of Public Instruction agrees with the comments and has made the changes.

COMMENT: OPI Special Education Division commented that subsection (5) should be added to ensure that special education funds continue to be spent on special education allowable costs.

RESPONSE: The Superintendent of Public Instruction agrees with the comment and has added the subsection.

MONTANA OFFICE OF PUBLIC INSTRUCTION

By: Nancy Keenan
Nancy Keenan, Superintendent

Kathleen Holden
Kathleen Holden, Rule Reviewer

Certified to the Secretary of State March 3, 1995

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

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| In the matter of proposed amendment of ARM 12.6.901 relating to a no wake speed zone in Bigfork Bay of Flathead Lake | NOTICE OF AMENDMENT OF RULE 12.6.901 |

TO: All Interested Persons:

1. On September 22, 1994, the Fish, Wildlife & Parks Commission (commission) published notice of the proposed amendment of the above-captioned rule at page 2600, 1994 Administrative Register, issue number 18.

2. The commission has adopted the rule as proposed.

AUTH: 87-1-303, 23-1-106(1), MCA
IMP: 87-1-303, 12-1-106(1), MCA

3. No adverse comments or testimony were received. Several persons verbally supported the rule.

4. The rule has been reviewed and approved by the Department of Health and Environmental Sciences as required by §87-1-303(2), MCA, with a determination that the rule would not have an adverse impact on public health or sanitation.

FISH, WILDLIFE & PARKS
COMMISSION

Robert N. Lane
Rule Reviewer

Patrick J. Graham, Secretary

Certified to the Secretary of State March 6, 1995.

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

| | | |
|---|---|---|
| In the matter of adoption of new Rule I and the amendment of Rules 12.7.803, 12.7.804, 12.7.805 and 12.7.808 relating to fishing contests. | ) ) ) ) | NOTICE OF ADOPTION OF NEW RULE I (12.7.809) and AMENDMENT OF RULES 12.7.803, 12.7.804, 12.7.805 AND 12.7.808 |

TO: All Interested Persons:

1. On November 23, 1994, the Fish, Wildlife and Parks Commission (commission) published notice of proposed adoption of rule I and amendments pertaining to fishing contests at page 3004, 1994 Montana Administrative Register, issue number 22.

2. The commission has adopted the rule I and amendments of rules 12.7.803, 12.7.804, 12.7.805 and 12.7.808 as proposed.

AUTH: 87-3-121, MCA IMP: 87-3-121, MCA

3. The commission has thoroughly considered all comments and testimony received. The comment and commission's responses are as follows:

Comment: One comment was received regarding whether the rule change would affect a particular derby.

Response: The procedure would not change for the applicant. The Department of Fish, Wildlife & Parks (department) would now make the initial decisions on applications for fishing derbies rather than the commission. For parties dissatisfied with the department's decision, an appeal process to the commission is provided by new rule ARM 12.7.809.

Fish, Wildlife and Parks
Commission

Robert N. Lane
Rule Reviewer

Patrick J. Graham
Secretary

Certified to the Secretary of State on March 6, 1995.

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

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| In the matter of the amendment of rule 16.10.504 regarding licensing standards for drinking water manufacturers. | NOTICE OF AMENDMENT |

(Drinking Water)

To: All Interested Persons

1. On January 26, 1995, the department published notice to amend ARM 16.10.504 regarding licensure standards for producers, manufacturers, packagers, and processors of drinking water, at page 99 of the Montana Administrative Register, Issue No. 2.

2. The rule was amended as proposed, with no changes.

3. No comments were received.

ROBERT J. ROBINSON, Director

Certified to the Secretary of State March 6, 1995.

Reviewed by:

Eleanor Parker, DHES Attorney

VOLUME NO. 46 OPINION NO. 1

ADMINISTRATIVE LAW AND PROCEDURE - Applicability of Montana Administrative Procedure Act to actions of Montana Self-Insurers Guaranty Fund board of directors;
LABOR AND INDUSTRY, DEPARTMENT OF - Relation to Montana Self-Insurers Guaranty Fund;
OPEN MEETINGS - Applicability of Open Meeting Law to Montana Self-Insurers Guaranty Fund board of directors;
RIGHT TO KNOW - Applicability of Montana Administrative Procedure Act to actions of Montana Self-Insurers Guaranty Fund board of directors;
STATE AGENCIES - Status of Montana Self-Insurers Guaranty Fund;
STATUTORY CONSTRUCTION - Montana Self-Insurers Guaranty Fund Act;
MONTANA CODE ANNOTATED - Title 2, chapter 4; chapter 3, part 2; sections 1-11-103(6), 2-3-102, -203(1), 5-4-402 to -404, 33-10-105, 39-71-504, -907, -2101, -2103, -2103(2), -2104 to -2106, -2109, -2601, -2602, -2602(1), -2611, -2611(1), -2615(2), -2615(3), -2618;
MONTANA CONSTITUTION - Article II, section 16;
MONTANA LAWS OF 1989 - Chapter 244;
MONTANA LAWS OF 1991 - Chapter 163;
MONTANA LAWS OF 1993 - Chapter 150.

HELD: 1. The Montana Self-Insurers Guaranty Fund does not ensure payment of all potential covered workers' compensation claims against employers bound by compensation plan No. 1 who are unable to pay the claims because of insolvency.

2. Proceedings of the board of directors of the Montana Self-Insurers Guaranty Fund are subject to the Montana Administrative Procedure Act (Mont. Code Ann. tit. 2, ch. 4), and the Open Meeting Law (Mont. Code Ann. tit. 2, ch. 3, pt. 2).

3. The legislature gave the Montana Self-Insurers Guaranty Fund the power to prevent the sole exercise, by the Department of Labor and Industry, of the powers enumerated in Mont. Code Ann. §§ 39-71-2101, -2103 to -2106, -2109, and -2611, as they are affected by 1993 Mont. Laws, ch. 150, and 1991 Mont. Laws, ch. 163.

4. In all cases except those involving workers' compensation liabilities accrued prior to July 1, 1989, the Department of Labor and Industry must obtain the concurrence of the Montana Self-Insurers Guaranty Fund when it seeks to require an employer who self-insures to give security in addition to the security the employer has already provided.

February 23, 1995

Ms. Laurie A. Ekanger, Commissioner
Department of Labor and Industry
Lockey and Roberts
P.O. Box 201501
Helena, MT 59620-1501

Dear Ms. Ekanger:

The Department of Labor and Industry has requested my opinion on four questions concerning the Montana Self-Insurers Guaranty Fund Act [MSIGFA], Mont. Code Ann. tit. 39, ch. 71, pt. 26, and related sections of the Workers' Compensation Act, Mont. Code Ann. tit. 39, ch. 71, especially as they relate to the Department of Labor and Industry [Department]. I have phrased your questions as follows:

1. Does the MSIGFA establish a mechanism which ensures the payment of all covered workers' compensation claims made against employers bound by workers' compensation plan No. 1 who are unable to pay claims because of insolvency?

2. Are the proceedings of the Montana Self-Insurers Guaranty Fund board of directors subject to the Montana Administrative Procedure Act, Mont. Code Ann. tit. 2, ch. 4, or the Open Meeting Law, Mont. Code Ann. tit. 2, ch. 3, pt. 2?

3. What powers are given to the Montana Self-Insurers Guaranty Fund by the phrase "with the concurrence of the Montana self-insurers guaranty fund" as used in 1993 Mont. Laws, ch. 150, and 1991 Mont. Laws, ch. 163?

4. Under what circumstances must the Department of Labor and Industry obtain the concurrence of the Montana Self-Insurers Guaranty Fund when it seeks to require an employer who self-insures to give security in addition to the security which the employer has already provided?

You state that these questions arise from your staff's experiences with the MSIGFA (1989 Mont. Laws, ch. 244) since its passage. The legislature passed the act in response to the problems associated with the bankruptcy of Great Western Sugar Co., a private self-insurer. See State ex rel. Div. of Workers' Compensation v. District Ct., 246 Mont. 225, 805 P.2d 1272 (1990). I will address your questions in the order in which they are presented above.

I.

The Montana Self-Insurers Guaranty Fund Act was enacted

> to provide a mechanism for the payment of covered workers' compensation claims of employers bound by compensation plan No. 1 who are unable to pay the claims because of insolvency, to establish a fund from which the claims may be paid, and to establish a board to assess the cost of the protection among those employers.

Mont. Code Ann. § 39-71-2602(1). To that end, Mont. Code Ann. § 39-71-2611(1) states: "The fund shall assume the workers' compensation obligations of a private self-insurer that come due after the private self-insurer has been determined to be an insolvent self-insurer."

However, these sections do not establish that the Montana Self-Insurers Guaranty Fund [Fund] will in fact pay *all* covered workers' compensation claims against a Fund member who has become insolvent; they only require that the Fund assume the workers' compensation "obligations" or liabilities of insolvent self-insurers. This is an important distinction.

"Liability is a broad term, of large and comprehensive significance. In a broad sense it means an obligation one is bound in law or justice to perform." State ex rel. Diederichs v. State Highway Comm'n, 89 Mont. 205, 211, 296 P. 1033, 1035 (1931), quoted with approval in State ex rel. Ward v. Anderson, 158 Mont. 279, 286, 491 P.2d 868, 872 (1971). The concept of liability must be distinguished from considerations of one's ability to discharge a liability. The law imposes many kinds of financial liabilities, without guaranteeing that any party will have the financial wherewithal to discharge the liability. You ask whether a mechanism has been created which will pay all potential covered workers' compensation claims. In my opinion, although the Fund is obligated by law to assume all workers' compensation liabilities for insolvent self-insurers, the law does not, and in all probability cannot, ensure that the Fund will have the resources to discharge all of the liabilities it assumes.

The Act contains provisions which may practically limit the Fund's ability to pay claims. For example, Mont. Code Ann. § 39-71-2615(2) limits the amount the Fund can assess against any self-insurer in any calendar year to 5 percent of the indemnity compensation paid by the self-insurer during the previous year. Mont. Code Ann. § 39-71-2615(3) provides similar protection to entities which cease to self-insure, limiting their liability to the Fund to three years of assessments after self-insurance status terminates. There is no legal requirement that the Fund be actuarially sound, i.e., that its assets be sufficient as a factual matter to satisfy all projected

liabilities. Cf. Mont. Code Ann. § 39-71-2311 (provisions aimed at ensuring actuarial soundness of the State Compensation Insurance Fund).

The statutes obligating the Fund to assume the liabilities of insolvent self-insurers and those which limit the assessments against members of the Fund are not directly contradictory, and they must be reconciled if possible. Dale v. Trade Street, Inc., 258 Mont. 349, 357, 854 P.2d 828, 832 (1993). Such a reconciliation is possible; the result is that, in the case of the insolvency of a self-insurer, the Fund must assume the workers' compensation obligations of the employer. However, the assessments that the Fund may make on the other members of the Fund in order to pay the covered workers' compensation claims of the insolvent self-insurer are limited by the terms of Mont. Code Ann. § 39-71-2615. Taken together, the effect of these statutes is that the Fund must assume the workers' compensation obligations of an insolvent self-insurer, but the Fund's sources of revenue with which to pay claims may be limited.

In response to a request for information on your questions, the Fund has argued that the law contains mechanisms which, as a practical matter, make any shortfall in the Fund highly unlikely to occur. For example, the Fund obligates self-insurers to post security for payment of benefits, and the amount of security posted has historically far exceeded the claims experience of the self-insurers. Moreover, pursuant to its statutory rulemaking authority, the Fund has adopted bylaws which deal with the possibility of insufficient funds to pay covered claims by providing: "[A]ny remaining unpaid benefits shall be paid as soon thereafter as sufficient funds become available." Bylaws of the Montana Self-Insurers Guaranty Fund, art. V, B.1. Cf. Mont. Code Ann. §§ 33-10-116(3) and -227(5) (providing similar means of supplying shortfall in assets of Casualty and Property Insurance and Life and Health Insurance Guaranty Associations).

I take no issue with the sound management practices which the Fund has followed. I have no reason to disagree with the Fund's assertion that the combination of Fund assessments and security posted by self-insurers provides a high level of protection for injured workers' benefits. However, the factual issue of whether the Fund is well positioned to satisfy obligations as they come due is separate from the legal issue you pose, which is whether the law ensures payment of all these obligations. The bylaw provisions cited above appear to assume the possibility that the Fund may not have the assets in hand to pay all of the obligations imposed by law in a timely manner. In my opinion, the law allows for the possibility, however remote, that the assets of the Fund may not be sufficient in a future case to cover its obligations.

The law is incapable of ensuring that any obligation will be satisfied. However, I note that in the case of the Fund, as

with other insurance guarantee funds, the legislature has not gone as far as it might have. The Fund's situation should be contrasted, for example, with the requirements imposed by the legislature for associations, corporations, or organizations of self-insuring employers:

> Each individual employer in an association, corporation, or organization of employers given permission by the department to operate as self-insured under plan No. 1 of this chapter is jointly and severally liable for all obligations incurred by the association, corporation, or organization under this chapter. An association, corporation, or organization of employers given permission to operate as self-insured must maintain excess liability coverage in amounts and under such conditions as provided by rules of the department.

Mont. Code Ann. § 39-71-2103(2). By these provisions, the legislature explicitly made members of self-insuring employers' associations jointly and severally liable for all obligations incurred by those associations. In addition, an employers' association is required to maintain excess liability coverage. The legislature chose to do neither of these things in the case of the Fund. Finally, as I have previously noted, the legislature has not required that the Fund be operated on an actuarially sound basis.

I express no opinion here on whether courts might recognize some legal or equitable right of recovery in favor of an injured worker against any person or entity in the event that the Fund is not financially able to satisfy the workers' compensation obligations of an insolvent self-insurer. Cf. State ex rel. Div. of Workers' Compensation v. District Court, 246 Mont. 225, 805 P.2d 1272 (1990) (state agency subject to suit for negligence in authorizing employer to self-insure). I note, however, that while the legislature has immunized the Fund and its members from individual liability for the Fund's decisions and actions, Mont. Code Ann. § 39-71-2618, it has not acted to immunize the Department from claims such as the ones brought in State ex rel. Div. of Workers' Compensation. I likewise express no opinion on the advisability of making changes in the statutes to more closely approach the goal of providing absolute protection for the benefits of injured workers when a self-insurer becomes insolvent. I can only examine the structure and possible consequences of current statutes. I conclude that the Montana Self-Insurers Guaranty Fund does not provide a mechanism which legally ensures payment of all potential covered workers' compensation claims against employers bound by compensation plan No. 1 who are unable to pay the claims because of insolvency.

II.

Your second question asks whether certain proceedings of the Fund's board of directors are subject to the Montana Administrative Procedure Act [MAPA], Mont. Code Ann. tit. 2, ch. 4, or the Open Meeting Law, Mont. Code Ann. tit. 2, ch. 3, pt. 2.

In order to answer this question, we must first examine the laws that determine the types of meetings to which the two acts apply. Because the reasoning applicable to the acts differs somewhat, I will examine the acts separately. I also note that the statutes governing the MSIGF differ in potentially significant ways from those governing the Casualty and Property Insurance Guaranty Association, Mont. Code Ann. tit. 33, ch. 9, pt. 1, and the Life and Health Insurance Guaranty Association, *id.*, pt. 2. I have not been asked for an opinion as to whether the conclusions stated herein would apply to these other guaranty associations and, accordingly, I express no such opinion.

A.

MAPA applies to rulemaking and contested case proceedings conducted by state agencies. "Agency" is defined in MAPA, Mont. Code Ann. § 2-4-102(2), by reference to the definition of the term in Montana's statutes dealing with public notice and the opportunity to be heard, Mont. Code Ann. § 2-3-102, which provides:

> (1) "Agency" means any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts except:
>
> (a) the legislature and any branch, committee, or officer thereof;
>
> (b) the judicial branches and any committee or officer thereof;
>
> (c) the governor, except that an agency is not exempt because the governor has been designated as a member thereof; or
>
> (d) the state military establishment and agencies concerned with civil defense and recovery from hostile attack.

The Fund board of directors is certainly a "board," fitting the first part of the definition. The Fund board is not specifically excepted from the definition in subsections

(1)(a)-(d). Thus, under the definition, the exercise by the Fund of any of the three specific powers listed--rulemaking, determining contested cases, and entering contracts--would bring the Fund board under the definition of an "agency."

According to Mont. Code Ann. § 39-71-2610, the legislature has given the Fund board two of the three powers listed in the definitional statute: the power to make rules and the power to enter into contracts. My conclusion regarding rulemaking authority is buttressed by the fact that when the legislature passed the MSIGFA in 1989, it attached a statement of intent (1989 Mont. Laws, ch. 244). The inclusion in the MSIGFA of a statement of intent to authorize adoption of administrative rules strongly indicates the legislature's intention to treat the Fund board as a rulemaking entity subject to MAPA. See Mont. Code Ann. §§ 5-4-402 to -404. It is therefore my opinion that the Fund board of directors fits the definition of "agency" in Mont. Code Ann. § 2-3-102, and, by incorporation under Mont. Code Ann. § 2-4-102(2), in MAPA as well.

The question might arise, since private organizations may adopt rules (bylaws) and enter contracts in order to carry out their purposes and responsibilities, what makes the Fund a public organization? The answer is that the Fund is a public organization because it has a public purpose, Mont. Code Ann. § 39-71-2602, because its powers to compel membership and assess members derive from the police power of the state, and because it has been granted specific statutory authority to adopt public rules and enter public contracts. When the Fund board adopts rules or resolves matters which fall within the definition of "contested case" under MAPA, Mont. Code Ann. § 2-4-102(4), it must comply with MAPA.

B.

The second part of this issue deals with the Montana Open Meeting Law. It states in pertinent part:

> All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds must be open to the public.

Mont. Code Ann. § 2-3-203(1).

In examining the definition of "agency" in the Open Meeting Law, the Montana Supreme Court has again referred to the definition of "agency" found in Mont. Code Ann. § 2-3-102. SJL of Montana v. City of Billings, 263 Mont. 142, 147, 867 P.2d 1084, 1087 (1993); see also Common Cause of Mont. v. Statutory Committee, 263 Mont. 324, 868 P.2d 604 (1994). In these cases, the Court held, contrary to my conclusion here, that the meetings at issue did not involve "agencies" as defined in the statute. Because

I find that the Fund Board is an "agency" as that term is defined in Mont. Code Ann. § 2-3-102, it is a public agency which must comply with the open meeting law.

This conclusion is consistent with the philosophy underlying the open meeting law. The laws guaranteeing the public's right to know are to be broadly construed. SJL of Montana, 263 Mont. at 146. In 44 Op. Att'y Gen. No. 40 (1992), Attorney General Racicot held that the open meeting law applies "generally to agencies that 'exist to aid in the conduct of the peoples' [sic] business.'" 44 Op. Att'y Gen. No. 40 at 2. The Fund exists to aid in the regulation of self-insurers, which is in turn an integral part of the workers' compensation system, a system which has from its earliest inception been recognized as serving an important public purpose. See Shea v. North Butte Mining Co., 55 Mont. 522, 528, 179 P. 499, 501 (1919). The Fund draws its authority to compel membership, and to assess its members and exercise its other regulatory powers, from the state's police power over employers. Application of the open meeting law to the Fund is, in my opinion, consistent with the law's purpose.

III.

Your third question concerns the phrase, "with the concurrence of the Montana self-insurers guaranty fund." That phrase, or an equivalent, is used throughout 1993 Mont. Laws, ch. 150, and 1991 Mont. Laws, ch. 163. You ask what powers were given to the Fund by the legislature through the use of that phrase.

In 1930 the Montana Supreme Court had occasion to discuss the concept of concurrence at length, and referred to standard definitions. Concurrence is defined as:

> "Concurrence in opinion; agreement." Century Dictionary. "A meeting of minds; agreement in opinion; consent." Webster's Dictionary. "Agreement in mind or opinion; consent; approbation; approval; to come together in opinion or action." Standard Dictionary.
>
> In the case of Northern Pacific Ry. v. Bennett, 83 Mont. 483, 272 P. 987, 992 [1928], this court quoted with approval the language of the Supreme Court of New York in the case of People ex rel. Schwab v. Grant, 126 N.Y. 473, 27 N.E. 964 [1891], as follows: "The requirement that a person must secure leave from some one [sic] to entitle him to exercise a right, carries with it, by irresistible implication, a discretion on the part of the other to refuse to grant it, if, in his judgment, it is improper or unwise to give the required consent."

Great Northern Util. Co. v. Public Serv. Comm'n, 88 Mont. 180, 212, 293 P. 294, 301 (1930).

As the Montana Supreme Court noted, the power to concur, by irresistible implication, also carries with it the power to withhold concurrence, such that withholding concurrence should have the effect of preventing the action. This "veto" power is the real power granted the Fund by the legislature in 1991 and 1993. The power of concurrence implies no power to initiate action.

I conclude that the legislature gave the Montana Self-Insurers Guaranty Fund, through its power of concurrence, the power to prevent the sole exercise by the Department of Labor and Industry of the powers enumerated in Mont. Code Ann. §§ 39-71-2101, -2103 to -2106, -2109, and -2611, as they are affected by 1993 Mont. Laws, chapter 150, and 1991 Mont. Laws, chapter 163.

IV.

Your final question also concerns the Fund's power of concurrence, as well as the power to require a private self-insurer to provide additional security. Specifically, you ask under what circumstances the Department must obtain the Fund's concurrence when the Department seeks to require an employer who self-insures to give security in addition to the security that the employer has already provided.

Your question arises because Mont. Code Ann. §§ 39-71-2105 and -2106, as amended in 1993, authorized the Department, with the concurrence of the Fund, to require any self-insurer to provide additional security or additional proof of solvency and financial ability to pay covered workers' compensation claims. In 1993, in addition to adding by amendment the concurrence language to Mont. Code Ann. §§ 39-71-2105 and -2106, the legislature enacted the following:

> § 3. **Saving clause.** The department of labor and industry may require an employer, without concurrence of the Montana self-insurers guaranty fund, to give security in addition to the requirements described in 39-71-2105 and 39-71-2106 for workers' compensation liabilities that the employer accrued prior to July 1, 1989.

1993 Mont. Laws, ch. 150. Because the saving clause was not codified in the Montana Code Annotated, a question arises as to its effect. However, the question is answered clearly in the statutes. Mont. Code Ann. § 1-11-103(6) states unequivocally that in cases of inconsistency between enrolled bills and codified statutes, enrolled bills, such as 1993 Mont. Laws, ch. 150, control. As part of the enrolled bill, the "saving clause" is a law which must be given effect.

These three enactments may be read consistently once it is recognized that the saving clause is more in the nature of a proviso. See State ex rel. Huffman v. District Court, 119 Mont. 201, 461 P.2d 847 (1969); Great Western Sugar Co. v. Mitchell, 119 Mont. 328, 174 P.2d 817 (1946). In the words of the Mitchell case, describing the proviso at issue there, "it is clear that the legislature intended to limit or restrict what had gone before and to exclude from the scope of the statute that which it evidently thought might otherwise be within its terms." 154 Mont. at 332, 174 P.2d at 819. In this case, the legislature, through the saving clause, differentiated between workers' compensation liabilities accrued before July 1, 1989, and later workers' compensation liabilities. It is clear that the legislature intended to exclude the first group of liabilities from the requirement that the Department obtain the concurrence of the Fund before requiring additional security. With respect to workers' compensation liabilities accrued after July 1, 1989, the concurrence of the Fund is required before any demands by the Department that private self-insurers provide additional security or additional proof of solvency and ability to pay.

This is consistent with the Montana Supreme Court's holding that "workers' compensation benefits are determined by the statutes in effect as of the date of injury." Buckman v. Montana Deaconess Hosp., 224 Mont. 318, 321, 730 P.2d 380, 382 (1986), and cases cited therein. The saving clause appears designed to reflect the legislature's intent that the Fund not be at risk for workers' compensation claims which arose prior to its creation. Since the Department regulates self-insurers with respect to such pre-Fund claims without the participation of the Fund, the legislature added the saving clause to make it clear that the Fund played no role in the Department's determination of the nature and amount of security required for pre-Fund claims.

I conclude that, in all cases *except* those involving workers' compensation liabilities accrued prior to July 1, 1989, the Department of Labor and Industry must obtain the concurrence of the Montana Self-Insurers Guaranty Fund when it seeks to require an employer who self-insures to give security in addition to the security which the employer has already provided.

THEREFORE, IT IS MY OPINION:

1. The Montana Self-Insurers Guaranty Fund does not ensure payment of all potential covered workers' compensation claims against employers bound by compensation plan No. 1 who are unable to pay the claims because of insolvency.

2. Proceedings of the board of directors of the Montana Self-Insurers Guaranty Fund are subject to the Montana Administrative Procedure Act (Mont. Code Ann. tit. 2,

ch. 4), and the Open Meeting Law (Mont. Code Ann. tit. 2, ch. 3, pt. 2).

3. The legislature gave the Montana Self-Insurers Guaranty Fund the power to prevent the sole exercise, by the Department of Labor and Industry, of the powers enumerated in Mont. Code Ann. §§ 39-71-2101, -2103 to -2106, -2109, and -2611, as they are affected by 1993 Mont. Laws, ch. 150, and 1991 Mont. Laws, ch. 163.

4. In all cases except those involving workers' compensation liabilities accrued prior to July 1, 1989, the Department of Labor and Industry must obtain the concurrence of the Montana Self-Insurers Guaranty Fund when it seeks to require an employer who self-insures to give security in addition to the security the employer has already provided.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/rfs/kaa

VOLUME NO. 46 OPINION NO. 2

EDUCATION - Payment of teachers for contractual leave days during instructional and professional development meetings;
EMPLOYEES, PUBLIC - Payment of teachers for contractual leave days during instructional and professional development meetings;
LABOR RELATIONS - Payment of teachers for contractual leave days during instructional and professional development meetings;
SALARIES - Payment of teachers for contractual leave days during instructional and professional development meetings;
SCHOOL DISTRICTS - Payment of teachers for contractual leave days during instructional and professional development meetings;
TEACHERS - Payment for contractual leave days during instructional and professional development meetings;
ADMINISTRATIVE RULES OF MONTANA - Rule 10.65.101;
MONTANA CODE ANNOTATED - Sections 20-4-304, 39-31-101 to -409;
OPINIONS OF THE ATTORNEY GENERAL - 45 Op. Att'y Gen. No. 21 (1993), 43 Op. Att'y Gen. No. 34 (1989), 42 Op. Att'y Gen. No. 37 (1987), 38 Op. Att'y Gen. No. 116 (1980), 38 Op. Att'y Gen. No. 20 (1979), 37 Op. Att'y Gen. No. 113 (1978).

HELD: Pursuant to Mont. Code Ann. § 20-4-304, a teacher must either attend the annual instructional and professional development meetings of teachers' organizations or attend other in-service training sometime during the year as approved by the trustees. A teacher cannot use contractual leave to avoid the obligation to attend one or the other kind of training.

February 27, 1995

Mr. Mike Weber
Richland County Attorney
201 West Main, Courthouse
Sidney, MT 59270

Dear Mr. Weber:

You have requested my opinion on a question arising from an ambiguity in the statute governing attendance at the annual instructional and professional development meetings of teachers' organizations. I have phrased your question as follows:

> May a teacher use contractual leave to avoid the obligation under Mont. Code Ann. § 20-4-304 to attend either instructional and professional development meetings or other appropriate in-service training?

The factual situation that gives rise to your question is a dispute between the Sidney Public Schools and the Sidney Education Association [SEA] involving teachers who seek to use collectively bargained personal leave during time set aside for annual instructional and professional development meetings of teachers' organizations, which are traditionally scheduled during a four-day weekend in late October each year. Mont. Code Ann. § 20-4-304, as amended in 1989, requires the schools to close during the days these annual meetings are scheduled, and obligates the teachers to acquire in-service training. It states as follows:

> The trustees of a school district shall close the schools of the district for the annual instructional and professional development meetings of teachers' organizations. A teacher may attend instructional and professional development meetings without loss of salary or attend other appropriate inservice training, as may be prescribed by the trustees, without loss of salary. If a teacher does neither, he must not be paid.

Id. Your letter informs me that the collective bargaining agreement (master agreement) establishes 17 days per year of sick and personal leave, to be used under conditions set forth in the master agreement. The master agreement also establishes a grievance procedure, which culminates in binding arbitration, for the resolution of disputes over the application or interpretation of the master agreement.

A recent Attorney General's Opinion discusses the limits on my authority to construe the language of a collective bargaining agreement:

> Where parties have entered into a collective bargaining agreement under which they agree to submit issues of contract interpretation to grievance and arbitration, the grievance procedure must be followed, and the issues cannot be addressed in the first instance in another forum. Allis Chalmers Corp. v. Lueck, 471 U.S. 202, 219-20 (1985).

45 Op. Att'y Gen. No. 21 (Dec. 30, 1993). Your question does not require me to construe the agreement between the SEA and the Sidney Public Schools. You ask only whether a statute limits the ability of the parties to the agreement to contract over a specific condition of employment. This has traditionally been a question which the Attorney General and the courts have answered without construing a particular collective bargaining agreement.

Collective bargaining between public employers and employees is established and encouraged by statute in Montana, Mont. Code Ann. §§ 39-31-101 to -409. However, the right of public

employees to bargain collectively is limited by a legislative expression of public policy. Several Opinions of the Attorney General have reiterated the general rule that "when a particular employment condition for public employees has been legislatively set, it may not be modified through collective bargaining without statutory authorization." 43 Op. Att'y Gen. No. 34, 103 at 105 (1989); 42 Op. Att'y Gen. No. 37, 149 at 151 (1987); 38 Op. Att'y Gen. No. 116, 408 at 410 (1980); 38 Op. Att'y Gen. No. 20, 71 at 73 (1979); 37 Op. Att'y Gen. No. 113, 486 at 488-89 (1978). See also School Dist. No. 12 v. Hughes, 170 Mont. 267, 273-75, 552 P.2d 328 (1978); City of Billings v. Smith, 158 Mont. 197, 490 P.2d 221 (1971); Abshire v. School Dist. No. 1, 124 Mont. 244, 220 P.2d 1058 (1950).

There is no question that the final sentence of Mont. Code Ann. § 20-4-304 unconditionally prohibits payment of a teacher if neither of the conditions set forth in the statute is met. The statutory conditions are that a teacher either attends "the annual instructional and professional development meetings of teachers' organizations," or attends "other appropriate inservice training, as may be prescribed by the trustees" (Mont. Code Ann. § 20-4-304). I find that the statute prohibits payment of the teacher's salary in cases where the teacher attends *neither* type of training. Thus, the law does not require that the teacher "not be paid" if the teacher misses the annual teachers' organization meetings as long as the teacher attends "other appropriate inservice training" which has been approved by the trustees.

However, nothing in the statute indicates a legislative intention that the "other appropriate inservice training" refer only to training offered during the four-day weekend in October when the "annual instructional and professional development meetings" traditionally occur. Mont. Admin. R. 10.65.101 requires "a minimum of three of the [total of seven "pupil instruction-related"] days for instructional and professional development meetings or other appropriate in-service training." Some school districts recognize that this requirement may be met by attending the annual teacher organization meetings or by attending other in-service training throughout the year as approved by the trustees. This flexibility is particularly important to teachers who coach or sponsor extracurricular activities held during the fall. Athletic competitions and related events are frequently held in football, girls' basketball, and cross-country during the weekend when the teachers' organizations meet. It would be impossible for teachers involved in these events to fulfill their in-service training requirements by attending these meetings and to fulfill their extracurricular activities contracts as well. There is no indication in the statute or in its legislative history that the legislature intended to require teachers who are coaches or sponsors to forfeit two days of pay because their coaching or sponsoring contracts prevent them from participating in the annual teacher organization meetings and training sessions. Nor

is there an indication that the legislature intended that all extracurricular activities stop during that weekend.

An interpretation of the statute which requires the teacher to attend some form of in-service training during the traditional teacher meeting weekend, on pain of loss of pay, would produce unreasonably punitive consequences. One example is that of the athletic coaches and activity sponsors discussed above. Another could occur if a teacher were on emergency, sick or maternity leave which extended to cover the dates of the annual teachers' organization meetings. If the statute means that a teacher must attend inservice training of some kind during that weekend or forfeit two days of pay, teachers who fall ill or are injured, or those whose maternity leaves fall during that particular period of the year, would be docked pay through no fault of their own. I find no indication that the legislature intended this unreasonable result.

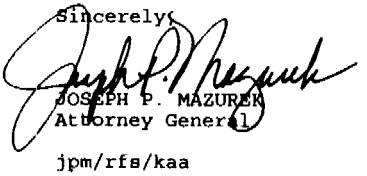
Your opinion request is phrased in terms of a teacher attending neither type of training, and in that case the statutory prohibition controls. However, in the factual situation you present, it is possible that a teacher might use a contractual leave day during the annual meetings of teachers' organizations and still fulfill his or her training requirement if there is an opportunity for "other appropriate inservice training as may be prescribed by the trustees" during the balance of the year. The statute gives the trustees significant control over this subject by giving them the discretion to approve or disapprove alternative in-service training opportunities. However, nothing in the statute operates to preclude collective bargaining as to the approval of in-service training, since such training is clearly a "condition of employment" under Mont. Code Ann. § 39-31-201. I find no indication in the statutory language or legislative history that the legislature intended to dictate to schools that this in-service training obligation be fulfilled according to any particular schedule, as long as the teacher acquires the necessary training.

In sum, school districts cannot act beyond their delegated powers: "The Montana Supreme Court decided very early that a school district was a public corporation with limited powers, exercising through its board only such authority as is conferred by law, either expressly or by necessary implication." School Dist. No. 12 v. Hughes, 170 Mont. at 273, 552 P.2d at 332. I conclude that the authority to override the statutory prohibition against payment of a teacher who does not attend instructional and professional development meetings or other approved in-service training has not been conferred by law upon school districts in the state of Montana. If a teacher does not attend the annual teachers' organization meetings or such other in-service training as the trustees approve, the teacher may not be paid for the two days during which the schools are closed pursuant to Mont. Code Ann. § 20-4-304.

THEREFORE, IT IS MY OPINION:

Pursuant to Mont. Code Ann. § 20-4-304, a teacher must either attend the annual instructional and professional development meetings of teachers' organizations or attend other in-service training sometime during the year as approved by the trustees. A teacher cannot use contractual leave to avoid the obligation to attend one or the other kind of training.

Sincerely,



JOSEPH P. MAZUREK
Attorney General

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VOLUME NO. 46 OPINION NO. 3

COUNTIES - County boards of health;
HEALTH AND ENVIRONMENTAL SCIENCES, DEPARTMENT OF - Inspection of food establishments;
HEALTH BOARDS AND DISTRICTS - Inspection of food establishments;
STATUTORY CONSTRUCTION - Conflicting statutes;
MONTANA CODE ANNOTATED - Sections 50-2-104 to -107, -116, -118, 50-50-104, -106 to -108, -205, -301, -305;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 22 (1985).

HELD: Local boards of health are required to inspect food establishments and to participate in enforcing state laws governing those establishments.

March 3, 1995

Mr. Robert J. Robinson, Director
Department of Health and Environmental Sciences
Cogswell Building, Room C108
P.O. Box 200901
Helena, MT 59620-0901

Dear Mr. Robinson:

The Department of Health and Environmental Sciences has requested my opinion on the following question:

> Are local boards of health required to inspect food establishments and to participate in enforcing state laws governing those establishments and, if so, what are the mandatory requirements to which a local board of health must adhere?

Your inquiry arises from Carbon County's notification to the department that the county's sanitarian will no longer assist the department in the inspection of food service establishments. Apparently, Carbon County's position is that the county health officer has no statutory duty to inspect such establishments.

Both the state department of health and local boards of health have statutory powers and duties regarding the inspection of food establishments and enforcement of provisions regarding food establishments.

Regarding the general powers and duties of local health boards, Mont. Code Ann. §§ 50-2-104 to -107 require the creation of a county board of health or other "local board" in each county. See 41 Op. Att'y Gen. No. 22 (1985). A local board is defined as a county, city-county or district board of health. Mont. Code Ann. § 50-2-101(3). Mont. Code Ann. § 50-2-116 prescribes

the powers and duties of local boards of health. It provides, inter alia, that local boards shall appoint a local health officer and *shall* supervise inspections of public establishments for sanitary conditions. Mont. Code Ann. § 50-2-116(1)(a) and (h). Local health officers must comply with Mont. Code Ann. § 50-2-118, which sets out the officers' powers and duties. 41 Op. Att'y Gen. No. 22 (1985). Those duties include provisions that local health officers *shall* make inspections for sanitary conditions. Mont. Code Ann. § 50-2-118(1)(a). Further, the statutes pertaining to food establishments expressly provide that the state *and* local health officers "*shall* make investigations and inspections of establishments and make reports to the department as required under rules adopted by the department." Mont. Code Ann. § 50-50-301 (emphasis added).

Additional code sections support a conclusion that the legislature intended the department and the local health boards to share the responsibility for inspecting food establishments and for enforcing provisions regarding such facilities. Mont. Code Ann. § 50-50-104 authorizes the state department of health and local health boards to enter into cooperative agreements to carry out the provisions regarding food establishments. Actions to enjoin continued violations of chapter 50 may be brought by either the department or the local health officer. Mont. Code Ann. § 50-50-106. The county attorney is required to prosecute violations of chapter 50 when the department presents such evidence to him or her. Mont. Code Ann. § 50-50-107. Food establishments must provide both state and local health officers free access in order to conduct investigations and inspections. Mont. Code Ann. § 50-50-302.

Despite the above provisions which appear to confer mandatory duties upon the department *and* the local health boards to conduct inspections of food establishments, Carbon County has apparently relied upon the language of Mont. Code Ann. § 50-50-305 to determine that the inspection of food establishments by local health boards is optional.

Under Mont. Code Ann. § 50-50-205, 85 percent of license fees collected by the department are deposited into the local board inspection fund created by Mont. Code Ann. § 50-2-108 in order to at least partially reimburse the local health boards for inspection of food establishments. Under Mont. Code Ann. § 50-50-305, each year the department must pay to the local health board an amount from the local board inspection fund which is to be used only for inspecting licensed food establishments and enforcing the provisions of chapter 50, if the local board meets certain conditions. Included in the conditions are the requirements that there be a functioning local board of health, that the local board in fact conduct such inspections and enforce the provisions of chapter 50, and that the board, its officers and sanitarians meet minimum program performance standards established by department rules. Funds

that a local board is not qualified to receive are retained by the department to be used to enforce the provisions of chapter 50. Apparently, Carbon County believes that the language of the statute gives it the discretion to decide *not* to assist the department in the inspections with the result that the department simply will retain the funds so that it may conduct the inspections. Thus, it appears that there may be a conflict between the various statutory provisions which impose a mandatory duty upon local boards to conduct inspections of food establishments and enforce provisions of chapter 50, and Mont. Code Ann. § 50-50-305, which arguably implies that the local boards' inspection and enforcement duties are discretionary.

"Legislative intent must be ascertained from an examination of all of the statutes on one subject matter as a whole, not just the wording of one particular section." Vita-Rich Dairy, Inc. v. Department of Business Regulation, 170 Mont. 341, 553 P.2d 980, 984 (1976). Statutes dealing with the same subject matter are to be construed together and harmonized if possible. Crist v. Segna, 191 Mont. 210, 622 P.2d 1028, 1029 (1981).

The above statutes can be harmonized by construing Mont. Code Ann. § 50-50-305 to allow the inspection program to be more accountable by permitting the department to restrict funds going to the local health board if it is not a functioning board or is not conducting inspections and enforcing chapter provisions in a satisfactory manner. In such cases, the department may use the funds which would otherwise go to the local health board to implement the chapter provisions on a temporary basis to protect the health and safety of the public until the local board is functioning properly. In light of the clear statutory provisions, discussed above, which place a mandatory duty upon the local health board and its officer to participate in inspections and enforcement of chapter 50 provisions, Mont. Code Ann. § 50-50-305 cannot be interpreted to abrogate, by implication, those mandatory duties.

THEREFORE, IT IS MY OPINION:

Local boards of health are required to inspect food establishments and to participate in enforcing state laws governing those establishments.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/ppc/kaa

BEFORE THE BOARD OF NURSING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the petition for declaratory ruling on the administration of intravenous conscious sedation medications by non-anesthetist registered nurses | ) ) ) ) ) | DECLARATORY RULING |

TO: All Interested Persons:

**Introduction**

1. On October 13, 1994, the Board of Nursing published a Notice of Petition for Declaratory Ruling in the above-entitled matter at page 2752, 1994 Montana Administrative Register, issue number 19.

2. On November 17, 1994, the Board presided over a hearing in this matter to consider written and oral testimony from interested individuals.

3. After consideration of the testimony and deliberation, the Board passed a motion to grant the petition for declaratory ruling.

**Issue**

4. Petitioners requested a ruling on whether it is within the scope of practice of a non-anesthetist registered nurse to administer intravenous conscious sedation medications under a physician's order based on the Board's interpretation of section 37-8-102(5)(b), MCA, defining professional nursing.

**Factual Background**

5. The Petitioners represent the nursing staff at the Kalispell Regional Hospital and set forth the following definition of "intravenous conscious sedation" as adopted by the Association of Operating Room Nurses [AORN]:

> Intravenous conscious sedation is produced by the administration of pharmacologic agents. A patient under conscious sedation has a depressed level of consciousness, but retains the ability to independently and continuously maintain a patent airway and respond appropriately to physical stimulation and/or verbal command.

6. The Petition alleges that non-anesthetist registered nurses currently perform IV conscious sedation for short-term therapeutic, surgical, or diagnostic procedures, and that this practice provides cost-effective, quality healthcare.

7. The Petitioners requested this declaratory ruling to clarify that IV conscious sedation is within the scope of a non-anesthetist registered nurse who has had specialized training pursuant to a written standard of care describing conscious sedation policies and procedures as required by the Joint Commission on Hospital Accreditation.

**Summary of Comments**

8. Kate Triplett, RN, submitted written testimony against allowing non-anesthetist registered nurses to administer IV conscious sedation, expressing the need for nurses performing the procedure to have specialized knowledge of anesthetic agents and potential side effects. Ms. Triplett further expressed the need for immediate accessibility to monitoring equipment, intubation equipment, and oxygen supplies when IV conscious sedation is being performed.

9. Several nurses signed their names to written statements submitted on behalf of Saint Vincent's Hospital and Health Center and Deaconess Medical Center in support of the petition. The testimony indicated that it is common practice for non-anesthetist nurses to administer IV conscious sedation medication under a physician's order. Both facilities follow the AORN standards of care with regard to administration of IV conscious sedation. These standards include parameters to be assessed during procedures which indicate a need for IV conscious sedation and a patient-monitoring policy.

10. The Montana Nurses' Association, represented by Barbara Booher, testified in support of the petition. This testimony included a position statement adopting the AORN standard of care with regard to the role of the registered nurse in administering IV conscious sedation.

**Relevant Law**

11. The scope of practice of a registered nurse is set forth at section 37-8-102(5)(b), MCA, and includes "the administration of medications and treatments prescribed by physicians . . . ."

12. ARM 8.32.1404(2) and (3) state that the registered nurse shall "accept responsibility for individual nursing actions and competence and base practice on validated data;" and shall "obtain instruction and supervision as necessary when implementing nursing techniques or practices . . . ."

**Conclusion**

13. Based on these definitions, rules, statutes and the facts herein cited, the Board of Nursing adopts the position that it is within the scope of practice of a non-anesthetist registered nurse to administer IV conscious sedation medication.

The Petition is granted. DATED this 11th day of January, 1995

BOARD OF NURSING

BY: Nancy Heyer RN CNA
NANCY HEYER, RN, CNA, PRESIDENT

BEFORE THE BOARD OF NURSING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the petition ) DECLARATORY RULING
for declaratory ruling on the )
determination of pronouncement )
of death by a registered nurse )

TO: All Interested Persons:

1. On October 13, 1994, the Board of Nursing published a Notice of Petition for Declaratory Ruling in the above-entitled matter at page 2755, 1994 Montana Administrative Register, issue number 19.

2. On November 17, 1994, the Board presided over a hearing in this matter to consider written and oral testimony from interested individuals.

3. On February 23, 1995, the Board withdrew the motion to issue an interpretive rule in this matter, and in the alternative, made a motion to issue this declaratory ruling.

**Issue**

4. Petitioners requested a ruling on whether it is within the scope of practice of a registered nurse to determine or pronounce death, based on the Board's interpretation of Section 50-22-101, MCA, defining "determination of death," and Section 37-8-102(5)(b), MCA, defining professional nursing.

**Factual Background**

5. The Petitioners represent the nursing staff at the Missouri River Medical Center. The Petitioners alleged that on April 25, 1994, they received a notice of procedure from the administrator directing nursing staff to notify the appropriate medical staff member regarding a patient's absence of vital signs and to receive orders from the physician regarding disposition of the body. This notice was preceded by notice from medical staff that they would no longer physically verify death on hospital or nursing home patients.

6. The Petitioners alleged that in 1988, a Department of Health and Environmental Sciences survey of the facility indicated that nurses could not "certify" death.

7. An advisory opinion of the Board of Nursing issued in May, 1987 stated that "death pronouncement is a medical diagnosis and not within the scope of registered nursing practice." The Petitioners filed the Petition for Declaratory Ruling to seek clarification and to avoid practicing in violation of the Nurse Practice Act.

**Summary of Comments**

8. The Montana Nurses' Association submitted testimony in support of the ruling that it is within the scope of practice of a registered nurse to determine or pronounce death based on a registered nurse's qualifications to conduct nursing assessments and that the past practice has included this assessment and communication of the assessment to the physician.

9. Rita Turley, MSN, RN, Lionel Tapia, MD, and Jane Scharff, MN, RN, of Saint Vincent Hospital and Health Center, submitted written testimony in support of the authority of registered nurses to determine or pronounce death. This testimony stated that the substantial specialized knowledge of life sciences that registered nurses must have includes the ability to comprehend, assess, and describe the cessation of life. The testimony further stated that it has been the practice for over 20 years that the registered nurse assess and describe the cessation of vital signs to the physician via telephone to receive the pronouncement of death from the physician.

10. Further testimony was heard regarding the authority of elected officials to legally pronounce death in Montana without specialized training in life sciences.

**Analysis**

11. The May 8, 1987 advisory opinion of the Board of Nursing stated that because "pronouncement of death is a medical diagnosis," it was not within the scope of a registered nurse's practice to pronounce death. However, that advisory opinion further indicated that a registered nurse is "responsible for conducting and documenting nursing assessments of the health status of individuals and for communicating the evaluation data to the appropriate members of the health team."

12. The term "professional nursing," is defined in Section 37-8-102(5)(b), MCA, and requires "substantial specialized knowledge" of biological, physical, and behavioral sciences. This section further defines the nursing process as including "the assessment, nursing analysis, . . . and evaluation in the promotion and maintenance of health . . . ." "Nursing analysis" is the "identification of those client problems for which nursing care is indicated and may include referral to medical . . . resources." Section 37-8-102(5)(b)(i), MCA.

13. Based on these definitions and the facts herein cited, it is within the scope of practice of a registered nurse to assess, analyze, and evaluate the cessation of vital signs to determine that death has occurred. This determination must be communicated to the appropriate medical resource to receive a medical diagnosis (pronouncement of death) appropriately documented.

14. Section 50-22-101, MCA states that determination of death "must be made in accordance with accepted medical standards." The procedure outlined herein conforms with "accepted medical standards."

BOARD OF NURSING

BY: Nancy Heyer RN, CNA
NANCY HEYER, RN, CNA, PRESIDENT

Service Date: September 1, 1993

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

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| IN THE MATTER OF GROUSE MOUNTAIN ASSOCIATES, LTD., dba GROUSE MOUNTAIN LODGE, Petition for Declaratory Ruling on the Application of Motor Carrier Laws to the Transportation of Hotel Guests. | ) | TRANSPORTATION DIVISION |
| | ) | DOCKET NO. T-93.33.DR |

## DECLARATORY RULING

### Introduction

1. On March 9, 1993, Grouse Mountain Associates, Ltd., dba Grouse Mountain Lodge (Grouse Mountain), a hotel business located at Whitefish, Montana, filed a Petition for Declaratory Ruling before the Montana Public Service Commission (PSC). The Petition requests a ruling on the application of PSC-administered motor carrier laws to Grouse Mountain's "courtesy" transportation of its hotel guests.

2. On April 7, 1993 the PSC issued a Notice of Petition for Declaratory Ruling, setting forth the facts stated and the question of law presented by Grouse Mountain and allowing 20 days for comment from interested persons. Public comments were received in support of the Petition, in opposition to the Petition, and in merely expressing views on the matter.

3. On April 1, 1993, Randall Johnson, dba Flathead Glacier Transportation and Whitefish Sober Chauffeur Taxi, Inc. (Johnson), filed a Motion to Defer PSC consideration of Grouse Mountain's Petition. The Motion was based primarily on the existence of a pending court action (Cause No. DV-93-82A, Eleventh Judicial District) previously brought by Johnson against Grouse Mountain and including a similar question of law as that presented in the Petition. On May 3, 1993 the PSC granted Johnson's Motion and deferred action on the Petition. On May 24, 1993, the PSC reinstated action on the Petition, a Motion by Grouse Mountain then disclosing that the court action had been stayed pending a determination by the PSC.

4. In this proceeding Johnson has made several procedural requests or arguments. Johnson requested a hearing on the matter. Requests for hearing generally are granted in declaratory rulings only when there are problems such as the facts stated by the Petitioner are unclear or a need exists to explore or better understand the environment in which the ruling will apply and there is no less burdensome means to solve those problems. The given facts and the environment in which

a ruling will apply in this instance are clear. Johnson's request is denied.

5. Johnson also disputes the facts provided by Grouse Mountain. Declaratory rulings are based on facts as given by a petitioner and normally do not entail a process to resolve or determine a contest of those facts (distinguish the contested case procedure at Sections 2-4-601 through 2-4-631, MCA). If the facts as given in a Petition for Declaratory Ruling are not accurate, the Petitioner is at risk that the ruling simply will not be applicable. The facts used in this ruling will be Grouse Mountain's stated facts. Any request by Johnson to contest facts or provide additional facts is denied.

6. In this proceeding Grouse Mountain has made several procedural arguments concerning lack of notice, absence of service, ex parte contacts, party status, and improper intervention. Procedures in declaratory rulings are governed by Section 2-4-501, MCA (MAPA), and ARM 1.3.226 through 1.3.229 (A.G. Model Rules, adopted by the PSC pursuant to ARM 38.2.101). These provisions have no notice, service, intervention, ex parte, or hearing requirements. Under these governing provisions the declaratory ruling procedure appears to be designed to allow a procedure that is unburdensome and a prompt answer to the question presented. Although it may be courteous that key participants in declaratory rulings exchange papers and keep each other informed, it is not a requirement in actions before the PSC unless the PSC orders otherwise. In several of these regards, the more common administrative rulemaking procedure operates in a similar fashion. See, generally, Sections 2-4-301 through 2-4-315, MCA. Neither declaratory rulings nor rulemaking require the more comprehensive and elaborate "contested case" procedures prescribed in Sections 2-4-601 through 2-4-631, MCA. Any request by Grouse Mountain to impose contested case procedures for notice, service, ex parte contacts, party status, or intervention is denied.

## Analysis

7. The facts stated in the question presented by Grouse Mountain are that Grouse Mountain operates a hotel in Whitefish, Montana, providing lodging, food, and beverages to paying guests. In conjunction with its hotel operations it owns two 9-12 passenger vehicles and two 20-30 passenger vehicles which it uses to transport its registered guests between (to and from) its hotel and Glacier International Airport, the Amtrack rail station in Whitefish, Big Mountain Ski and Summer Resort, near Whitefish, and downtown Whitefish. It charges a fee of $2.00 per passenger for transportation between its hotel and downtown Whitefish. In the other transportation movements of guests it does not charge a fee. Grouse Mountain does not advertise or offer transportation services to the general public.

8. The question of law present in Grouse Mountain's Petition is whether the "courtesy" transportation activities

of Grouse Mountain are those of a regulated motor carrier as falling within the definition of "motor carrier" provided in Section 69-12-101(7), MCA (and related provisions), or whether they are those of an unregulated private carrier as being exempt or excluded from that definition.

9. Comments on the matter were received from a number of interested persons. These include Billings Yellow Cab, Johnson, North Valley Refuse (Whitefish), Montana Innkeepers Association, Kalispell Taxi Service, City Cab (Billings), Grouse Mountain, and Big Mountain Resort (Whitefish). Those generally in favor of courtesy transportation being excluded from regulation comment that: the competitive resort and hotel industry must provide every convenience for guests; commonly provided courtesy transportation has not been and should not be classified as motor carriage; and a declaration that such transportation is regulated would be impractical, unreasonable, and create an undue hardship. Grouse Mountain, in addition to arguing that its transportation is incidental, argues that its transportation is merely "accommodative."

10. Those generally in opposition to courtesy transportation being excluded from regulation comment that: regulated transportation companies should handle the transportation needs of the public; hotel transportation should be regulated and required to meet the same standards for the safety of the public and the welfare of the transportation industry; unregulated courtesy transportation undermines stability of regulated carriers through increased loss of riders and increased rates to those riders remaining; and Montana public policy is to promote and protect public transportation. Several comments suggest that hotel courtesy transportation without a fee might be incidental, but with a fee it is not. Johnson submits that the primary business test does not apply to the transportation of passengers. City Cab comments that the "primary business test" includes a consideration of competition with those in the transportation business.

11. The PSC determines that a part of Grouse Mountain's transportation activities is regulated motor carriage and a part is not. The analysis of the question presented begins with the statutory definition of "motor carrier." Insofar as it is applicable to Grouse Mountain's circumstances, a "motor carrier" is any person operating a motor vehicle for the transportation of persons for hire on a commercial basis. See, generally, Section 69-12-101(7), MCA. Within this definition "for hire" means remuneration of any kind, direct or indirect. See, generally, Section 69-12-101(5), MCA. Within the definition of "motor carrier," "on a commercial basis" means "as a business, not in the sense of having profit as a primary aim or any other similar sense, but in the sense of being a serious concern regularly and habitually engaging the time and effort of the carrier." See, In the Matter of Department of Commerce, paras. 22-36, PSC Docket No. T-9597, Declaratory Ruling (January 25, 1991).

12. Grouse Mountain meets all of the statutorily expressed elements of the definition of "motor carrier." Under the

given facts, it is clearly a "person," it clearly operates one or more motor vehicles, and it clearly transports persons (passengers). It also transports "for hire." Without even considering the nominal fee charged for transportation between its hotel and downtown Whitefish, "for hire" exists as its hotel guests pay for lodging, food, and beverages in a for-profit setting. In such a case it reasonably must be imputed that a portion of the revenues obtained are actually assigned to cover the costs of transportation. Remuneration of some kind is received, albeit indirectly. Given the definition of "for hire" (remuneration of any kind, direct or indirect), it seems unlikely that there could normally be any transportation in a for-profit setting that is not "for hire" in some qualifying fashion. Grouse Mountain also operates "on a commercial basis," as the transportation regularly and habitually engages its time.

13. However, a legal analysis of who is a "motor carrier" does not end with review of the expressed elements in the statutory definition of "motor carrier." There are additional elements or considerations bearing on whether transportation activity is that of a "motor carrier." There are exemptions (see, e.g., Section 69-12-102, MCA) and there are exclusions. No statutory exemptions appear to apply in Grouse Mountain's case ("accommodative transportation," Section 69-12-105, MCA, will be discussed later). However, at least one exclusion is potentially applicable -- the "primary business test."

14. The "primary business test" exclusion is not expressly codified by statute. However, it is valid case law, based on a long-standing judicial interpretation of the statutory definition of "motor carrier." In Board of Railroad Commissioners v. Gamble-Robinson Co., 111 Mont. 441, 111 P.2d 306 (1941), the Montana Supreme Court reasoned that "engaged in the transportation" (found in the title of Chapter 184, L. 1931, the Montana law first establishing the definition of "motor carrier") did not mean engaged in some other service and merely transporting in connection therewith. The Court held that transportation "as an incident to the conduct of their lawful business" was not motor carriage. 111 P.2d at 310-311. The Gamble-Robinson "incident to" rule essentially prescribes that transportation activity done as an incident to a principal nontransportation business is not an act within the definition of "motor carrier." Such incidental transportation is excluded from the definition of "motor carrier."

15. The Gamble-Robinson "incident to" rule is now commonly referred to as the "primary business test," a term coined from the name for a similar concept long used in federal motor carrier regulation and now codified at 49 USC 10524. The essential elements of the Gamble-Robinson "incident to" rule or the "primary business test" are that there must be a principal real nontransportation service, business, or occupation to which related transportation activities are incidental (in the scope of, in furtherance of, and subordinate to). See, In the Matter of Department of Commerce,

paras. 37-52, PSC Docket No. T-9597, Declaratory Ruling (January 25, 1991). Transportation which meets these elements and is thereby incidental to a principal nontransportation business is not within the definition of "motor carrier."

16. Grouse Mountain does have a real nontransportation business. The business is that of a hotel -- providing lodging, food, and beverages to paying guests. Under the given facts and what is otherwise virtually self-evident about common hotel operations, the PSC views it as unnecessary to study the matter further to reach the conclusion that Grouse Mountain's hotel operations are primary in relation to its transportation operations. Grouse Mountain's transportation of its hotel guests is secondary. The PSC also views it as a certainty that the hotel operations can be categorized as Grouse Mountain's principal business -- the other activities, including transportation, are subordinate.

17. However, merely categorizing one aspect of a business as primary and another as secondary is not the analysis applied in the "primary business test." The "primary business test" is not concerned with "primary" and "secondary," it is concerned with "principal" and "incidental." In order for something to qualify as being secondary it must merely be subordinate. In order for something to qualify as being incidental it must be subordinate to and also in furtherance of and in the scope of. See generally, Department of Commerce, Id., at para. 46. Under the "primary business test," once it has been determined that there is a real primary or principal nontransportation business to which related transportation activities are subordinate, the transportation activities must be evaluated to determine if they meet the other criteria of being incidental--"in the furtherance of" and "in the scope of."

18. Grouse Mountain's business is to provide lodging, food, and beverages. For the transportation to be incidental under the "primary business test" the transportation must be "in the furtherance of" and "in the scope of" providing lodging, food, and beverages. "In the furtherance of" generally implies a direct promotion or advancement of something. For purposes of the "primary business test" the qualifying transportation element must directly promote or advance the qualifying nontransportation element. In Grouse Mountain's case, transportation "in the furtherance of" would be that which directly promotes or advances the business of providing lodging, food, and beverages. "In the scope of" generally implies being directly within the boundaries, extent, or range of something. For purposes of the "primary business test" the boundaries, extent, or range of a qualifying nontransportation business limits or defines the permissible boundaries, extent, or range of the transportation aspect of the business. In Grouse Mountain's case, transportation "in the scope of" would be limited to that which is directly within the boundaries of Grouse Mountain's business of providing lodging, food, or beverages.

19. In its business it appears that Grouse Mountain engages in transportation of two general types. One type is that of transporting guests between its hotel and other common

carriers such as airlines and railroads (Amtrack). The other type is that of transporting guests between its hotel and the local downtown area (Whitefish) or a local recreation area (Big Mountain). These two general types of transportation have distinctions that will become apparent in regard to the proper application of the "primary business test."

20. Transportation between Grouse Mountain's hotel and a point at which guests connect with the identified other means of transportation meets the criteria for being incidental. It is in furtherance of the business of providing lodging, food, and beverages because it directly benefits, promotes, and encourages the hotel business (lodging, meals, and beverages) by providing a convenient means of conveying guests to and from the hotel, directly for hotel purposes. It is in the scope of the business of providing lodging, food, and beverages because it facilitates nothing other than those things directly within the scope of a business providing lodging, food, and beverages. This type of transportation is incidental and not motor carriage.

21. Transportation between Grouse Mountain Lodge and a point at which guests engage is some activity such as sports, recreation, shopping, sight seeing, amusement, business dealings, and other might be in the furtherance of a lodging business from a promotional standpoint. However, such is not properly within the scope of a business providing lodging, meals, and beverages. Such transportation facilitates things outside of the boundaries of the hotel business. Providing lodging, food, and beverages does not encompass these other things. Even though the transportation may be convenient and desirable to guests, it strays beyond the scope of a business providing lodging, meals, and beverages. This type of transportation is regulated motor carriage.

22. The PSC concludes that Grouse Mountain's transportation of hotel guests is partly unregulated private carriage and partly motor carriage as explained above. Grouse Mountain must engage the services of a motor carrier or obtain motor carrier authority to transport its guests between its hotel and points such as Big Mountain Resort or downtown Whitefish.

Analysis of Other Points Raised

23. Several comments relate to a distinction between courtesy transportation for a fee and that for which no fee is assessed. Although that part of Grouse Mountain's transportation activities for which a fee is assessed has been declared motor carriage anyway, it should be noted that the existence of a nominal fee charged for transportation that is incidental to a principal business is generally inconsequential to the analysis. In a for-profit setting "for hire" generally will be imputed in any event and unless the fee assessed generates revenues to such an extent that, in conjunction with all other factors, the transportation aspect of a business becomes the principal undertaking, it usually justifies no consideration.

24. Grouse Mountain suggests that its transportation is accommodative. Section 69-12-105, MCA, provides that "accommodative transportation" is not a service for hire even though the persons transported share in the cost or pay for the movement. The transportation that Grouse Mountain provides is not "accommodative" within the meaning of Section 69-12-105, MCA. "Accommodative" refers to a transportation movement that arises sporadically or occasionally, normally without design or obligation, as a convenience or courtesy. Grouse Mountain's transportation is regular. Furthermore, insofar as Grouse Mountain's transportation is in a for-profit setting and is not otherwise excluded from the definition of "motor carrier" it would be defined as a "transportation business" to which the "accommodative transportation" exclusion is not available. See also, Section 69-12-105, MCA.

25. Johnson questions whether the primary business test applies to the transportation of passengers. It does. The exact logic applied in Gamble-Robinson to the transportation of property applies equally to the transportation of persons (passengers). The same statute is involved, no change in rationale is required, there simply is no reason to distinguish between property and persons in this regard. The "primary business test" is applicable to the transportation of passengers.

26. City Cab suggests that the primary business test includes a consideration of competition with those engaged in the transportation business. The PSC has previously considered competition with regulated carriers as a reason not to apply the "primary business test." See, In the Matter of Marvin Shock, Declaratory Ruling, PSC Docket No. T-9157 (May 3, 1988). The PSC has departed from this consideration of competition, although it appears that the Shock ruling would remain the same for other reasons. Upon reevaluation since Shock, it does not now appear that Gamble-Robinson actually includes competition as a required and determinative factor in an analysis of whether transportation is incidental. Additionally, a consideration of competition, if applied strictly, would essentially render the "primary business test" meaningless as there simply is no incidental transportation that does not compete with regulated carriers to some extent.

27. Several participants comment that public transportation is to be preserved by the PSC. This is true. However, public transportation can only be preserved in a fashion that correctly applies the governing law. Exemptions and exclusions from the definition of "motor carrier" exist and must be considered and applied.

28. It should be finally noted that a number of Montana businesses operate to serve persons who are enjoying the many recreational opportunities that are available in this state. Hotels, motels, guest ranch lodges, outfitter lodges, and like facilities are no exception. By this ruling, which applies only to Grouse Mountain as the facts are given by Grouse Mountain, the PSC is not attempting to declare that businesses providing comprehensive services relating to recreational op-

portunities and also provide services that entail lodging or motor carrier transportation of guests will be found to be engaged in regulated transportation. Until all general possibilities in this regard are presented and considered, questions must be analyzed on a case by case basis.

DECLARATORY RULING

Under the facts presented, Grouse Mountain, having a principal nontransportation hotel business providing lodging, meals, and beverages, may transport its registered guests between (to or from) its hotel and points of connection with other common carriers without obtaining motor carrier authority. Such transportation is not within the definition of "motor carrier" as it is incidental to the principal nontransportation hotel business of providing lodging, meals, and beverages. Grouse Mountain cannot lawfully transport its registered guests between (to or from) its hotel and other points or places referenced within the facts presented without engaging the services of a regulated motor carrier or obtaining proper motor carrier authority. Such transportation is within the definition of "motor carrier" and is not incidental to a principal nontransportation hotel business of providing lodging, meals, and beverages.

Done and dated this 18th day of August, 1993, by a vote of 3 - 2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ANDERSON, Chairman
(Voting to Dissent)

BOB ROWE, Vice Chairman
(Voting to Dissent)

DAVE FISHER, Commissioner

NANCY MCCAFFREE, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.

Service date: September 1, 1993

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

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| In the matter of Grouse Mountain Associates, Ltd., dba Grouse Mountain Lodge, petition for declaratory ruling on the application of motor carrier laws to the transportation of hotel guests. | ) ) ) ) ) ) | Transportation Division<br><br>Docket No. T93.33.DR |

**Dissent of Commissioners Anderson and Rowe**

The majority opinion is a reasoned statement of the Commission's interpretation of the "primary business" exception to motor carrier regulation. However, it reaches a conclusion in which we cannot fully concur; therefore, we dissent.

The Commission must faithfully execute the laws passed by the legislature. The legislature long ago decided that having a stable motor carrier industry is in the public interest. Because that industry can be destablilized by excessive competition, "entry" is regulated by the Commission. It may be in the public interest to protect existing carriers if additional entry would harm them.

In this case, the Commission's order is intended to protect a local carrier which is subject to regulation (City Taxi) from actual or alleged competition by a party (Grouse Mountain) which is not currently regulated. The majority opinion is premised on the concern that "cream skimming" of a highly-profitable segment of the market by an unregulated carrier may weaken the regulated carrier, and thereby harm transportation service to the community. This is a legitimate concern, but one not supported by the record.

Grouse Mountain transports only its guests and not the general public. Furthermore, Grouse Mountain invested in transportation equipment because the existing carriers were not meeting its needs. The regulated carrier, therefore, is not harmed by the transportation provided by Grouse Mountain.

The second crux of the case is the "primary business test." Is the transportation provided by Grouse Mountain "incidental" to and "within the scope of" its primary business? The majority opinion is that the portion of the transportation which connects with other common carriers is indeed exempted by this

test, but that other transportation, such as regular shuttles for guests to the Big Mountain ski area, is not.

This logic is difficult to constrain. Would dude ranches and outfitters be required to use a regulated carrier to take guests to town? Possibly. Would hotel guests on the outskirts of a city be required to call a taxi for spur-of-the-moment trips, rather than using a courtesy van? Probably. If so, is public convenience really served? If not, would regulated carriers be harmed?

In applying the primary business test, the majority correctly focused on the distinction between principal and incidental activities--those which are in the furtherance of or in the scope of the non-transportation business. The ruling identifies Grouse Mountain's business as "providing lodging, food and beverages." Although this description was supplied by Grouse Mountain itself, a more accurate description might be "providing recreational experiences." Such a description might affect the outcome of the case.

For these reasons, we dissent.

RESPECTFULLY SUBMITTED this 20th day of August, 1993

Bob Anderson

Bob Anderson, Chairman

Bob Rowe

Bob Rowe, Vice-Chair

Service Date: October 14, 1994

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

* * * * *

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|---|---|---|
| IN THE MATTER OF GROUSE MOUNTAIN ASSOCIATES, LTD., dba GROUSE MOUNTAIN LODGE, Petition for Declaratory Ruling on the Application of Motor Carrier Laws to the Transportation of Hotel Guests. | ) ) ) ) ) ) | TRANSPORTATION DIVISION<br><br>DOCKET NO. T-93.33.DR<br><br>ORDER NO. 6193b |

ORDER ON RECONSIDERATION

1. On September 1, 1993 the Public Service Commission (PSC) issued a Declaratory Ruling in the above-entitled matter (Grouse Mountain). That ruling held that certain "courtesy transportation" by Grouse Mountain Associates, Ltd., dba Grouse Mountain Lodge (Grouse Mountain), is in part regulated motor carriage, as being within the definition of "motor carrier," and in part unregulated private carriage, as being incidental to Grouse Mountain's principal business of providing lodging, food, and beverages.

2. On September 9, 1993, Randall Johnson, dba Flathead Glacier Transportation and Whitefish Sober Chauffeur Taxi, Inc. (Johnson), a participant in opposition to Grouse Mountain's requested ruling, filed a Request for Partial Reconsideration. On September 13, 1993 Grouse Mountain filed a Motion to Reconsider and Brief pertaining to the PSC's ruling. On September 23, 1993 Johnson filed a response to Grouse Mountain's motion.

3. On October 25, 1993 the PSC deferred action on reconsideration and stayed enforcement of the September 1, 1993 ruling, pending consideration of administrative rules on the principal legal theory applying, the "primary business test." Rules codifying this existing law were noticed to the public, comments were then received and considered, and rules were adopted by the PSC, effective June 23, 1994. See, ARM 38.3.1001 through 38.3.1005.

4. The objective of rulemaking was to take the governing legal concept (primary business test) out of several then-pending fact-specific contexts and place it in a setting where it could be considered "in general." The PSC believes that the objective was met and that the resulting rules, although confined only to the basics of the primary business test, will be a benefit in considering primary business test matters.

5. The adopted rules will apply on reconsideration of Grouse Mountain. However, the PSC is not making "new" law apply

retroactively. In a Declaratory Ruling the PSC merely declares activity lawful or unlawful, not in past, but in the present. Furthermore, the rules merely codify existing law and amount to no more than that which could have been stated on reconsideration by order, without rules. Nevertheless, where the new rules might be applicable, but mere citation might be inadequate explanation, discussion will be included.

6. On reconsideration the PSC concludes that the September 1, 1993, Declaratory Ruling will be affirmed. Although the PSC could simply deny reconsideration without opinion, it is believed that a written opinion is appropriate in an effort to assist all involved in better understanding the basis for the initial ruling and this ruling on reconsideration.

7. On reconsideration Johnson argues that the case law upon which the Montana primary business test is based, Board of Railroad Commissioners v. Gamble-Robinson Co., 111 Mont. 441, 111 P.2d 306 (1941), "specifically states" that the test does not apply to the transportation of persons. On this same point, Johnson also argues that at least one federal case, Red Ball Motor Freight v. Shannon, 377 U.S. 311, 84 S.Ct 1260, 12 L.Ed.2d 341 (1964), implies the same at the federal level. Johnson therefore concludes that the primary business test does not apply to Grouse Mountain's transportation operations (transportation of persons).

8. Johnson's argument was overruled in the initial ruling and, with all respect, it is again overruled. Johnson is simply wrong. Gamble-Robinson makes no statement (as referenced by Johnson or similar to it), "specifically" or otherwise, that the primary business test does not apply to the carriage of persons. Furthermore, the opinion does not even include reasoning or language upon which support for Johnson's argument can be inferred. As a matter of law, all reasonable interpretation of Gamble-Robinson is directly contrary to the argument submitted by Johnson. Even the quotation cited by Johnson to support the argument makes reference to "transportation of the persons and property of others" (emphasis added).

9. More importantly, although it is true that Gamble-Robinson involved only facts pertaining to the transportation of property, the Court was interpreting statutory law which directly pertained to both the transportation of property and persons. Therefore, the legal reasoning of the Court would logically apply equally to both. In context, there simply is no identifiable distinction between property and persons even remotely significant enough to support a proposition that the legal reasoning in Gamble-Robinson does not apply to the carriage of persons.

10. In regard to Red Ball, Johnson's referenced federal opinion, regardless of what it or any other federal case or federal statute pertaining to the primary business test actually maintains in regard to the carriage of persons, it remains only federal law governing transportation only at the federal level (interstate) and is not controlling in intrastate matters. The PSC may draw from federal cases for sound reasoning on interpretation of legal concepts in general. However, it cannot draw

upon federal statutes or cases as controlling authority in intrastate matters.

11. Johnson's next argument on reconsideration pertains to the PSC's departure from its prior "competition" or "carrier business growing up around" ruling in Matter of Shock, Declaratory Ruling, PSC Docket No. T-9157 (May 3, 1988). ARM 38.3.1004, one of the new primary business test rules, provides that transportation incidental to a principal business remains unregulated even though it might compete with regulated motor carriage. The PSC has settled the matter by rule. However, as indicated above, when a new rule is cited as authority, explanation will be included.

12. In this regard, Johnson argues that the PSC's basis for the departure from Shock (Johnson asserts that the PSC's basis is that a strict application of the competition factor would render the primary business test meaningless) misses the point that Shock specifically deals with those situations in which a common carrier industry has grown up around the transportation involved. In this argument, Johnson misunderstands that the concept of a carrier industry "growing up around" transportation must be preceded by a determination that competition is a factor to begin with. If the PSC departs from competition as a factor (which it has) it departs from the "growing up around" aspect.

13. The PSC determines that Gamble-Robinson simply does not include "competition" as a required and determinative factor in an analysis of whether transportation is incidental. Gamble-Robinson's reference to "does not compete for the transportation of persons and property of others, with those engaged in the transportation business" is within a mere preliminary statement (or restatement) of the question presented to the Court. The referenced question is immediately restated by the Court without reference to "competition." Furthermore, "competition" is not referenced again in the Court's opinion or used as a factor essential to (or, arguably, even related to) any of the controlling legal reasoning and rationale expressed by the Court.

14. Johnson also argues that the PSC has refused to examine the facts from his point of view (apparently in denying Johnson's request for hearing). Johnson's argument pertains to potential evidence of his business "growing up around." The PSC now views such evidence as immaterial. Furthermore, again with all respect, declaratory ruling proceedings are not contested case proceedings. In a Declaratory Ruling proceeding, an evidentiary hearing will be held only if, on a material point, a hearing is necessary to understand the facts presented by the petitioner.

15. On reconsideration, Grouse Mountain argues that the supplemental information provided in its initial comments in support of its Petition for Declaratory Ruling demonstrates that Grouse Mountain has a significant recreational component in its business. It argues that the providing of recreational experiences to guests is an integral and essential component of its business. It states that it has a business sales focus on recreation, employing full time staff to sell recreational

packages and advise guests of recreational opportunities. It states that recreational opportunities include hiking, biking, fishing, skiing, boating, sailing, golfing, and others in the area of Whitefish, Big Mountain, Glacier National Park, and Flathead Lake. Grouse Mountain reiterates that it transports only its guests and not the public in general. Grouse Mountain concludes that its transportation to recreational opportunities (transportation to Big Mountain Ski and Summer Resort is the only transportation specifically in issue) is incidental to the recreational aspects of its business and a proper application of the primary business test would so dictate that it is unregulated private carriage.

16. Grouse Mountain's argument is overruled. The facts forming the basis for the argument were known by the PSC initially. The PSC understands that Grouse Mountain operates in an area that could be easily described as a recreational environment, rich in recreational opportunities. The PSC understands that Grouse Mountain promotes and packages recreational ventures for its guests. The PSC understands that a large part of Grouse Mountain's business turns on the existence of recreational opportunities.

17. However, Grouse Mountain, as a business itself, owns and operates facilities to provide lodging, meal, and beverage services. Grouse Mountain does not actually, as a business itself, own and operate facilities which provide the referenced recreation itself. By way of example (actual issue), transportation to and from Big Mountain Ski and Summer Resort, it is Big Mountain's ski and summer resort business, not Grouse Mountain's lodging, meals, and beverages business, that is the business to which the transportation in question would be incidental.

18. Related to this point, Johnson argues (in his response) that, given Grouse Mountain's argument that transportation is an integral part of its business, Grouse Mountain is admitting that transportation is not incidental. The PSC disagrees. Transportation can be an integral part of a principal business and remain incidental. New rules also allow for this. Transportation can remain important to, even essential to, the principal business and remain incidental. See, ARM 38.3.1002(d).

19. Johnson's Request for Partial Reconsideration is DENIED. Grouse Mountain's Motion to Reconsider is DENIED. The Declaratory Ruling is AFFIRMED on reconsideration.

Done and dated this 30th day of August, 1994, by a vote of 3-2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ANDERSON, Chairman
(Voting to Dissent)

BOB ROWE, Vice Chairman
(Voting to Dissent-Attached)

DAVE FISHER, Commissioner

NANCY MCCAFFREE, Commissioner

DANNY OBERG, Commissioner

ATTEST:
Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: You may be entitled to judicial review of this ruling. Judicial review may be obtained by filing a petition for review within thirty (30) days of the service date of this order. Sections 2-4-501 and 2-4-702, MCA.

GROUSE MOUNTAIN ASSOCIATES, LTD.
DOCKET NO. T-93.33.DR, ORDER NO. 6193b

**DISSENT OF COMMISSIONER ROWE**

I would grant Grouse Mountain's motion for reconsideration, and hold that its transportation of resort guests at no direct charge is not subject to Public Service Commission regulation. My reasons are more fully stated in my dissent to the original order and in my concurrence to the stay of enforcement. I will refrain from unduly repeating those arguments.

The transportation at issue should not be subject to regulation because it is incidental to Grouse Mountain's primary business and because it is not made available to the general public. Safety is a legitimate concern. However, full "public convenience and necessity" regulation will serve no substantial public purpose, will unnecessarily interfere with private activity, and will potentially drain public resources if the Commission finds itself attempting to supervise similar transportation provided by other resorts and lodges.

Within statutory constraints, the Commission should promote policies which produce reasonable results. Public convenience and necessity regulation of transportation of resort guests to and from a ski area, when that transportation is not provided at an additional charge and when it is not offered to the general public is not reasonable.[1] Finding such transportation to be exempt from motor carrier regulation as "incidental to" Grouse Mountain's primary business would produce a reasonable result. Such a real-world application of the "primary business test" would help keep regulation from interfering in economic activity where it serves no substantial purpose.

The majority grounds its decision in a sincere belief in the theory of "ruinous competition." I respect the majority's genuine concern to promote and preserve high quality motor carriage, especially for rural areas. Montana's certificated motor carriers do provide generally excellent service, often under adverse conditions. I agree they deserve a level playing field against direct competitors. I do not believe these legitimate ends are furthered by the intrusion of regulation in this instance.

RESPECTFULLY SUBMITTED this 6th day of October, 1994.

Bob Rowe

BOB ROWE
Vice Chairman

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[1] The majority opinion states that while transportation by Grouse Mountain to the ski area would be subject to regulation, transportation from Grouse Mountain provided by the ski area would be "incidental to" the ski area's business, and so presumably unregulated. (Order, p. 7.) The distinction strikes me as arid scholasticism. I fail to see what significant purpose it serves.

## 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. |

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The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 1994. This table includes those rules adopted during the period January 1, 1995 through March 31, 1995 and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through December 31, 1994, this table and the table of contents of this issue of the MAR.

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