RESERVE

MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 14

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

In the matter of the adoption of proposed rules regarding procedures that state agencies must follow to protect heritage properties and paleontological remains and providing general procedures which the state historic preservation office must follow in implementing its general statutory authority	)	NOTICE OF PUBLIC HEARING

TO: All Interested Persons

1. On August 15, 1996 at 10:00 a.m., a public hearing will be held in the third floor conference room of the Montana Historical Society, 225 North Roberts, Helena, Montana, to consider the adoption of new rules I through XIV.

2. The proposed new rules provide as follows:

RULE I POLICY (1) State, federal and other agencies are required or allowed by statute to consider the retention of heritage properties and paleontological remains on lands owned or controlled by the state in consultation with the state historic preservation officer. It is the policy of the Montana historical society to assist those agencies in preserving heritage properties and paleontological remains and to encourage the avoidance, whenever feasible, of agency actions or agency assisted or licensed actions that substantially alter heritage properties or paleontological remains on those lands.

AUTH: 22-3-423(9), MCA IMP: 22-3-424, MCA

RULE II DEFINITIONS Terms defined in 22-3-421, MCA, have the same meaning in this subchapter and for the further purposes of this subchapter:

(1) "Adverse effect" means any change which impacts heritage values or paleontological remains visually, audibly, physically, or atmospherically or a transfer of rights or title which results in the neglect of heritage property to the extent that its heritage values are substantially diminished.

(2) "Area of effect" means the land area in which a project takes place and which may be changed by the project.

(3) "Heritage values" means the economic, educational, scientific, social, recreational, cultural or historic qualities possessed by sites, structures or objects which may constitute

sufficient significance to warrant consideration under these rules as heritage property or paleontological remains.

(4) "Project" means any undertaking, including a project considered under the Montana Environmental Policy Act, which has the potential to alter or affect the heritage values of heritage property or paleontological remains.

(5) "Restore" means to conduct major repairs, reconstruction, structural or other improvements on a building, structure or feature possessing heritage values with the intention of preserving or reconstructing physical features representing those values.

(6) "SHPO" means the state historic preservation office of the Montana historical society as created by 2-15-1512, MCA.

(7) "State entity" means an agency or governmental unit recognized by the state constitution or created by the legislature, including counties and municipalities.

AUTH: 22-3-423(9), MCA IMP: 22-3-421, 22-3-424, MCA

RULE III INITIATION OF ANTIQUITIES CONSULTATION UNDER 22-3-424, MCA (1) The agency shall initiate reviews and studies required by 22-3-424, MCA, prior to initiating any undertaking which has the potential to adversely affect heritage values. The agency shall complete its review early enough to be used in formulating agency decisions about the project. Completion of reviews and studies after the agency has committed itself to the scope, format, or siting of the project will not constitute adherence to these regulations.

(2) At specified stages within the following procedure, SHPO response to the agency is required. If the SHPO fails to respond in the times described in this subchapter, the agency may assume that the SHPO does not object to the agency position and the agency may move forward with the project.

AUTH: 22-3-423(9), MCA IMP: 22-3-424, MCA

RULE IV RESPONSIBILITY FOR ANTIQUITIES CONSULTATION (1) The administrator of each agency is responsible for assuring compliance with 22-3-424, MCA, when projects involving his division may affect heritage properties or paleontological remains.

(2) Each agency may designate a position to manage issues concerning heritage property or paleontological remains protection.

(3) Each agency shall bear the costs of administration related to compliance with this rule.

(4) Requests for SHPO consultation shall be made in writing.

AUTH: 22-3-423(9), MCA IMP: 22-3-424, MCA

RULE V IDENTIFICATION OF HERITAGE PROPERTIES AND PALEONTOLOGICAL REMAINS (1) The agency shall identify all heritage properties and paleontological remains that are located

on state lands within the area of effect. The agency shall use the following heritage value criteria in identifying heritage property, whether or not it meets the criteria for listing on the register. Heritage property values are historical associations which link a property to an event, trend, theme, era, or person from the recent or distant past and which:

(a) demonstrate the potential for promotional, commercial, recreational or other uses which may provide economic gain to citizens of the state;

(b) embody educational information which may be applied to instruct children or adults in aspects of Montana's history;

(c) have social associations which illustrate the interaction and behavior of people in Montana's history or prehistory;

(d) possess recreational attributes which support the appreciation of heritage values through sightseeing, photography, painting or other means of personal experience or artistic expression;

(e) have cultural associations which illustrate and contribute to the understanding of human cultures; or

(f) are verified by a professional paleontologist advising the SHPO through formal agreement to be paleontological remains.

(2) The agency shall use the following procedure to identify what known historic, architectural, or prehistoric properties or paleontological remains exist within a project area and how unknown or unevaluated resources should be discovered:

(a) The agency shall provide the SHPO with the legal description of the proposed project; information on the nature of previous land use; a description of the current condition and use of the area of effect; a brief summary of the nature and scope of the proposed project; and any information the agency has on heritage property or paleontological remains in the area of effect.

(b) If a project would change or remove a building, including cases where new buildings are to be built adjacent to old buildings, the agency shall provide the SHPO with information on the legal description, a photograph of the building(s), a brief description of the proposed project, and when available, dates of building construction, information on building use and changes to the building over time. If applicable and available, the design of new buildings shall be provided.

(3) The SHPO shall provide the agency with information on known heritage property or paleontological remains in the area, the likelihood of unknown heritage property or paleontological remains in the area, and whether a previous cultural resource survey has occurred in the area of effect.

(4) If the SHPO has information that heritage resources or paleontological remains exist or may exist in the area of effect, the SHPO shall recommend inventory, recordation and data collection methods. If a project involves a building, the SHPO shall inform the agency about whether any building has been recorded previously or if its historic and architectural value

has been assessed. If recordation and evaluation of heritage properties has not occurred, the SHPO shall recommend documentation and evaluation methods. All SHPO recommendations for methods to be applied shall be based on standards, procedures, and guidelines provided for in 22-3-428, MCA. The SHPO shall provide its recommendation to the agency within 30 working days of the SHPO's receipt of an agency's request.

(5) Upon receipt of the information and recommendations from the SHPO, the agency shall determine what additional action is necessary to fulfill its responsibility to identify Montana heritage properties in the area of effect.

(6) If the agency does not follow the SHPO's recommendation, it shall document its decision and justification in the project file. A copy of the documentation must be forwarded to the SHPO.

AUTH: 22-3-423(9), MCA IMP: 22-3-424, MCA

RULE VI EVALUATION OF HERITAGE PROPERTIES AND PALEONTOLOGICAL REMAINS (1) In consultation with the SHPO, the agency shall assure that any historic, prehistoric or architectural property identified in a project's area of effect has been professionally evaluated to determine whether it is a heritage property and whether it is eligible for the register or if it contains paleontological remains. That evaluation shall include the following:

(a) The agency shall seek the SHPO's written evaluation of whether a property qualifies as a site that contains paleontological remains, or heritage property and, if so, whether it is eligible for the register.

(b) The SHPO shall provide the agency with a written evaluation of any site as a heritage property, register site or paleontological remains within 15 working days of receipt of a request for the evaluation. The time for evaluation may be extended an additional 15 working days to a maximum total of 30 working days upon request by SHPO and concurrence by the agency.

AUTH: 22-3-423(9), MCA IMP: 22-3-424, MCA

RULE VII AVOIDANCE OR MITIGATION OF PROJECT IMPACTS

(1) After an agency has followed [rules III-V] and found that no heritage properties or paleontological remains exist within a project's area of effect, the agency may proceed with the project.

(2) If sites within the area of potential effect are found to be heritage properties but are not eligible for the register, the agency shall follow its own procedures regarding the protection of heritage values prior to proceeding with the project. In forming those policies, the agency shall consult with entities appropriately concerned with heritage values including recreational, economic development, and travel interests.

(3) If heritage properties eligible for the register or paleontological remains are found to exist within the project's area of effect, the agency shall determine, in writing, whether the project will have an adverse effect on that property and propose mitigation of the effect. If the agency determines that a project will have an adverse effect, it shall prepare a written explanation of why one or more of the actions in (a) through (d) has been chosen and how it will be carried out. In determining mitigation the agency may solicit the opinions of the public or adjacent or involved property owners and otherwise collect public comment on the protection of heritage property or paleontological remains in the area of effect as to:

(a) protecting the heritage values of the heritage property or paleontological remains by avoiding that property;

(b) abandonment of the proposed project;

(c) modification or redesign of the proposed project to avoid or lessen adverse effects or mitigate harm or alteration through any method including:

(i) relocating the project;

(ii) incorporating the heritage property or paleontological remains into the project in a useful way;

(iii) inviting private or nonprofit entities to use the historic property in productive ways;

(iv) scientific excavation of archaeological or paleontological deposits;

(v) recordation of heritage properties prior to their removal or alteration;

(vi) production of a public education program about the property; or

(d) continuance of the project with no avoidance or mitigation measures.

(4) Upon completion of its assessment of project impact and selection of the proposed action, the agency shall forward its decision in the form of a mitigation plan to the SHPO for review and comment.

(5) The SHPO will review and comment on the agency's assessment of project impacts and mitigation plan in accordance with 22-3-430, MCA, within ten working days of receipt of a request for comment.

(6) If the SHPO does not concur with the agency's assessment of project impacts and mitigation plan, the agency and the SHPO will attempt to resolve the difference. If the agency and SHPO cannot agree, the agency shall decide how to proceed, notify the SHPO upon making that decision and document its decision in writing for the project file. The agency shall provide the SHPO with a copy of its final decision.

(7) If historic or prehistoric properties are identified during the course of the project the agency shall, in accordance with 22-3-435, MCA, notify the SHPO immediately, provide information on the property and stop any project work that could harm the property. The SHPO shall assess the property's value as a heritage property or paleontological remains within two working days. The agency shall subsequently consider any adverse effects on heritage properties according to (1) through

(3) of this rule and report its mitigation plan to the SHPO immediately upon completion of that plan.

AUTH: 22-3-107(2), 22-3-423(9), MCA
IMP: 22-3-424, 22-3-435, MCA

RULE VIII FEDERAL HISTORIC PRESERVATION REVIEW CONSTITUTES COMPLIANCE (1) The review of projects under 16 U.S.C. 470(f) shall constitute compliance with those sections of 22-3-424 and 22-3-430, MCA, which deal with heritage properties eligible for the register.

AUTH: 22-3-107(2), MCA IMP: 22-3-424, 22-3-430, MCA

RULE IX ADVICE TO SHPO ON PALEONTOLOGICAL REMAINS (1) The SHPO may request an advisor or group of advisors to assist the SHPO in protecting paleontological remains in accordance with state statute and these rules. Such advisor or advisory group may participate in any of the activities assigned the SHPO in protecting paleontological remains through memorandum of agreement between the SHPO and a professional paleontological institution.

AUTH: 22-3-107(2), MCA
IMP: 22-3-421(7), 22-3-423(9), 22-3-424, 22-3-430, MCA

RULE X MEMORANDUM OF AGREEMENT (1) For a specific project or for a specific type of project, the agency may propose different procedures from those described in Rules I through VII to the SHPO.

(2) The SHPO will respond to such request within 20 working days of the receipt of a request.

(3) Procedures agreed to by both the agency and the SHPO for a specific project or specific types of projects may be incorporated into a memorandum of agreement, signed by both parties.

AUTH: 22-3-423(9), MCA IMP: 22-3-424, MCA

RULE XI ANTIQUITIES PERMITS (1) The state historic preservation officer shall prepare and make available the criteria for granting antiquities permits and the applications for antiquities permits provided for under 22-3-432, MCA. The state historic preservation officer may designate a state archaeologist, a state paleontologist and/or a state historical architect to assist with the management of antiquities permits and the protection of heritage values.

(2) Applications for antiquities permits will be submitted by applicants to the state agency responsible for the management of lands owned by the state. Upon review, the state agency will forward the application for an antiquities permit with the agency's comments and recommendations to the SHPO.

(3) Antiquities permits shall be granted or denied to the applicant by the SHPO within 15 days of receipt of an

application containing all needed information by the SHPO. A copy of the granted or denied antiquity permit will be forwarded by the SHPO to the state agency.

(4) No antiquities permit will be required for the purpose of identifying and recording heritage properties and paleontological remains on state-owned lands when such activities will not result in the excavation, removal, or restoration of heritage properties and paleontological remains.

(5) Antiquities permits shall specify the means by which the state will protect artifacts, features, objects or paleontological remains excavated or removed in the course of the permitted work.

AUTH: 22-3-107(2), MCA IMP: 22-3-432, MCA

RULE XII DEPOSIT OF MATERIALS RELATED TO HERITAGE PROPERTY AND PALEONTOLOGICAL REMAINS (1) The agency shall deposit with the SHPO all inventory reports and other pertinent documents, maps, photographs and site forms generated in the course of complying with 22-3-421 through 22-3-441, MCA.

AUTH: 22-3-107(2), MCA
IMP: 22-3-421 through 22-3-441, MCA

RULE XIII CONSULTATION UNDER 22-3-429, MCA (1) State agencies, federal agencies or state entities requesting consultation with the SHPO under 22-3-429, MCA, shall make such requests in writing to the SHPO and shall specifically reference the statute under which the request is made.

(2) Reviews of such projects shall follow the procedures in 22-3-429 and 22-3-430, MCA.

AUTH: 22-3-107(2), MCA IMP: 22-3-429, 22-3-430, MCA

RULE XIV SHPO STANDARDS, PROCEDURES AND GUIDELINES (1) SHPO standards, procedures and guidelines shall be referenced in SHPO recommendations when required by statute or rule.

(2) The standards and guidelines used by the national park service of the United States department of the interior and the advisory council on historical preservation are, in part, the standards and guidelines to be used to protect heritage properties eligible for listing on the national register. Copies may be obtained free of charge from the State Historical Preservation Office, 1410 Eighth Avenue, Helena, Montana 59620; telephone (406) 444-2694.

AUTH: 22-3-107(2), MCA IMP: 22-3-428, MCA

3. Adoption of these new rules is necessary to comply with 22-3-423(9), MCA, in order to provide agencies which have no rules of their own with a procedure to follow in consulting with SHPO. In addition, the new rules provide procedures the SHPO will follow in implementing its general statutory authority.

The rules provide deadlines for SHPO responses and seek to standardize filing and reporting procedures.

4. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Paul Putz, State Historic Preservation Office, P.O. Box 201202, Helena, Montana 59620-1202, and must be received no later than August 16, 1996.

5. Paul Putz, State Historic Preservation Office, P.O. Box 201202, Helena, Montana 59620-1202 has been designated to preside over and conduct the hearing.

BOARD OF TRUSTEES
MONTANA HISTORICAL SOCIETY

By: Susan McDaniel, President
Susan McDaniel, Chairman

Kelly M. O'Sullivan
Rule Reviewer

Certified to the Secretary of State July 8th, 1996.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of 16.8.1903, regarding air quality operation fees, and 16.8.1905, regarding air quality permit application fees.	))))	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES

(Air Quality)

To: All Interested Persons

1. On August 15, 1996, at 10:30 a.m. or as soon thereafter as it may be heard, the board will hold a public hearing at Room 111 of the Metcalf Building, 1520 E. 6th Ave., Helena, Montana, to consider amendment of the above-captioned rules.

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

16.8.1903 AIR QUALITY OPERATION FEES (1)-(3) Remain the same.

(4) The air quality operation fee is based on the actual, or estimated actual, amount of air pollutants emitted during the previous calendar year and is the greater of a minimum fee of $300 or a fee calculated using the following formula:

tons of ~~total particulate~~ PM-10 emitted,
multiplied by ~~$14.00~~ $15.50; plus
tons of sulfur dioxide emitted,
multiplied by ~~$14.00~~ $15.50; plus
tons of lead emitted,
multiplied by ~~$14.00~~ $15.50; plus
tons of oxides of nitrogen emitted,
multiplied by ~~$3.50~~ $3.88; plus
tons of volatile organic compounds emitted,
multiplied by ~~$3.50~~ $3.88.

(5) and (6) Remain the same.

AUTH: 75-2-111, 75-2-220, MCA; IMP: 75-2-211, 75-2-220, MCA

16.8.1905 AIR QUALITY PERMIT APPLICATION FEES

(1)-(4) Remain the same.

(5) The fee is the greater of:

(a) a fee calculated using the following formula:

tons of ~~total particulate~~ PM-10 emitted,
multiplied by ~~$14.00~~ $15.50; plus
tons of sulfur dioxide emitted,
multiplied by ~~$14.00~~ $15.50; plus
tons of lead emitted,
multiplied by ~~$14.00~~ $15.50; plus
tons of oxides of nitrogen emitted,

multiplied by ~~$3.50~~ $3.88; plus
tons of volatile organic compounds emitted, multiplied by ~~$3.50~~ $3.88;

(b) Remains the same.

AUTH: 75-2-111, 75-2-220, MCA; IMP: 75-2-211, 75-2-220, MCA

3. ARM 16.8.1902 requires annual review of air quality permit fees. The proposed amendments to the air quality operation and permit application fee schedules in 16.8.1903 and 16.8.1905 are necessary to meet the increased direct and indirect costs of the department's air quality permit program. The amendments would produce the fees calculated by the department, as limited by the legislative appropriation, and as necessary to fund the air quality permit program for calendar year 1997.

The board is proposing to change the term "total particulate" to "PM-10" (particulate matter of 10 microns or less), to coincide with recent guidance from the federal Environmental Protection Agency (EPA). On October 5, 1995, EPA issued guidance clarifying that, for purposes of the Title V operating permit program, the regulated particulate pollutant is PM-10 rather than total particulate.

4. Interested persons may submit their data, views, or arguments concerning the proposed amendment, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to the Board of Environmental Review, Metcalf Building, P.O. Box 200901, Helena, MT 59620-0901, no later than August 22, 1996.

5. Tim Fox has been designated to preside over and conduct the hearing.

BOARD OF ENVIRONMENTAL REVIEW

CINDY YOUNKIN, Chairperson

Reviewed by:

JOHN F. NORTH,
Rule Reviewer

Certified to the Secretary of State July 8, 1996 .

BEFORE THE MONTANA TRANSPORTATION COMMISSION
AND THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the proposed adoption of rules concerning debarment of contractors due to violations of department requirements and determination of contractor responsibility	)))))	NOTICE OF PROPOSED ADOPTION NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On October 10, 1996, the Montana Transportation Commission and the Montana Department of Transportation propose to adopt rules to revise their existing written policy on debarment of contractors from public contracts, and to adopt rules relating to nonresponsibility of contractors. The Commission's policy on disqualification of bidders has existed since 1984, as amended in 1986.

2. The Commission and Department desire to adopt formal rules to explain the reasons for, causes of, consequences of and procedures for debarment or suspension of contractors.

3. The proposed rules will read as follows:

RULE I PURPOSE (1) Public contracts for construction, repair and public works are to be awarded to the lowest responsive, responsible bidder.

(2) The Montana department of transportation will debar or suspend contractors which violate these rules, and will not do business with, or allow prime and subcontractors to do business with, on department-related projects, persons debarred or suspended by the federal government, by another state, or by another agency of Montana state government.

(3) If a person commits an act, as defined in these rules, indicating that the person no longer merits the privilege of contracting with the department or participating in department projects, the department may begin proceedings under these rules to debar the person from bidding on or otherwise participating in department contracts or projects. A person's decision to bid upon or accept contracts with the department is a voluntary acceptance of the provisions of these rules and their requirements.

(4) Disputes under this process are not a contested case under the Montana Administrative Procedure Act, in accordance with 2-4-102, MCA.

(5) These provisions are in addition to other actions that may be taken against a person (i.e., criminal prosecution, civil actions for false, fraudulent or fictitious claims or to recover amounts incorrectly paid under such claims, disadvantaged business enterprise program decertification, etc.), and do not prevent other actions or sanctions from being taken, where considered appropriate.

AUTH: 60-2-201, 60-3-101 MCA; IMP: 18-1-102, 18-2-313, 18-4-301, 60-2-111, 60-2-112, 60-2-201 MCA

REASON: The proposed rule states the Montana and federal basis for creation of rules implementing and enforcing the debarment policy. The proposed rule is necessary in order to provide a policy which specifically sets forth the debarment policy.

The Code of Federal Regulations (CFR) requires that a person who is debarred or suspended be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities, whether as a contractor for the federal government, or as a prime or subcontractor on work that involves federal funds. The CFRs prohibit debarred or suspended persons from participating in the federal-aid highway program.

The Montana Supreme Court, in Koich v. Cvar, 111 Mont. 463, 110 P.2d 964 (1941), said that a bidder selected for contract award must have the skill, ability and integrity to do faithful, conscientious work and to promptly fulfill its contract.

RULE II DEFINITIONS The following definitions shall apply for the purpose of these rules:

(1) "Adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred.

(2) "Administrator" is an administrator of a division of the Montana department of transportation.

(3) "Commission" is the Montana transportation commission.

(4) "Convicted" means any finding of guilt of an offense, whether after a trial or upon a plea of guilty or *nolo contendere* (or any equivalent) in any court in the United States, whether or not it is pending appeal. A conviction ceases to be a conviction only when it is later reversed by a court of competent jurisdiction.

(5) "Debarment" is an action taken or decision made by an agency, other than temporary determinations of nonresponsibility or suspension, that excludes a person from bidding on or participating in projects and contracts. Debarment or suspension of a person under these rules constitutes debarment or suspension of all its divisions and other organizational elements.

(6) "Department", unless obviously referring to another agency, is the Montana department of transportation.

(7) "Director" is the director of the Montana department of transportation.

(8) "Notice" is written communication served in person or sent by certified mail, return receipt requested or equivalent, to the last known address of a person, its identified counsel, its agent for service of process, its then-listed corporate agent, or any partner, officer, director, owner, or joint venturer of the party. Notice, if returned by the U.S. postal service as being undeliverable by mail, shall be considered to have been received by the addressee five days after being properly sent to the last address known to the department. It

is the responsibility of persons doing business with the department to provide current, accurate mailing addresses.

(9) "Person" is any individual, corporation, partnership, firm, association or other legal entity, however organized.

(10) "State" applies to any of the United States and the District of Columbia, unless by its use in these rules it clearly is limited only to Montana.

(11) "Suspension" is an immediate and temporary exclusion of a person from bidding on or participating in contracts, work or projects during the period pending completion of any investigation into, and the initiation and completion of, possible debarment proceedings as may ensue. It is a discretionary administrative decision by the director, and is not appealable to the commission or elsewhere.

AUTH: 60-2-201, 60-3-101 MCA; IMP: 60-2-111, 60-2-112, 60-2-201 MCA

REASON: The terms are used throughout the rules, so definition is required for clarity. Several definitions are derived from 49 CFR Part 29.

RULE III SCOPE (1) During a period of debarment by the department, another Montana state government agency, any other state, or the federal government, a debarred person may not participate in work, contracts or projects with the department, whether or not the department knew of the debarment or debarment action, aside from projects or contracts already awarded to a person at the time it is debarred.

(2) A person submitting a bid on a federal-aid project must certify compliance with Part XI of the Federal Highway Administration Form FHWA 1273 (Required Contract Provisions, Federal-Aid Construction Contracts) and provide certification to the department that all subcontractors, material suppliers, vendors and other lower tier participants used are in full compliance with Part XI of the Form FHWA 1273. A person submitting a bid to the department on a federal-aid contract must make its certification part of every subcontract, material supply agreement, purchase order or other covered lower tier transaction. "Covered lower tier transactions" include primary purchase of materials for contract items incorporated into the work. A copy of the Form 1273 may be obtained from department offices at 2701 Prospect Avenue, Helena, MT 59620-1001.

(3) Debarment is distinct from a commission finding of nonresponsibility. The commission has the authority and ability in its discretion to find a person nonresponsible for purposes of disallowing a bid on a project or contract without conducting debarment proceedings.

(4) Debarment applies both to a firm and individuals. In the case of the former, it may be applied against any or all businesses in which a firm has involvement (i.e., joint ventures), or over which it has ownership or control (i.e., subsidiaries). In the case of the latter, debarment may be

applied to and enforced against any and all businesses in which the individual has any level of interest, ownership, or control.

(5) If debarred by the federal government or any Montana government agency, a person may not bid on or otherwise participate in any department project or contract in any capacity (prime contractor, subcontractor, supplier, etc.), including as a separate contractor for a utility to relocate utilities required by a department project, until after the completion of the entire debarment period, whether or not the department debars the person. Debarment proceedings may proceed even if the person ceases doing business during the proceedings.

(6) If a person is debarred by any agency of the federal government for any period, the department may debar it for a period up to that set by the federal government without need for further debarment proceedings. The only evidence required in a debarment hearing in a case based on an existing debarment will be a certified copy of an order, agency letter or other final action declaring the debarment in the other jurisdiction. That will not prevent the person from presenting evidence to dispute the proposed debarment or its length. If the person is debarred by a branch or agency other than of the Montana or federal government (i.e., another state, a county, etc.), or if the department may wish a debarment period exceeding that set by the other Montana agency or the federal government, the department must hold full debarment proceedings before increasing the debarment period.

(7) A person planning to bid on or participate in a department contract or work, or who has already bid on or is participating in a department contract or work, must immediately notify the director in writing of any debarment or suspension against it, or of any debarment or suspension proceedings pending against it in any jurisdiction.

AUTH: 60-2-201, 60-3-301 MCA; IMP: 60-2-111, 60-2-112 MCA

REASON: The proposed rule is needed so that state policy better conforms with federal law and regulations. Much Department work uses federal funds, paid to a contractor or utility (in the case of required utility relocation). Department funds are not to be paid, directly or indirectly, to a debarred or suspended person.

RULE IV REASONS FOR DEBARMENT (1) A person may be debarred upon adequate evidence that the person:

(a) Has been convicted of, or has committed, one of the following offenses, whether a violation of any state's or federal law or regulation, within the prior three years:

(i) Fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(ii) Violation of federal or state antitrust statutes, including those proscribing price-fixing between competitors, allocation of customers between competitors, and bid-rigging;

(iii) Embezzlement, theft, forgery, falsification or destruction of records, making false statements, receiving

stolen property, making false, fraudulent or fictitious claims, bribery, or obstruction of justice;

(iv) Any act prohibited by state or federal law committed in any jurisdiction involving conspiracy, collusion, lying or material misrepresentation with respect to bidding on any public or private contract, or fraud;

(v) Any felony (federal or state) or other offense indicating a lack of business or personal integrity, or business or personal honesty that seriously and directly affects the present integrity of a person;

(vi) Violation of a prior federal or state suspension or debarment; or

(vii) Any other cause of a serious and compelling nature which affects the responsibility of the contractor to be awarded contracts by the commission or department.

(b) Filed a false, fictitious or fraudulent claim to any federal or state agency in conjunction with: work performed on a department project; work performed for the department; or any claim that the department (or the state of Montana as the department's self-insuring entity) owes the person for purported acts of the department or one of its agents. If a contractor submits a claim, either under the department claims procedure, in a lawsuit against the department, or by any other means, which is not adequately and fully supported with factual evidence and cost data, it will be considered to be false, fictitious or fraudulent under these rules;

(c) Violated terms of a public agreement or contract, affecting his integrity for future contracts with the department or performance in department contracts. This includes:

(i) a willful failure to perform in accordance with the terms of one or more public agreements or transactions, including contract requirements (i.e., standard specifications, special provisions, etc.), or serious or repeated violations of specifications, bid requirements or claims procedures. If a person wishes to contract with the department or participate in projects, he must abide by the department's specifications and requirements, or will no longer be allowed the privilege;

(ii) a history of failure to perform or of unsatisfactory performance in one or more public agreements or transactions. This includes a common or repeated practice of a contractor submitting low bids and later submitting claims which are determined to be unfounded or unreasonable (i.e., claiming for work or conditions which were called for in or should reasonably have been anticipated for the project);

(iii) a failure to reimburse the department, after written demand is made, for an overpayment made by the department to the person under a contract;

(iv) a willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction; or

(v) serious or repeated violations of U.S. department of labor wage requirements.

(d) Knowingly violated Montana or federal DBE programs. It includes violations of the department's

DBE program (i.e., establishing or dealing with a known DBE "front"; dealing with a DBE which he knows is not performing a "commercially useful function"; or performing part of the DBE's required work);

(e) Has done, is doing, or is attempting to do business with, a debarred, suspended or otherwise ineligible person on a department project or contract while knowing of the debarment, suspension or ineligibility;

(f) Has not timely paid all required taxes (i.e., fuel taxes), fees, charges or wages in connection with its work on a project(s), or has not procured all legally-required permits or notices for the due and lawful prosecution of its work;

(g) Has not observed or complied with significant required laws or regulations in the accomplishment of its work; or

(h) For any other cause of so serious or compelling a nature that it affects the present responsibility of the person.

(2) For purposes of these rules, an indictment or the filing of criminal charges of offenses enumerated in these rules against the person shall constitute adequate evidence for purposes of suspension.

AUTH: 60-2-201, 60-3-101 MCA; IMP: 17-8-231, 18-1-102, 18-2-313, 60-2-111, 60-2-112, 60-2-201 MCA

REASON: The proposed rule is necessary to conform with federal law and regulation, and comply with Montana statutes. The Department must be able to use its discretion in reviewing objectionable actions by persons interested in bidding on public contracts and receiving public funds for them, and in deciding if a person is not responsible enough to be permitted to seek those public funds.

RULE V PROCEDURES (1) If the department receives or learns of credible information that a person has engaged in conduct which may warrant suspension or debarment, the department shall initiate and follow the following procedure.

(2) The administrator of the division concerned with the alleged conduct or contract will obtain any information that may be readily obtained on the alleged conduct. If the administrator initially determines that there exists credible evidence that the person has committed a violation set forth above, the administrator shall notify the director in writing of information supporting that determination.

(3) If the director agrees that, from the information available, credible evidence exists, the director shall mail, certified return receipt requested, a written notice to the person. The notice shall contain a statement of the pertinent facts, the alleged violations being considered, notice of the right to an administrative hearing, and that debarment is being considered. If debarment is proposed based on a debarment by another state or federal agency, a copy of that debarment or its notice letter will be attached.

(4) A person against which debarment is proposed shall be provided an opportunity for administrative hearing. A written request for hearing must be received by the department's chief

counsel within 14 calendar days after the person's receipt of notice of the determination.

(a) Failure to timely submit a written request constitutes a waiver of the opportunity for administrative hearing, and a final debarment decision by default may then be entered by the director, which is not subject to appeal.

(b) Default orders will use the procedure stated in Model Rule 10, ARM 1.3.214.

(5) The person against whom debarment is being considered has the right to be accompanied, represented and advised by counsel, and to appear in person or by or with counsel. Counsel will not be provided by or at the expense of the Department.

(6) Service of notice and later documents for the hearing will be complete and effective when made upon a person, or his counsel, if he has counsel.

(7) Upon timely receipt of a written request for an administrative hearing, the director shall appoint a hearing examiner. A written notice appointing the hearing examiner shall be issued by the director, and sent to the person requesting the hearing.

(8) The proceedings may be handled informally using the procedures stated in Model Rule 11, ARM 1.3.215.

(9) A notice of hearing shall be sent by the hearing examiner to the person requesting the administrative hearing. The notice shall include:

(a) A statement of the date, time, and location of the hearing;

(b) A reference to the provisions of the violation(s) involved;

(c) A short, understandable statement of the matters asserted; and

(d) A statement advising the party of its right to be represented by legal counsel at the hearing.

(10) The hearing examiner shall not engage in communications prohibited by 2-4-613, MCA.

(11) For administrative hearings:

(a) The department shall record any administrative hearing conducted and maintain an administrative record of the proceedings. The administrative record shall include:

(i) the initial determination of the administrator;

(ii) the written request for administrative hearing;

(iii) the appointment of the hearing examiner;

(iv) the notice of administrative hearing;

(v) the evidence offered to, or considered by, the hearing examiner;

(vi) any objections and rulings thereon;

(vii) all matters placed on the record at the administrative hearing;

(viii) all briefs or memoranda submitted by the parties; and

(ix) any transcript made of the proceedings.

(b) The hearing examiner presiding over the hearing shall have the powers and duties stated in 2-4-611(3), MCA.

(c) Discovery will be available to the parties in accordance with Rules 26, 28 through 37 (except Rule 37(b)(1) and 37(b)(2)(d)) of the Montana Rules of Civil Procedure in effect as of the date of the adoption of these rules. Provided that: all references in the Montana Rules of Civil Procedure to a "court" are considered to refer to the department; all references to the use of subpoena power are considered to refer to the power in these rules; references to "trial" are considered to refer to the hearing; all references to "plaintiff" are considered to refer to a "party"; all references to "clerk of court" are considered to refer to the department person designated by the director to keep documents filed in the case.

(i) If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the department, the refusal to obey the department's order shall be enforced as provided in these rules.

(ii) If a party seeking discovery from the department believes he has been prejudiced by a protective order issued by the department under Rule 26(c), Montana Rules of Civil Procedure, or, if the department refuses to make discovery, the party may petition the District Court, First Judicial District for the County of Lewis and Clark, for review of the intermediate agency action under 2-4-701, MCA.

(d) The department and the hearing examiner shall have the same authority, powers, and responsibilities for issuing and enforcing subpoenas and subpoena duces tecum as stated in Model Rule 25, ARM 1.3.230.

(e) The usual order of presentation at a hearing shall be:

(i) Argument and the submission of evidence and testimony on behalf of the department;

(ii) Argument and the submission of evidence and testimony from the party requesting the hearing; and

(iii) The introduction of rebuttal evidence and testimony by the department.

(iv) The hearing may be continued with recesses as determined by the hearing examiner.

(f) Evidence introduced at the hearing may be received in written form or oral testimony given under oath or affirmation. Parties have a right to cross-examine all persons testifying at a hearing.

(i) The hearing examiner may consider hearsay evidence for the purpose of supplementing or explaining other evidence. A decision should not ordinarily be based wholly upon hearsay evidence, however, circumstances in some cases may require it (i.e., debarment based on a prior debarment in another jurisdiction), at the discretion of the hearing examiner.

(ii) Judicially noticed facts are not hearsay.

(iii) Fraudulent, criminal or other seriously improper conduct of any individual (officer, director, shareholder, partner, employee, or other individual associated with a person) may be imputed to the person when the conduct occurred in connection with the individual's performance of duties for or on behalf of the person, or with the person's knowledge, approval,

or acquiescence. The person's acceptance of the benefits derived from the conduct will be evidence of such knowledge, approval or acquiescence.

(iv) The department's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.

(v) Exhibits shall be marked and the markings shall identify the party offering the exhibit. Exhibits shall be preserved by the department as part of the administrative record.

(g) Objections to offers of evidence must be made at the time of the offer and shall be noted in the administrative record. A hearing examiner may rule on evidentiary objections at the time of the hearing, after receipt of oral or written argument by the parties, or at the time of entry of the proposed decision.

(h) The person must present all potential and available grounds to contest the debarment, and failure to raise an issue before the hearing examiner' will waive that issue's consideration on any appeal or potential judicial review.

(i) The department's burden of proof for the hearing will be a preponderance of the admissible evidence presented. That is proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(j) After the hearing and any required post-hearing briefs and submissions, the hearing examiner shall enter a proposed decision, which shall be served on all parties by certified mail, return receipt requested, to their designated agent. The proposed decision shall contain findings of fact and conclusions of law supported by the administrative record, and recommend a proposed action to the director.

(12) The director shall within 30 days review the proposed decision and enter the department's final decision. The director may accept, reject or modify the proposed decision. The director's final decision shall contain findings of fact and conclusions of law, and shall be mailed to the parties by certified mail, return receipt requested.

(13) The sole method of appeal of the director's decision is as follows:

(a) The director's decision is final unless appeal is made to the commission. An appeal may only be made if it is submitted to the director in writing, and only if received by the director's office no later than 10 calendar days after date of delivery of the final decision to the designated agent of the appealing party. If delivery of the final decision is refused or for any other reason not able to be delivered to the designated agent (i.e., returned as undeliverable, addressee moved and left no forwarding address, etc.), the decision will be final and the ten-day appeal period will begin to toll on the date the certified letter is returned to the director's office.

(b) The sole appeal of the director's decision is to the commission. It shall review the administrative record of the proceedings and its findings and conclusions only. The

commission will determine whether or not the findings and conclusions are supported by that record. The commission may affirm, reject or modify the director's decision. If the commission determines that the record does not support the findings and conclusions, it may refer the matter back to the director for any action the commission deems appropriate and directs.

(c) The commission's review will not be a *de novo* hearing, nor will it receive written briefs from a party except on the issue of whether or not the findings and conclusions are supported by the administrative record. The commission will not hear oral argument or testimony, or receive any evidence that was not presented in the hearing.

(d) A stenographic record of the oral proceedings of the administrative hearing will be transcribed upon receipt of a written request. The department may arrange for the record to be transcribed by a business, rather than by the department, in which case the requester will be responsible to make direct arrangements for payment with the firm. Otherwise, the estimated cost of transcription and mailing must be paid by the requester prior to transcription of the record. Any balance of payment due must be received by the department prior to delivery, and any amount determined to be excess shall be returned to the requestor upon completion of the transcript.

(e) All final decisions and orders shall be available for public inspection on request. Copies of final decisions and orders will be given to the public on request on payment of reasonable costs.

(14) The period of debarment will be commensurate with the seriousness of the cause(s), and be for a specified term. While the term will usually not exceed three years, if circumstances warrant, a longer period of debarment may be imposed.

(a) The date(s) of the offenses for which debarment is imposed are inapplicable to a debarment period and participation in projects or contracts.

(b) Projects or contracts already awarded to a person at the time it is debarred will not be affected, except as follows: A bid may be rejected, or contract award rescinded, if a person submits the bid or is awarded the contract after the date on which it was debarred by any agency or in any jurisdiction.

(15) The procedures herein provided are mandatory for anyone wishing to contest a debarment. Failure to properly request a hearing, present all defenses, or to perfect an appeal will be a failure to exhaust administrative remedies, and will absolutely waive the protesting party's right to any judicial review that might otherwise be available.

(16) Reinstatement of a debarred person occurs automatically after the completion of the entire time period of the debarment.

AUTH: 60-2-201, 60-3-101, MCA; IMP: 60-2-111, 60-2-112, 60-3-101, MCA

REASON: The proposed rule is needed to provide due process to a person charged with a violation that could result in debarment. The proposed rule is based on the Model Rules in the Administrative Rules of Montana, modified somewhat to fit the circumstances of debarment hearings, and 49 CFR Part 29.

RULE VI SUSPENSION (1) Pending debarment proceedings or an investigation that could lead to discovery of facts for which debarment proceedings may be initiated, the department may suspend a person from contracting with the department or participating in department projects. Suspension may be used when there exists evidence of any of the above debarment causes, and immediate action is considered necessary or prudent to protect the department or the public contracting process.

(2) The scope of a suspension is the same as the scope of a debarment (see Rule III, above).

(3) Suspensions may last for a reasonable period pending the completion of an investigation and any debarment proceedings. If legal or debarment proceedings are not initiated within six months after the date of the suspension notice, the suspension shall be terminated.

(4) A suspension will be imposed by written letter from the director, on the written recommendation of the administrator of the affected division.

(5) The person will be immediately provided a copy of the director's letter imposing its suspension, the reasons therefor, that the suspension is temporary pending investigation of the reasons stated, and the suspension's effect.

(6) The time of suspension may, but need not, be included in any eventual period of debarment, at the discretion of the director or commission.

AUTH: 60-2-201, 60-3-101, MCA; IMP: 60-2-111, 60-2-112, 60-3-101, MCA

REASON: The proposed rule is necessary to provide a basis for suspending a person pending investigation and possible debarment proceedings, and to implement suspension guidelines similar to 49 CFR Part 29, Subpart D.

RULE VII STANDARDS OF RESPONSIBILITY (1) Among factors that may be considered in determining whether the standard of responsibility has been met are whether a prospective contractor:

(a) has available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the reasonable ability to obtain them, necessary to indicate the capability to meet all contractual requirements;

(b) has a satisfactory record of integrity;

(c) is qualified legally to contract with the commission;

(d) has not failed to supply any necessary information in connection with any inquiry concerning the responsibility; and,

(e) has a satisfactory record of past performance and contract compliance.

(2) Nothing shall prevent the commission from establishing additional responsibility standards for a particular contract, provided that these additional standards are set forth in the contract documents.

(3) A prospective contractor must supply information requested by the commission concerning the responsibility of the contractor. If the contractor fails to supply the requested information, the commission shall base a determination of responsibility upon any available information or may find the prospective contractor nonresponsible.

(4) The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

(a) evidence that the contractor possesses the necessary items;

(b) acceptable plans to subcontract for the necessary items; or

(c) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

(5) If a bidder who otherwise may have been awarded a contract is found nonresponsible, a written determination of nonresponsibility setting forth the basis of the finding must be prepared by the commission. The determination must be made part of the contract file and a copy of the determination mailed to the affected bidder.

AUTH: 60-2-201, 60-3-101, MCA; IMP: 60-2-111, 60-2-112, MCA

REASON: The proposed rule is necessary to explain the reasons for which the Commission may determine a bidder or potential bidder on public contracts for the Department nonresponsible. The proposed rule is substantially identical to that recently implemented by the Department of Administration.

4. The proposed rules would convert the Commission's existing written policy on disqualification of bidders into formally adopted rules, and comply with existing guidance of federal law and the Code of Federal Regulations.

5. Interested persons may submit their data, views or arguments concerning the proposed rules in writing to Timothy W. Reardon, Chief Counsel, Montana Department of Transportation, 2701 Prospect Avenue, P.O. Box 201001, Helena, MT 59620-1001, to be received no later than 5:00 p.m. (Mountain Time), September 6, 1996.

6. If a person who is directly affected by the proposed adoptions wishes to present his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request along with any comments he has to Timothy W. Reardon, Chief Counsel, Montana Department of Transportation, 2701 Prospect Avenue, P.O. Box 201001, Helena, MT 59620-1001, to be received no later than 5:00 p.m. (Mountain Time), August 15, 1996.

7. If the Commission and Department receive requests for a public hearing on the proposed adoptions from either 10% or 25, whichever is less, of those persons directly affected by the proposed adoption, from the Administrative Code Committee of the Legislature, from a government agency or subdivision or from an association having no less than 25 members who will be directly affected, hearing will be held at a later date. Notice of the hearing will be printed in the Montana Administrative Register. Ten percent of the persons directly affected has been determined to be 90, based on the 900 contractor firms listed on the Department's Contract Plans Section's "Invitation to Bid" list.

MONTANA DEPARTMENT OF TRANSPORTATION

By: _____
MARVIN DYE, Director

MONTANA TRANSPORTATION COMMISSION

By: _____
THORM FORSETH, Chairman

_____
LYLE MANLEY, Rule Reviewer

Certified to the Secretary of State July 8, 1996.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the amendment of rules 18.12.501 and 18.12.701 and the repeal of rules 18.12.101 through 18.12.103, 18.12.201 through 18.12.203, 18.12.301 through 18.12.304, 18.12.601 through 18.12.612, 18.12.801 through 18.12.808, 18.13.101, 18.13.201 through 18.13.224 and 18.13.301 through 18.13.319 pertaining to the Department of Transportation's aeronautical powers and duties.	NOTICE OF PROPOSED AMENDMENT AND REPEAL NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On November 7, 1996, the Department of Transportation proposes to amend rules 18.12.501 and 18.12.701 and to repeal rules 18.12.101 through 18.12.103, 18.12.201 through 18.12.203, 18.12.301 through 18.12.304, 18.12.601 through 18.12.612, 18.12.801 through 18.12.808, 18.13.101, 18.13.201 through 18.13.224, and 18.13.301 through 18.13.319 which pertain to the Department's regulation of aeronautics.

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

18.12.501 PENALTIES (1) Any person violating ~~any of~~ the foregoing rules shall be guilty of a misdemeanor and punishable by a fine of not more than $500.00 or by imprisonment in a county jail for not more than 90 days, or both.
AUTH: Sec. 67-2-102 MCA; IMP: Sec. 67-1-105, 67-2-301 MCA

Reason: All but one of the preceding rules is being repealed. Consequently, it is necessary to amend this rule.

18.12.701 OPERATING RULES AND REGULATIONS (1) Because the publication of operating rules ~~and regulations~~ of the Yellowstone Airport at West Yellowstone, Montana, would be unduly cumbersome, expensive or otherwise inexpedient, the department consents to the omission of the text of the rules from the code. Such rules may be obtained free of charge from the Division of Aeronautics, ~~Municipal Airport~~ 2630 Airport Road, Helena, Montana 59620.
AUTH: Sec. 67-2-102 MCA; IMP: Sec. 67-2-102 MCA

Reason: The use of the term "and regulations" is redundant. The correct mailing address is as indicated in the amended rule.

3. Rules 18.12.101 through 18.12.103, proposed to be repealed, are on page 18-2009 of the Administrative Rules of

Montana.
AUTH: Sec. 67-2-102 MCA; IMP: 67-3-211 MCA

Reason: These rules are now adequately covered by statute.

4. Rules 18.12.201 through 18.12.203, proposed to be repealed, are on page 18-2011 of the Administrative Rules of Montana.
AUTH: 67-2-102 MCA; IMP: 67-3-211 MCA

Reason: These rules are now covered by the Montana Department of Agriculture.

5. Rules 18.12.301 through 18.12.304, proposed to be repealed, are on pages 18-2013 through 18-2015 of the Administrative Rules of Montana.
AUTH: 67-2-102 MCA; IMP: 67-3-211 MCA

Reason: These rules are now adequately covered by statute.

6. Rules 18.12.601 through 18.12.612, proposed to be repealed, are on pages 18-2021 through 18-2026 of the Administrative Rules of Montana.
AUTH: 67-2-102 MCA; IMP: 67-3-401 MCA

Reason: These rules are now adequately covered by statute and the FAA requires higher liability dollars.

7. Rules 18.12.801 through 18.12.808, proposed to be repealed, are on pages 18-2029 through 18-2032 of the Administrative Rules of Montana.
AUTH: 67-2-102 MCA; IMP: 67-3-101(3), 67-3-104, 67-3-105, 67-3-301, 67-3-303 MCA

Reason: These rules are being repealed because they primarily implement statutes which have been repealed.

8. Rule 18.13.101, proposed to be repealed, is on page 18-2207 of the Administrative Rules of Montana.
AUTH: 2-4-201 MCA; IMP: 2-4-201 MCA

Reason: This rule is now adequately covered by statute and by the Department's organizational rule.

9. Rules 18.13.201 through 18.13.224, proposed to be repealed, are on pages 18-2209 through 18-2218 of the Administrative Rules of Montana.
AUTH: 67-2-102 MCA; IMP: 67-2-102 MCA

Reason: The rules, which are proposed to be repealed, were adopted to implement statutes which have now been repealed, sections 67-3-421 through 67-3-424, MCA..

10. Rules 18.13.301 through 18.13.319, proposed to be

repealed, are on pages 18-2219 through 18-2232 of the Administrative Rules of Montana.
AUTH: 67-2-102 MCA; IMP: 67-2-102 MCA

Reason: The rules, which are proposed to be repealed, were adopted to implement statutes which have now been repealed, sections 67-3-921 through 67-3-424, MCA.

11. Interested persons may present their data, views or arguments concerning the proposed amendment and/or repeal in writing to Mike Ferguson, Administrator, Aeronautics Division, Montana Department of Transportation, 2630 Airport Road, Helena, MT 59620-0507. Any comments must be received no later than 5 p.m., October 11, 1996.

12. If a person who is directly affected by the proposed amendment and/or repeal wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Mike Ferguson, Administrator, Aeronautics Division, Montana Department of Transportation, 2630 Airport Road, Helena, MT 59620-0507. A written request for hearing must be received no later than 5 p.m., September 13, 1996.

13. If the agency receives requests for a public hearing on the proposed amendment and/or repeal from either 10 percent or 25, whichever is less, of the persons who are directly affected by the proposed action; from the administrative code committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 280 persons based on the number of registered pilots in Montana.

MONTANA DEPARTMENT OF TRANSPORTATION

By: _____
MARVIN DYE, Director

_____
LYLE MANLEY, Rule Reviewer

Certified to the Secretary of State July 8, 1996.

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

In the matter of the proposed amendment of Rules 36.2.401 through 36.2.403, repeal of Rules 36.2.404 through 36.2.406 and adoption of rules pertaining to the minimum standards and guidelines for the streambed and land preservation act.	))))))	NOTICE OF PROPOSED AMENDMENT, REPEAL AND ADOPTION OF RULES NO PUBLIC HEARING CONTEMPLATED

To: All Interested Persons.

1. On August 26, 1996, the Department of Natural Resources and Conservation proposes to amend Rules 36.2.401 through 36.2.403, repeal Rules 36.2.404 through 36.2.406, and adopt rules pertaining to the minimum standards and guidelines for implementation of the natural streambed and land preservation act by conservation districts.

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

36.2.401 PURPOSE ~~Under Section 11, Chapter 463, Laws of 1975, the Natural Streambed and Land Preservation Act of 1975, the board of natural resources and conservation is required to adopt rules setting minimum standards and guidelines for the purpose of the act which must be met or exceeded by standards and guidelines for projects adopted by local districts. This sub-chapter sets forth those state minimum standards and guidelines.~~(1) The purpose of this subchapter is to set minimum standards and guidelines for the administration of the natural streambed and land preservation act. Districts must adopt local rules that meet or exceed these standards and guidelines.

AUTH: 75-7-117, MCA
IMP: 75-7-117, MCA

36.2.402 DEFINITIONS ~~As used in this sub-chapter and in Chapter 463, Laws of 1975:~~ As used in this sub-chapter and in Title 75, chapter 7, part 1, MCA, the following definitions apply:

(1) "Act" means the natural streambed and land preservation act.

(2) "Bed" means the channel occupied by a stream.

(3) "Channel" means the area where a stream of water flows measured from mean high water mark to mean high water mark.

(4) "Emergency" means an unforseen event or combination of circumstances that call for immediate action to safeguard life,

including human or animal, or property, including growing crops, without giving time for the deliberate exercise of judgment or discretion under the act.

(5) "Immediate banks" means the area beginning at the mean high water mark in the bed of a stream and extending to the point where an activity will not have an impact on the state of the stream.

~~(1)~~(6) "Mean high water mark" means ~~a water level corresponding to the natural or ordinary high water mark and is the line which the water impresses on the soil by covering it for sufficient periods of time to deprive the soil of its vegetation and destroy its value for agricultural purposes~~ the line that water impresses on the land for sufficient periods to cause physical characteristics that distinguish the area below the line from above it. Characteristics of the area below the line include, when appropriate, but are not limited to, deprivation of the soil of substantially all terrestrial vegetation and destruction of its agricultural value.

~~(2) "Project area" means the area within the jurisdiction of the act and this sub-chapter and includes the area within the mean high water mark on both sides of a stream. The term also includes the immediate banks to a stream as determined by the supervisors.~~

~~(3)~~(7) "Natural perennial flowing stream" means a stream which in ~~its natural state historically~~ the absence of diversion, impoundment, appropriation, or extreme drought flows continuously at all seasons of the year and during dry as well as wet years.

(8) "Plan of operation" means an annual plan for a project of recurring nature that, if approved by the supervisors, authorizes a specific activity for a period not to exceed 10 years.

(9) "Stream" means any perennial-flowing stream or river, its bed and immediate banks, its flood channels and braided channels. Stream does not include streams designated by the district as not having aquatic or riparian attributes in need of protection under the act.

AUTH: 75-7-117, MCA
IMP: 75-7-117, MCA

36.2.403 STANDARD FORMS (1) The following forms ~~shall be adopted, printed, and made~~ are available ~~by~~ from the department of natural resources and conservation and shall be used by each conservation district and applicant for a project~~:~~:

~~(1)~~(a) Form 270 "Notice of Proposed Project" is the application form to be submitted by the applicant to the supervisors for project review~~;~~.

~~(2)~~(b) Form 271 ~~"Supervisors Report" form to return to the applicant with stated course of action~~ "Arbitration

Agreement" is the agreement to be reviewed and agreed to by the applicant prior to district acceptance of Form 270~~.~~.

~~(3)~~ (c) Form 272 "~~Individual~~ Team Member Report" ~~form submitted~~ is the form to be used for team members to submit project recommendations to the supervisors.

~~(4)~~ (d) Form 273 "Supervisor's Decision" ~~form submitted~~ is the form to be used to convey the district's decision to the applicant and team members.

(e) Form 274 "Official Complaint" is the form to be used for individuals to notify a district of an activity taking place without written consent of the supervisors.

(f) Form 275 "Notice of Emergency" is the form to be used for individuals to notify a district of projects undertaken during an emergency to safeguard life, property, or growing crops.

(2) A district may add to the standard forms and may create additional forms. Any district modifying or creating additional forms must provide a copy to the department of natural resources and conservation.

AUTH: 75-7-117, MCA
IMP: 75-7-117, MCA

3. The amendment of these rules is necessary to eliminate conflicts with existing statutes resulting from 1995 legislative changes.

4. Rules 36.2.404, 36.2.405, and 36.2.406 are proposed to be repealed. The rules proposed to be repealed are on pages 36-33 through 36-35 of the Administrative Rules of Montana. The repeal of these rules is necessary because they are outdated and in conflict with current interpretations of the law. Cites for all three rules proposed for repeal are AUTH: 75-7-117, MCA and IMP: 75-7-117, MCA.

5. The proposed new rules will read as follows:

RULE I APPLICABILITY (1) The act and these rules apply to projects that impact any perennial-flowing stream or portions thereof, including its bed, immediate banks, flood channels, overflow channels, and braided channels, unless the stream has been designated as not having aquatic or riparian attributes in need of protection as outlined in Rule III. A district may consider a stream to flow perennially if it dries up periodically due to man-made causes, or extreme drought.

(2) The act and these rules do not apply to ditches, intermittent streams, or wetlands not associated with the bed or banks of a stream, unless activities on a ditch, intermittent stream, or wetland directly impact a perennial-flowing stream.

AUTH: 75-7-117, MCA

IMP: 75-7-102, MCA

RULE II WRITTEN CONSENT REQUIRED - PROJECT REVIEW (1) A person planning to engage in a project that will impact a stream must receive written consent of the supervisors prior to undertaking the project.

(2) The district shall review all projects to ensure they are achieved in a manner consistent with the policy set forth in the act. The supervisors, in making their decision to deny, approve, or modify a notice of a proposed project, will determine the purpose of the project and whether the project is a reasonable means of accomplishing the project.

(3) The district may reject notices of proposed projects that are not complete. The time frame starts when the application is accepted by the district.

AUTH: 75-7-117, MCA
IMP: 75-7-111, 75-7-112, MCA

RULE III EXCLUSION OF STREAMS (1) The district may exclude a stream, or portion thereof, upon a finding that the stream does not have significant aquatic and riparian attributes in need of protection.

(2) In order to make a determination, the district must conduct a public meeting to gather information relative to the aquatic and riparian attributes of a stream. Notice of the public meeting shall be one publication of a notice in a newspaper of general circulation in the area at least 10 days prior to the meeting. Directly affected parties will be notified by mail at least 10 days prior to the meeting.

(3) If after public meeting, the district determines that a stream has no aquatic and riparian attributes, the district may exclude the stream, or portion thereof, from jurisdiction of this act.

AUTH: 75-7-117, MCA
IMP: 75-7-103(6), MCA

RULE IV STANDARDS AND GUIDELINES (1) It is the applicant's responsibility to provide sufficient information for the district to make a reasonable determination to approve, modify, or deny a notice of proposed project. Information to be provided by the applicant, may include, but is not limited to, the purpose of the project, a detailed project description of how the project will be accomplished, project plans and drawings, maps of the site, time of construction, length of time to complete the project, and engineering designs if required by the district.

(2) Projects must be designed and constructed using methods that minimize:

(a) adverse impacts to the stream, both upstream and downstream;

(b) future disturbance to the stream.

(3) All disturbed areas must be managed during construction and reclaimed after construction to prevent erosion.

(4) Temporary structures used during construction must be designed to handle high flows anticipated during the construction period. Temporary structures must be completely removed from the stream channel at the conclusion of construction and the area must be restored to a natural or stable condition.

(5) All projects must be designed to pass instream bed loads and sediment except when the intended purpose of the project is to trap or otherwise manage these materials.

(6) Channel alterations must be designed to retain original stream length or otherwise provide hydrologic stability.

(7) Streambank vegetation must be protected except where removal of such vegetation is necessary for the completion of the project. When removal of vegetation is necessary, it must be kept to a minimum.

(8) Riprap, rock, or other material used in a project must be of adequate size, shape, and density and must be properly placed to protect the streambank from erosion.

(9) The district may:

(a) limit the time and duration of construction to minimize impacts to the stream or associated aquatic life;

(b) prohibit hazardous materials used in structures;

(c) prior to completion of a proposed project, require the applicant to submit engineering designs when in the district's judgment the project's complexity requires a greater assurance of project stability to minimize impacts to the stream;

(d) require the applicant to protect water quality during and after project construction;

(e) require the applicant to establish project monitoring programs and provide photographic documentation.

(10) The following activities are prohibited:

(a) the placement of road fill material in a stream, except if approved for use in the construction of a project;

(b) the placement of debris or other materials where it can erode or float into the stream;

(c) projects that impede fish migration;

(d) side casting of road material into a stream;

(e) projects that restrict normal high flows;

(f) operation of construction equipment in a stream without written consent of the supervisors; and

(g) excavation of streambed gravels without written consent of the supervisors.

AUTH: 75-7-117, MCA
IMP: 75-7-117, 75-7-112, MCA

6. The adoption of these rules is necessary to set minimum standards and guidelines. The adoption of these rules will provide better guidance to districts, which will result in a more consistent application of the natural streambed and land preservation statutes statewide.

7. Interested persons may submit data, views, or arguments concerning the proposed amendments, repeals or new rules in writing to Laurie Zeller, Conservation Districts Bureau, Department of Natural Resources and Conservation, 1625 Eleventh Avenue, Box 201601, Helena, Montana 59620-1601. Any comments must be received no later than August 19, 1996.

8. If a person who is directly affected by the proposed amendments, repeals or new rules wishes to express data, views and arguments orally or in writing at a public hearing, the person must make written request for a hearing and submit this request along with any written comments to the above address. A written request for hearing must be received no later than August 19, 1996.

9. If the agency receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons directly affected by the proposed action; from the administrative code committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 150, based on the estimated number of permits issued in 1995.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

ARTHUR R. CLINCH, DIRECTOR

DONALD D. MacINTYRE, RULE REVIEWER

Certified to the Secretary of State July 8, 1996.

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

In the matter of the proposed adoption of a new rule to reject, modify, or condition permit applications in the Houle Creek Basin	))))	NOTICE OF PUBLIC HEARING

TO: All Interested Persons

1. On Thursday, September 5, 1996 at 7:00 PM a public hearing will be held in the Visitor Center of the Nine Mile Ranger Station on Remount Road near Alberton, MT, to consider the adoption of new rule I.

2. The proposed new rule provides as follows:

"RULE I. HOULE CREEK BASIN CLOSURE (1) The Houle Creek Basin means the entire Houle Creek drainage area located in hydrologic basin 76M in Missoula County, Montana. The Houle Creek Basin designated as the closure area is all that drainage and headwaters originating in Sections 4 and 8, Township 15 North, Range 21 West, MPM flowing southwesterly to its confluence with the Frenchtown Irrigation District ditch in the SENENE Section 30, Township 15 North, Range 21 West, MPM. The entire Houle Creek drainage including all unnamed tributaries is contained in the closure area as outlined on file map page 4.

(2) The department shall reject all surface water applications to appropriate water within the Houle Creek Basin for any diversions, including infiltration galleries, for consumptive uses of water during any time of the year.

(3) Applications for nonconsumptive uses shall be accepted and processed. Any permit if issued shall be modified or conditioned to provide that there will be no decrease in the source of supply, no disruption in the stream conditions, and no adverse effect to prior appropriators within the reach of stream between the point of diversion and the point of return. The applicant for a nonconsumptive use shall provide sufficient factual information upon which the department can determine the applicant's ability to meet the conditions imposed by this rule.

(4) Applications for groundwater shall be accepted, however the applicant shall provide sufficient factual information upon which the department can determine whether or not the source of the groundwater is part of or substantially or directly connected to surface water. If it is found that the proposed diversion of groundwater would cause a calculable reduction in the surface water flow during the closure period the application shall be rejected. A calculable reduction means a theoretical reduction based on credible information as opposed to a measured reduction. If the applicant fails to submit sufficient factual information as required, the application shall be considered defective and shall be processed pursuant to 85-2-302, MCA.

(5) Temporary emergency appropriations of water as defined in ARM 36.12.101(6) and 36.12.105 shall be exempt from these rules.

(6) These rules apply only to applications received by the department after the date of adoption of these rules.

(7) The department may, if it determines changed circumstances justify it, reopen the basin to additional appropriations and amend these rules accordingly after public notice and hearing."

AUTH: 85-2-319, MCA
IMP: 85-2-319, MCA

3. Rationale: This rule is necessary for the protection of existing water rights in the Houle Creek Basin. Unappropriated surface water is not available to new appropriations in the basin throughout the year. On October 22, 1993 a petition was filed pursuant to 85-2-319, MCA with the Department of Natural Resources and Conservation. The petition requested the basin be closed year-round to all new appropriations of water. The petitioners claim the demand for water far exceeds the availability.

In response to the petition the Department set up a monitoring program to gather water availability information. Measuring devices were installed and monitored alternately by the DNRC and the petitioners for one year. As a result, the Department prepared an availability report and is proposing to reject new surface water permit applications for consumptive uses during any time of the year. The intent of this rule is to preserve existing stream flows for senior appropriators.

4. Persons with disabilities who need an alternative accessible format of this information, or who require some other reasonable accommodation in order to participate in this public hearing, should contact the Department of Natural Resources and Conservation, Attn: Teresa McLaughlin, PO Box 201601, Helena, MT 59620-1601, telephone no. (406)444-6610.

5. 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 Teresa McLaughlin, Department of Natural Resources and Conservation, PO Box 201601, Helena, MT 59620-1601, and must be received no later than September 4, 1996.

6. Vivian Lighthizer has been designated to preside at and conduct the hearing.

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

BY: _____
Arthur R. Clinch, Director

_____
Donald D. MacIntyre, Rule Reviewer

Certified to the Secretary of State July 8, 1996.

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

In the matter of the proposed amendment of rules 36.12.102, Forms and 36.12.103, Application and Special Fees	))))	NOTICE OF PUBLIC HEARING

TO: All Interested Persons

1. On August 22, 1996 at 7 PM a public hearing will be held by the Department of Natural Resources and Conservation in the Lower Floor Conference Room of the USF&G Building, 1625 Eleventh Avenue, Helena, MT to consider the proposed amendments to the above stated rules.

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

"36.12.102 FORMS (1) The following necessary forms for implementation of the act and these rules are available from the Department of Natural Resources and Conservation, Water Resources Division, ~~1520 East 6th Avenue~~ 48 N. Last Chance Gulch, PO Box 201601, Helena, Montana 59620-1601, the water resources regional offices or the county clerk and recorders offices. The department may revise as necessary, the following forms to improve the administration of these rules and applicable water laws:

~~(1)~~ (a) Form No. 600 "Application for Beneficial Water Use Permit" (for groundwater developments in excess of 35 gpm or 10 acre-feet per year and surface water appropriations);

~~(2)~~ (b) Form No. 600A "~~Supplement to~~ Criteria Addendum, Application for Beneficial Water Use Permit" (for appropriations of less than 4,000 acre-feet and 5.5 cfs);

~~(3)~~ (c) Form No. 600B "~~Supplement to~~ Criteria Addendum, Application for Beneficial Water Use Permit" (for appropriations of 4,000 acre-feet or more and 5.5 cfs or more);

~~(4)~~ (d) Form No. 600ACF "Supplement to Application for Beneficial Water Use Permit - Upper Clark Fork River Basin Groundwater Appropriations" (for appropriations of less than 4,000 acre-feet and 5.5 cfs);

~~(5)~~ (e) Form No. 600BCF "Supplement to Application for Beneficial Water Use Permit - Upper Clark Fork River Basin Groundwater Appropriations" (for appropriations of 4,000 acre-feet or more and 5.5 cfs or more);

~~(6)~~ (f) Form No. 601 "Permit to Appropriate Water";

~~(7)~~ (g) Form No. 602 "Notice of Completion of Groundwater Development" (for groundwater developments with a maximum use of 35 gpm or less not to exceed 10 acre-feet per year);

~~(8)~~ (h) Form No. 603 "Well Log Report";

~~(9)~~ (i) Form No. 604 "Certificate of Water Right" (for groundwater of 35 gpm or less not to exceed 10 acre-feet per year);

~~(10)~~ (j) Form No. 605 "Application for Provisional Permit for Completed Stockwater Pit or Reservoir" (maximum capacity of the pit or reservoir must be less than 15 acre-feet);

~~(11)~~ (k) Form No. 606 "Application ~~for~~ to Change ~~of Appropriation~~ a Water Right";

~~(12)~~ (l) Form No. 606A "Supplement to Application ~~for~~ to Change ~~Appropriation~~ a Water Right" (for any change in point of diversion or place of storage and for changes in purpose of use or place of use of less than 4,000 acre-feet and 5.5 cfs);

~~(13)~~ (m) Form No. 606B "Supplement to Application ~~for~~ to Change ~~Appropriation~~ a Water Right" (for changes in purpose of use or place of use of 4,000 or more acre-feet a year and 5.5 cfs or more);

~~(14)~~ (n) Form No. 606ASW "Supplement to Application ~~for~~ to Change ~~of Appropriation~~ a Water Right" (for Salvage Water);

~~(15)~~ (o) Form No. 606T "Temporary Change Supplement to Application ~~for~~ to Change ~~of Appropriation~~ a Water Right";

~~(16)~~ (p) Form No. 607 "Application for Extension of Time;

~~(17)~~ (q) Form No. 608 "Water Right Transfer Certificate";

~~(18)~~ (r) Form No. 608A "Addendum to Water Right Transfer Certificate Form for Apportioned Water Right";

~~(19)~~ (s) Form No. 611 "Objection to Application";

~~(20)~~ (t) Form No. 612 "Notice and Statement of Opinion";

~~(21)~~ (u) Form No. 613 "Fee Schedule for ~~the Appropriation of Water~~ Water Use in Montana";

~~(22)~~ (v) Form No. 614 "Notice of Temporary Emergency Appropriation";

~~(23)~~ (w) Form No. 615 "Water ~~Conversion Table~~ Use Guidelines";

~~(24)~~ (x) Form No. 616 "Notice of Action on Application for Extension of Time";

~~(25)~~ (y) Form No. 617 "Notice of Completion of Permitted Water Development";

~~(26)~~ (z) Form No. 618 "Notice of Completion of Change of Appropriation Water Right";

~~(27)~~ (aa) Form No. 619 "Cancellation Notice of Certificate of Water Right";

~~(28)~~ (ab) Form No. 620 "Authorization to Change a ~~Appropriation~~ Water Right";

~~(29)~~ (ac) Form No. 621 "~~Notice of~~ Termination Notice of Authorization to Change a ~~Appropriation~~ Water Right";

~~(30)~~ (ad) Form No. 621A "~~Notice of~~ Termination Notice of Permit to Appropriate Water";

~~(31)~~ (ae) Form No. 622 "Revocation Notice of Authorization to Change a ~~Appropriation~~ Water Right";

~~(32)~~ (af) Form No. 624 "Revocation Notice of Permit to Appropriate Water";

~~(33)~~ (ag) Form No. 625 "Water Right Correction ~~to Water Right Record~~";

~~(34)~~ (ah) Form No. 626 "Application ~~for~~ to Renew~~al of~~ a Temporary Water Right Change";

~~(35)~~ (ai) Form No. 627 "Notice of Water Right" (exempt from the adjudication filing requirements);

~~(36) Form No. 628 "Reinstatement of Permit to Appropriate Water"~~

~~(37) Form No. 629 "Reinstatement of Authorization to Change Appropriation Water Right"~~

~~(38)~~ (aj) Form No. 630 "Petition to the ~~Board~~ Department of Natural Resources and Conservation for Controlled Groundwater Area";

~~(39)~~ (ak) Form No. 631 "Petition to the Department of Natural Resources and Conservation to Adopt Rules to Reject Permit Applications, or Modify or Condition Permits Issued in a Highly Appropriated Water Basin or Subbasin";

~~(40)~~ (al) Form No. 632 "Certificate of Water Right" (for perfected permits);

~~(41)~~ (am) Form No. 633 "Certificate of Water Right" (for decreed water rights).

Auth: Sec. 85-2-113, MCA Imp: Sec. 85-2-113, MCA

36.12.103 APPLICATION AND SPECIAL FEES

(1) remains the same

(a) For an Application for Beneficial Water Use Permit, Form No. 600, there shall be a fee of ~~$100~~ $200.

(b) For an Interim Permit, there shall be a fee of ~~$10~~ $25 in addition to (a) above.

(c) through (d) remain the same

(e) For an Application ~~for~~ to Change ~~of Appropriation~~ a Water Right, Form No. 606, there shall be a fee of ~~$100~~ $200, except, when~~,~~:

(i) the change application concerns a replacement well or reservoir in the same source, ~~or~~

(ii) the change application concerns only moving or adding stock tanks to an existing system, or

~~(ii)~~ (iii) the change application is the result of a recommendation made during verification, there shall be a fee of $25 in addition to the direct cost of giving notice, if the department determines it must be advertised.

(f) through (g) remain the same

(h) For each Addendum to Water Right Transfer Certificate for Apportioned Water Right, Form No. 608A, there shall be an additional fee of $50, up to a maximum of $200.

(i) For filing an Objection to Application, Form No. 611, there shall be a fee of ~~$50~~ $25.

(j) For an Application ~~for~~ to Renew~~al of~~ a Temporary Water Right Change, Form No. 626, there shall be a fee of ~~$25~~ $50.

(k) remains the same

(l) For a Petition to the ~~Board~~ Department of Natural Resources and Conservation for Controlled Groundwater Area, Form No. 630, there shall be a fee of ~~$100~~ $200 for filing this petition form, plus the petitioner shall also pay reasonable costs of giving notice, holding the hearing, conducting investigations, and making records pursuant to ~~sections~~ 85-2-506 and 85-2-507, MCA, except the cost of

salaries of the department personnel.

(m) For a Petition to the Department of Natural Resources and Conservation to Adopt Rules to Reject Permit Applications, or Modify or Condition Permits Issued in a Highly Appropriated Water Basin or Subbasin, Form No. 631, there shall be a fee of ~~$100~~ $200 for filing this petition form, plus the petitioners shall also pay reasonable costs of giving notice, holding the hearing, conducting investigations, and making records pursuant to ~~section~~ 85-2-319, MCA, except the cost of salaries of the department personnel.

(n) For reinstating a permit or change authorization, there shall be a fee of $25.

~~(n)~~ (o) For a Correction to Water Right Record, Form No. 625 where the error in an issued permit, authorization, certificate or exempt water right filing caused by an applicant and a new document is issued, there shall be a fee of $10. No fee shall be charged for correcting errors caused by the department.

(2) through (3) remain the same

Auth: Sec. 85-2-113, MCA Imp: 85-2-113, MCA

3. The Department received a petition requesting that rule 36.12.103(1)(i) be amended. The Department agrees in part with the petitioners request and has set a public hearing to take comments on the proposed amendments. The water right filing fee rule amendments are an attempt to bring the fees closer to the actual direct processing costs. At the same time the Department's address and current water right form titles are being corrected.

4. Persons with disabilities who need an alternative accessible format of this information, or who require some other reasonable accommodation in order to participate in this public hearing, should contact the Department of Natural Resources and Conservation, Attn: Teresa McLaughlin, PO Box 201601, Helena, MT 59620-1601, telephone no. (406)444-6610.

5. 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 Teresa McLaughlin, Department of Natural Resources and Conservation, PO Box 201601, Helena, MT 59620-1601 and must be received no later than August 23, 1996.

6. Vivian Lighthizer has been designated to preside at and conduct the hearing.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

BY: Donald D MacIntyre
for Arthur R. Clinch, Director

Donald D MacIntyre
Donald D. MacIntyre, Rule Reviewer

Certified to the Secretary of State July 8, 1996.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the adoption of Rules I, II, III, IV, V and VI pertaining to criteria for patient placement at the Montana Chemical Dependency Center	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF RULES

TO: All Interested Persons

1. On August 27, 1996, at 9:30 a.m., a public hearing will be held in the Auditorium of the Department of Health and Human Services Building, 111 Sanders, Helena, Montana to consider the proposed adoption of Rules I, II, III, IV, V and VI pertaining to criteria for patient placement at the Montana Chemical Dependency Center.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you request an accommodation, contact the department no later than 5:00 p.m. on August 16, 1996, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970.

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

[RULE I] MONTANA CHEMICAL DEPENDENCY CENTER: PURPOSE (1) The Montana Chemical Dependency Center (MCDC) is an approved public inpatient facility which provides inpatient (free standing) treatment to chemically dependent residents of Montana who demonstrate a severity of illness which matches the intensity of service.

AUTH: Sec. 53-24-209, MCA
IMP: Sec. 53-24-301, MCA

[RULE II] MONTANA CHEMICAL DEPENDENCY CENTER: DEFINITIONS (1) "Level of care" means the following for the purpose of this rule:

(a) level IV - inpatient (hospital) care as defined in ARM 20.3.202(13); requirements are found in ARM 20.3.213.

(b) level III - inpatient (free standing) care as defined in ARM 20.3.202(14); requirements are found in ARM 20.3.214.

(c) level II - day treatment and/or intensive outpatient treatment as defined in ARM 20.3.202(8) and (15); requirements are found in ARM 20.3.217 and ARM 20.3.218.

(d) level I - outpatient treatment as defined in 20.3.202(18); requirements are found in ARM 20.3.216.

(2) "Level III justification packet" means the materials to be sent to MCDC by the certified counselor (as defined in ARM 20.3.401 through 20.3.416) to justify the admission which include the following required items:

(a) results of assessment as defined in ARM 20.3.214(2)(a);

(b) copy of the biopsychosocial assessment as defined in ARM 20.3.202(4), completed by the certified counselor;

(c) level III patient placement justification as defined in ARM 20.3.214;

(d) identification of overriding considerations as defined in ARM 20.3.208(1)(j)(vii) if appropriate;

(e) confirmation that appropriate services are not available locally; and

(f) current discharge summary as defined in ARM 20.3.216(5)(j), if recently discharged from another level of care.

(3) "Supporting documentation" means medical or psychiatric information which substantiates the need for level III care and/or negates the need for level IV care.

(4) "Qualifying placement" means justification at level III in at least two of the six dimensions, as defined in ARM 20.3.208(1)(j)(i) through (vii) or one dimension with a consideration which overrides the patient placement match.

(5) "MCDC utilization review committee" means a team with clinical, medical and administrative representation, which determines the appropriateness of admission to level III treatment based on the documentation submitted by the certified chemical dependency counselor.

AUTH: Sec. 53-24-209, MCA
IMP: Sec. 53-24-301, MCA

[RULE III] MONTANA CHEMICAL DEPENDENCY CENTER: APPLICABILITY (1) All state approved chemical dependency programs, Indian Health Services (IHS) approved native american programs and certified chemical dependency counselors may refer clients to MCDC providing the level III justification packet is complete. In all cases the referring individual must be a certified chemical dependency counselor, who has utilized the level III justification format and the principles of patient placement.

AUTH: Sec. 53-24-209, MCA
IMP: Sec. 53-24-301, MCA

[RULE IV] MONTANA CHEMICAL DEPENDENCY CENTER: CRIMINAL JUSTICE SYSTEM REFERRALS (1) A court mandating or recommending chemical dependency treatment at MCDC must refer the offender to the approved chemical dependency program in their area or a

certified chemical dependency counselor to complete the assessment, patient placement and confirmation that appropriate services are not available locally. The program or certified chemical dependency counselor may then refer the offender to MCDC if appropriate. The board of pardons, probation/parole officers and pre-release centers must also use this procedure.

AUTH: Sec. 53-24-209, MCA
IMP: Sec. 53-24-301, MCA

[RULE V] MONTANA CHEMICAL DEPENDENCY CENTER: ADMISSION POLICIES AND PROCEDURES (1) An individual requesting admission to MCDC or a court referral must be assessed as chemically dependent pursuant to ARM 20.3.214(2)(a), and demonstrate a severity of illness which qualifies the individual for Level III care based on nationally recognized patient placement criteria. Furthermore, the certified chemical dependency counselor must confirm that the individual cannot obtain necessary care locally. If the referral source is other than a certified chemical dependency counselor, MCDC will determine the appropriate level of care placement and refer the person to that level of care.

(2) The certified chemical dependency counselor must contact the admission coordinator at MCDC and request admission. The admissions coordinator will instruct the program or certified counselor in admission protocols.

(3) The certified counselor will send the completed level III justification packet to MCDC.

(4) The MCDC utilization review committee will meet five days per week (Monday through Friday except holidays) to process and accept requests for admissions within 24 hours, providing the documentation within the level III justification packet is complete. Requests received after 11:00 a.m. on Friday will be processed on Monday.

(5) The committee may reject requests for admission based on inadequate documentation or inappropriate placement.

(6) The referring certified chemical dependency counselor will be notified of the deficiencies and be given an opportunity to correct the deficiencies and resubmit.

(7) Following acceptance of the admission request, MCDC will notify the referring certified chemical dependency counselor or state approved program of the specific date and time for the admission. The referring certified chemical dependency counselor or state approved program is responsible to arrange the travel so the individual arrives at the designated arrival time.

(8) MCDC may refuse an admission that fails to arrive at the scheduled date or time.

AUTH: Sec. 53-24-209, MCA
IMP: Sec. 53-24-301, MCA

[RULE VI] MONTANA CHEMICAL DEPENDENCY CENTER: DISCHARGE PROCESS TO LEVEL II OR I (1) Discharge will be determined by the individual's ability to meet MCDC's established discharge criteria based on nationally recognized patient placement criteria. Discharge planning will be ongoing, during the treatment process. All clients will receive a continuing care referral to the certified chemical dependency counselor or state approved program that initiated the admission, in order to ensure participation in necessary continuing care.

AUTH: Sec. 53-24-209, MCA
IMP: Sec. 53-24-301, MCA

3. The proposed new rules are necessary to implement legislation, SB 40, requiring assessment, application of patient placement criteria and confirmation at the community level by a certified chemical dependency counselor prior to acceptance for admission at the Montana Chemical Dependency Center (MCDC).

The proposed rules are necessary to eliminate inappropriate referrals to MCDC for inpatient treatment services. They will allow all admissions to MCDC to be evaluated by a certified chemical dependency counselor, using nationally recognized patient placement criteria and confirm the appropriate level of care is not available in the community. This will reduce costs, maintain a reasonable schedule of admissions while decreasing the no-show rate at MCDC. The proposed rules will also improve the linkage for the necessary aftercare and other support services patients require in the community when treatment at MCDC is completed. The proposed rules define terms and set policy and procedure guidelines for admission and discharge to MCDC and delineate the forms needed by referring counselors to allow admission to MCDC.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Laura Harden, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620, no later than August 30, 1996.

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

Rules Reviewer

Director, Public Health and Human Services

Certified to the Secretary of State July 8, 1996.

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

In the Matter of Proposed Adoption of a Rule Pertaining to Recovery of Abandonment Costs in Electric Utility Least-Cost Resource Planning and Acquisition.	)))))	NOTICE OF PROPOSED ADOPTION OF RULE I NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On August 22, 1996 the Department of Public Service Regulation proposes to adopt the rule identified in the above title and described in the following paragraphs, related to recovery of abandonment costs in the context of electric utility least-cost planning and acquisition.

2. The proposed rule modifies no existing rule.

3. The rule proposed to be adopted provides as follows:

RULE I. RECOVERY OF ABANDONMENT COSTS (1) The extent of electric utility recovery of abandonment costs as defined at 69-12-1203(1), MCA, will be governed by the commission's usual ratemaking consideration of plant and expenses. AUTH: Sec. 69-3-1206, MCA; IMP, Sec. 69-3-1206, MCA

4. Rationale: The rule is reasonably necessary as it is required by law (see, Sec. 69-3-1206(2), MCA).

5. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing (original and 10 copies) to Martin Jacobson, Public Service Commission, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601 no later than August 22, 1996.

6. 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 must make written request for a public hearing and submit this request along

with any written comments he has (original and 10 copies) to Martin Jacobson, Public Service Commission, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601, no later than August 22, 1996.

7. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be in excess of 25 persons based upon the number of utility service consumers in the state of Montana.

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

Dave Fisher

Dave Fisher, Vice Chair

CERTIFIED TO THE SECRETARY OF STATE JULY 8, 1996.

Robin A. McHugh

Reviewed By Robin A. McHugh

BEFORE THE BOARD OF HORSE RACING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to exercise persons and pony persons	)))	NOTICE OF AMENDMENT OF 8.22.703 EXERCISE PERSONS AND 8.22.709 PONY PERSONS

TO: All Interested Persons:

1. On May 23, 1996, the Board of Horse Racing published a notice of proposed amendment of the above-stated rules at page 1350, 1996 Montana Administrative Register, issue number 10.

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

3. No comments or testimony were received.

BOARD OF HORSE RACING
JAMES SCOTT, DVM, CHAIRMAN

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

Ann M Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, July 8, 1996.

BEFORE THE BOARD OF SANITARIANS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment, repeal and adoption of rules pertaining to sanitarians) NOTICE OF AMENDMENT, REPEAL AND ADOPTION OF RULES PERTAINING TO SANITARIANS

TO: All Interested Persons:

1. On March 7, 1996, the Board of Sanitarians published a notice of proposed amendment, repeal and adoption of rules pertaining to sanitarians at page 626, 1996 Montana Administrative Register, issue number 5. On April 25, 1996, the Board published a notice of public hearing at page 985, 1996 Montana Administrative Register, issue number 8, because a sufficient number of individuals requested that the Board hold a public hearing.

2. The Board has amended ARM 8.60.401, 8.60.403, 8.60.408, 8.60.412, and 8.60.413; repealed ARM 8.60.404, 8.60.406, 8.60.407, 8.60.410, and 8.60.411; and adopted new rules I (8.60.407A), II (8.60.410A) and III (8.60.411A) exactly as proposed. The Board has amended ARM 8.60.415 as proposed, but with the following changes:

8.60.415 SANITARIAN-IN-TRAINING (1) will remain the same as proposed.

(2) A sanitarian-in-training must work under the ~~direct~~ supervision of a licensed sanitarian. The supervising sanitarian must submit a plan for supervision for approval by the board.

(a) will remain the same as proposed.

(i) an estimate of time of ~~direct~~ supervision provided,

(ii) will remain the same as proposed.

(iii) method of maintaining contact and supervision, including an alternate supervisor in cases of unavailability of designated supervisor.

(3) ~~Direct s~~Supervision means the availability of a licensed sanitarian ~~on the premises~~ for purposes of immediate communication and consultation on a weekly and as needed basis as identified in the approved plan of supervision.

~~(4) Applicants for a temporary practice permit may apply to the board for a regional hardship exception to the on premises direct supervision requirement, provided there are no other licensed sanitarians in the county in which the temporary permit applicant seeks employment. Under this exception, the permittee shall be in communication on a weekly and as needed basis with an active licensed sanitarian engaged in duties similar to those assigned the permittee.~~

~~(5)~~ (4) A sanitarian-in-training ~~temporary practice permit~~ exemption is valid for a period of one year ~~or until the permit holder fails the examination, whichever occurs first. Temporary practice permit holders may continue to practice under the temporary practice permit until they are notified~~

~~that they have passed the examination and are issued a permanent license or that they have failed the examination~~."

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

ARM 8.60.401 BOARD MEETINGS

COMMENT: One comment expressed concern that the deletion of (3) would inhibit the Board's ability to hold conference calls. The comment suggested that geographic distances and scheduling difficulties made teleconferencing a necessity.

RESPONSE: The ability of the Board to hold conference calls does not stem from this rule; that authority is implied in section 37-1-131 and 37-1-307, MCA which set forth the board's duties and authority. The board has met via teleconference in the past and will continue to do so as needed.

ARM 8.60.412 UNPROFESSIONAL CONDUCT

COMMENT: One comment involved making certain that "unprofessional conduct" included the potentially fraudulent conduct where a licensed, registered sanitarian signs an inspection report without actually performing an inspection. Another comment expressed the desire that the Board have the ability to investigate a complaint when it has information before it without requiring a written complaint. One comment opposed addition of the words "and public" under (1)(b) under the rationale that the definition of "environmental health" includes public health and that the distinction serves to harm the profession by making it easier for policy makers to eliminate the public health basis for environmental health programs.

RESPONSE: Section 37-1-316(5), MCA, provides that it is unprofessional conduct for a licensee to sign or issue in the licensee's professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement. Section 37-1-308(2), MCA, provides that the department may investigate upon receipt of a written complaint or otherwise obtains information that a licensee or license applicant may have committed a violation of Title 37, Chapter 1. The board rejects the comment regarding (1)(b), recognizing that the use of the terms "environmental health" and "public health" are part of an ongoing debate. Until the debate is resolved, the board prefers to be more specific rather than leaving the definition to interpretation.

ARM 8.60.413 FEE SCHEDULE

COMMENT: One comment was made regarding the deletion of the reciprocity fee. Its deletion implied that the reciprocity provision was also deleted. The comment noted that use of a

national examination would tend to encourage granting reciprocity and identified a lack of understanding among the profession of how reciprocity is applied and suggests that it be explained in the rule.

RESPONSE: The board has the authority to grant a Montana license to an individual who possesses a current license in good standing from another state, if at the time of application to Montana, the other state's license standards are substantially equivalent to the standards in this state. This standard is set forth in 37-1-304, MCA. The board rejects the suggestion to explain how reciprocity is applied in the rule because to do so would be an unnecessary repetition of the statute.

ARM 8.60.415 SANITARIAN-IN-TRAINING

COMMENT: Subsection (3) One comment opposed an interpretation of the term "direct supervision" and "premises" that would require an SIT to be accompanied at all times and in the field by a licensed sanitarian, and suggested that the supervising registered sanitarian be given the authority to determine the degree of supervision required by the sanitarian-in-training.

Subsection (4) One comment supported the idea of a regional hardship exception to on-premises supervision, but suggested that a weekly or "as needed" communication between the supervising sanitarian and the trainee may not be feasible in all instances.

Subsection (5) Fifteen people opposed the amendment to this section. One comment supported the amendment.

One comment identified confusion between the terms "sanitarian-in-training" and "temporary practice permit holder." Another comment described that the intent of the "sanitarian-in-training" status was to provide on the job experience, time to prepare to take the examination, and take the examination multiple times if needed.

Many comments noted that the examination is a difficult examination to pass on the first attempt. Two comments stated that no other profession limits a person to one chance at passing the examination.

Nearly all of the comments noted the uniqueness of the profession in that there exists no strict curriculum or degree course that effectively educates a person to the total or intricate fields that sanitarians deal with on a day-to-day basis, and therefore, on the job training is a necessity.

Two county health officers commented with regard to a possible financial impact this rule would have on local county health departments if they have spent time and money training an individual who fails the first attempt of the examination and is not allowed to work until successfully passing the examination.

Other commentors felt that the rule would be a barrier to growth of the field, discouraging candidates when there is already a lack of qualified candidates attracted to the

profession. One comment noted that a lack of "sanitarians-in-training" would make his job more difficult.

Solutions to the problem identified in the comments were to request the Attorney General for a way to allow the Board to obtain a variance from the requirement. Seven comments suggested extending the period of a "sanitarian-in-training" to a period of 2 or 3 years to allow an individual to adequately learn and train in the sanitarian profession as well as prepare for the examination.

The comment in support of the amendment stated that it is in the best interest of the sanitarian profession to have been included in the legislative effort to bring uniformity to licensing of professionals under the Department of Commerce and that it would be a mistake to attempt to exempt the profession from this statute. The comment stressed that the issue should address expanding on the "sanitarian-in-training" designation and suggested that the engineer intern model should be adopted wherein the "engineer-in-training" takes an exam to become an "engineer-in-training", and after more experience and training, takes a second exam to become a professional engineer.

RESPONSE: Subsection (3) The board accepts the comment and will delete the language "on the premises." The intent of the rule is not to require that the supervisor accompany the trainee at all times, but to be available for communication and consultation. Further, because the comment pointed to an ambiguity in the definition of supervision, and because the statute does not use the term "direct," but only the term "supervision," the board will delete all reference in 8.60.415 to supervision as being "direct."

Subsection (4) The board rejects the comment that weekly communication is burdensome given modern telecommunications. However, the board will add language to (2)(a)(iii) to request the plan of supervision to address contingency plans for breaks in supervision by the designated supervisor; i.e., the availability of another licensed sanitarian whom the SIT can contact. In reference to the board's response to the comment on (3), the regional hardship exception will be deleted. Supervision of a sanitarian-in-training, regardless of the SIT's location, will involve submission of a plan as set forth in (2) and require weekly and as needed communication with a licensed sanitarian.

Subsection (5) Section 37-40-101(6), MCA, provides that a "Sanitarian-in-training" means a person who meets the minimum educational qualifications required for a sanitarian's license and who works under the supervision of a licensed sanitarian. Sanitarians-in-training may, with board approval, work in a public health agency for a period not to exceed 1 year and be considered exempt from the licensing and registration requirements of 37-40-301, MCA.

In the past, the board has issued a permit for SIT's. Under the law, the SIT is exempt from licensure and does not require a license or permit of any kind. Therefore, the board will no longer issue SIT permits and delete all reference in the rule to issuance of a temporary permit. In doing so, 37-1

305, MCA, will no longer be applicable. Section 37-1-305, MCA, provided that for the expiration of the temporary practice permit upon the candidate's failure of the licensing examination.

The SIT, as defined in 37-40-101(6), MCA, is exempt from licensure and therefore, is entitled to retake the examination as often as necessary. The statute is clear however, that the training period, may not exceed one year. This means that the SIT, in order to continue working, will have to pass the exam in one year. If the SIT does not pass the exam within the year of training, he or she may continue to attempt to pass the examination, but may not work.

The board would like to clarify that in no case will any SIT be granted approval to begin training if he or she does not meet the minimum qualifications for licensure as required by 37-40-101(6), MCA. Although the board may have allowed SIT's to pick up a missing microbiology class, for example, it was not appropriate to allow the SIT to begin without meeting the minimum qualifications for licensure. The board intends to deny any and all SIT applicants who do not meet these minimum requirements.

Having clarified the status of "sanitarian-in-training" as exempt from licensure, the board will delete (4).

The board does not dispute the comments regarding the difficulty of the examination, but notes that 37-40-101(6), MCA, will allow successive attempts to take the examination. In addition, the board notes that the new examination provider will provide a study guide whereas the former provider did not.

The board rejects the comment regarding the unavailability of curricula or degree courses that adequately educate persons wishing to enter the profession without undergoing an on-the-job training program. Such programs are currently available in state. While the board agrees that on-the-job training enhances the education of a prospective registered sanitarian it disputes that such training is necessary to pass the licensing examination.

The board acknowledges the comments regarding financial impact on counties who hire SIT's who ultimately are unable to pass the test. The board, however, cautions public health agencies against relying on SITs to provide a labor force. The Sanitarian-in-Training was introduced to the legislature under a one-year limit with the understanding that one year should be a sufficient amount of time to be able to pass the examination. If an SIT does not pass the examination after several attempts within a one year period, the public safety demands that the individual not be allowed to continue to practice until he or she can demonstrate the ability to pass the examination. The board wishes to repeat that after one-year, the SIT will continue to be allowed to sit for the examination, but will not be allowed to continue to work as an SIT.

NEW RULE III(3) RENEWAL

COMMENT: One comment proposed an amendment requiring the Department to send a certified letter to licensees whose licenses are set to lapse because 90 days may not be a long enough period given the many situations that can arise in a person's life that cause them to be late or even forget to renew.

RESPONSE: The board rejects the comment. In the history of the board, no individual has ever exceeded the 90 day grace period. Moreover, the license renewal forms sent to licensees already give notice to the individual of the consequence of failing to renew. It is the obligation of the individual licensee to renew his or her license and to keep the board informed of current addresses.

BOARD OF SANITARIANS
MELISSA TUEMMLER, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, July 8, 1996.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the amendment of rules 18.8.101, 18.8.304, 18.8.415, 18.8.428, 18.8.501, 18.8.502, 18.8.504, 18.8.509, 18.8.511A, 18.8.511B, 18.8.513, 18.8.514, 18.8.517, 18.8.519, 18.8.601, 18.8.602, 18.8.801, 18.8.1002 and 18.8.1101, and the repeal of rules 18.8.201, 18.8.701 and 18.8.1008 concerning the Motor Carrier Services program	NOTICE OF AMENDMENT AND REPEAL

TO: All Interested Persons.

1. On March 21, 1996, the Department of Transportation published notice of the proposed amendment of rules 18.8.101, 18.8.304, 18.8.415, 18.8.428, 18.8.501, 18.8.502, 18.8.504, 18.8.509, 18.8.511A, 18.8.511B, 18.8.513, 18.8.514, 18.8.517, 18.8.519, 18.8.601, 18.8.602, 18.8.801, 18.8.1002 and 18.8.1101, and the repeal of rules 18.8.201, 18.8.701 and 18.8.1008 concerning the Motor Carrier Services program, at page 714 of the 1996 Montana Administrative Register, issue number 6.

2. A public hearing was held in the auditorium of the Montana Department of Transportation building in Helena, Montana, on April 23, 1996, and public comments, written and oral, were received.

3. The Department has amended rules 18.8.101, 18.8.304, 18.8.415, 18.8.428, 18.8.501, 18.8.502, 18.8.504, 18.8.509, 18.8.511B, 18.8.513, 18.8.514, 18.8.517, 18.8.519, 18.8.601, 18.8.602, 18.8.801, 18.8.1002 and 18.8.1101 as proposed.

4. The agency has amended Rule 18.8.511A with the following changes:

18.8.511A WHEN FLAG VEHICLES ARE REQUIRED (1) Flag vehicles are required at the rear of a vehicle on interstate highways if the load or the vehicle exceeds 16.5 feet in width.

(2) A ~~F~~flag vehicle~~s are~~ is required at the front on all highways except interstate highways when ~~the main body of~~ the load or the vehicle exceeds 12 feet in width.

(3) Vehicles or loads exceeding 14 feet wide, but not exceeding 16.5 feet wide are not required to have a rear flag vehicle provided they are equipped with "oversize load" signs and flashing lights on both the front and the rear.

(4) Flag vehicles are required at the front and at the rear on all highways except interstate highways when ~~the main body of~~ the load or the vehicle exceeds ~~14~~ 16.5 feet in width ~~or if the overall width including appurtenances exceeds 15 feet~~.

(4) through (6) remain the same, but are renumbered (5) through (7).

AUTH: 61-10-155 MCA; IMP: 61-10-101 through 61-10-148 MCA

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

Written comments: The proposed amendments received written support from the Montana Manufactured Housing & Recreational Vehicle Association, the Montana Motor Carriers Association, Inc., and Hi-Ball Trucking, Inc.

Comments: Written comments opposing the amendment to subsection (4) of ARM 18.8.601 were received from the Montana Motor Carriers Association, Inc., and Hi-Ball Trucking, Inc. They were opposed to the amendment because of the burden it places on a carrier.

Response: The rule as proposed is adopted because the Federal Highway Administration has mandated this definition. See Response to similar oral comment.

Comment: Hi-Ball Trucking also submitted a written comment which was critical of Rule 18.8.602(4). Hi-Ball Trucking was of the opinion that the rule created a potentially unsafe condition where a bridge is located in a depression and a motorist is not able to see the stopped truck until it is too late to safely stop.

Response: MDT appreciates and understands the concern. The proposed rule change, however, was merely an attempt to make Rule 18.8.602(4) easier to read. It was not a substantive rule change. Consequently, MDT is of the opinion that a change of the rule as suggested by Hi-Ball Trucking would require a new notice and another comment period. This comment will be kept in mind and considered when the rules are amended again.

Oral comments: Oral testimony from several sources was received in general support of the proposed amendments and in

specific support of the proposed amendments to ARM 18.8.509, ARM 18.8.511B, ARM 18.8.513(4), and ARM 18.8.1101.

Opponents comments: Oral testimony was received from Doug Mote representing the Montana Logging Association and from Dennis McKenna, owner-operator leased to Westran, Inc., opposing the proposed amendment to ARM 18.8.511A. Mr. Mote stated that increasing the width to 16.5 feet before requiring a rear flag vehicle would result in the driver of the overdimensional load being unable to determine what traffic was following, and that traffic would not be able to pass safely on narrow two-lane highways. Mr. McKenna advised that because of the weight and slowness of a vehicle hauling equipment and clearing corners that a dangerous situation was created by not having a rear flag vehicle.

Response: The agency noted that the current rule allows movement of wide loads up to and including 15 feet with appurtenances before a rear flag vehicle is required. However, appurtenances are not defined and it is not specified in rule where the appurtenances must be located on the overdimensional load. This leads to confusion and difficulty in interpretation. In response to comments, the agency is amending ARM 18.8.511A to require additional lighting in lieu of a rear flag vehicle. The use of flashing lights and oversize load signs on the overdimensional load will provide adequate warning and assure continued safety for the traveling public. The elimination of a rear flag vehicle also reduces traffic congestion, resulting in fewer vehicles which a passenger car or pickup truck would have to pass. Regarding the inability of the driver to determine the traffic behind the overdimensional load, if the vehicle hauling the overdimensional load is equipped with mirrors as required in section 61-9-404, MCA, the driver would have rear visibility of 200 feet. With regard to Mr. McKenna's concerns, vehicle combinations which are designed and used for hauling extremely large and/or heavy pieces of equipment often require additional safety precautions pursuant to other rules, including front and rear flag vehicles and more restrictive hours of travel.

Comments: Oral testimony was received from Ben Havdahl representing Montana Motor Carriers Association, Inc.; Carl Schwitzer representing Montana Contractors Association; Russ Ritter representing Westran, Inc., Doug Miller representing Whitewood Transportation; Jim Novak with Montana Power Co.; and Doug Mote representing the Montana Logging Association in opposition to the amendment to subsection (4) of ARM 18.8.601. Testimony cited concerns about lack of uniform interpretation of the "8 hour rule," delays in emergency response to

disasters such as forest fires, and increased safety concerns.

Response: The agency noted that the amendment is the exact federal definition of a non-divisible overweight load. The Federal Highway Administration has mandated that Montana adopt the federal definition or face possible loss of federal funding for highway construction projects. The agency shares the concerns of the motor carrier industry, but is obligated to adopt the federal definition of a non-divisible load. It was further noted that the current definition of a non-divisible load would continue to be in effect for overweight loads traveling on non-interstate highways.

6. The agency has repealed rules 18.8.201 INTERSTATE APPORTIONED LICENSING, 18.8.701 RESTRICTED ROUTE-LOAD PERMITS, and 18.8.1008 REGULATIONS COVERING MOVEMENT OF ALL VEHICLES OR LOADS EXCEEDING 15 FEET WIDE, TO AND INCLUDING 18 FEET WIDE, found on pages 18-273, 18-313, and 18-320 of the Administrative Rules of Montana.

MONTANA DEPARTMENT OF TRANSPORTATION

By: Marvin Dye
MARVIN DYE, Director

Lyle Manley
Lyle Manley, Rule Reviewer

Certified to the Secretary of State July 8, 1996.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES OF THE STATE OF MONTANA

In the matter of the amendment of rules 16.32.101 through 16.32.103, 16.32.106, 16.32.107, 16.32.109 through 16.32.112, 16.32.118, 16.32.119, 16.32.128, 16.32.136 through 16.32.141; and the repeal of rules 16.32.114, 16.32.130, and 16.32.142, concerning procedures, criteria, and reporting for the certificate of need program	)	NOTICE OF THE AMENDMENT AND REPEAL OF RULES

TO: All Interested Persons

1. On May 9, 1996 the Department of Public Health and Human Services published notice of the proposed adoption of Rule I; the amendment of rules 16.32.101 through 16.32.103, 16.32.106, 16.32.107, 16.32.109 through 16.32.112, 16.32.118, 16.32.128, 16.32.136 through 16.32.141; and the repeal of rules 16.32.114, 16.32.130, and 16.32.142, concerning procedures, criteria, and reporting for the certificate of need program at page 1267 of the 1996 Montana Administrative Register, issue number 9.

The department decided not to adopt [Rule I] DEFINITIONS OF STATUTORY TERMS as a separate rule and instead incorporated those terms into ARM 16.32.101.

2. The Department has amended rules 16.32.107, 16.32.111, 16.32.118, 16.32.136, 16.32.137, 16.32.138 and 16.32.141 and repealed rules 16.32.114, 16.32.130, and 16.32.142, as proposed. In addition, the Department has amended 16.32.119.

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

16.32.101 DEFINITIONS (1) For the purpose of this subchapter:

~~(1)~~(a) "Current state health plan" means the compilation of components containing guidelines for determining need for health care facilities and services subject to certificate of need review that is most recently adopted by the governor and ~~the~~ a statewide health coordinating council appointed by the governor; a separate component adopted by the statewide health coordinating council and the governor for a single type of service or facility is part of the current state health plan.

(2) through (4) remain as proposed but are renumbered (1)(b) through (1)(d).

(2) The following terms appear in the Montana Code Annotated, are not defined in the statutes, and are interpreted by the department to mean the following:

(a) The phrase "enforceable capital expenditure commitment", as used in 50-5-305, MCA, means an obligation incurred by or on behalf of a health care facility when:

(i) an enforceable contract is entered into by such facility or its agent for the construction, acquisition, lease or financing of a capital asset;

(ii) a formal internal commitment of funds by such a facility which constitutes a capital expenditure; or

(iii) in the case of donated property, the date on which the gift vested.

(b) The phrase "office of a private physician, dentists or other physical or mental health care professionals, including chemical dependency counselors", used in 50-5-301, MCA, as an exception from the definition of "health care facility", to mean the private offices of those professionals, whether practicing individually or as a group, and associated facilities that are:

(i) located on the premises of the professional's offices;

(ii) operated as an integral part of the professional's private practice; and

(iii) primarily available only to the professionals whose offices are located on the premises. Such facilities may include outpatient services and observation beds, but may not include inpatient services.

16.32.102 LONG TERM CARE -- WHERE ALLOWED (1) A health care facility, as defined in 50-5-301, MCA, may provide long term care only if:

(a) it is licensed to provide the level of care in question; or

(b) it has received certificate of need approval pursuant to ARM 16.32.128 for the establishment of swing beds, is certified to provide long term care in such swing beds, and the provision of long term care is limited to such swing beds~~; or~~.

(2) A hospital may provide long term care only if:

(a) it has received certificate of need approval from the department for the establishment of swing beds, is certified to provide long term care in such swing beds, and the provision of long term care is limited to such swing beds; or

(1)(c) remains as proposed but is renumbered (2)(b).

16.32.103 SUBMISSION OF LETTER OF INTENT (1) through (1)(c) remain as proposed.

(i) ~~a substantial change in existing services or~~ the addition of a new service, and, if so, an estimate of the annual operating and amortization expenses required to provide it;

(1)(c)(ii) through (1)(c)(iv) remain as proposed.

~~(v) addition of health services that are to be offered in or through a health care facility, were not offered on a regular basis in or through the facility within the previous 12-month~~

~~period, and will result in additional annual operating and amortization expenses of $150,000 or more;~~

(1)(c)(vi) remains as proposed but is renumbered (1)(c)(v).

~~(vii)~~(vi) ~~if the person desires comparative review of their proposal with that of another applicant, the name of the other applicant~~the use of hospital beds to provide nursing or intermediate developmental disability care and, if so, the number of beds involved; or

(1)(c)(viii) remains as proposed but is renumbered (1)(c)(vii).

(1)(d) through (1)(k) remain as proposed.

(l) if the person desires comparative review of their proposal with that of another applicant, the name of the other applicant;

(1)(l) and (1)(m) remain as proposed but are renumbered (1)(m) and (1)(n).

(2) through (5) remain as proposed.

16.32.106 SUBMISSION OF APPLICATIONS (1) and (2) remain as proposed.

(3) No application for a proposal will be accepted earlier than the deadline set by 50-5-302(5), MCA, for receipt of a letter of intent requesting comparative review with that proposal, with the exception of a proposal for which a letter of intent was submitted requesting comparative review with an earlier proposal.

(4) through (6) remain as proposed.

(7) Within 20 working days after receipt of an application, ~~I~~if the application is determined to be incomplete, the department shall notify the applicant in writing by mail of ~~the incompleteness~~ that fact and of the specific information that is necessary to complete the application. The department shall also indicate a time, which may be no less than 15 calendar days, within which the department must receive the additional information requested. Within 15 working days after receipt of the additional information, the department shall determine whether the application is complete.

(8) remains as proposed.

(9) If the ~~intent of the application~~ applicant materially changes the proposal or the ~~financial feasibility of the proposed project is altered~~ capital expenditures projected are increased by 15% or $150,000, whichever is greater, after the department declares the application complete, the department may cease review of the original application and require the applicant to begin the process again by filing a new letter of intent for the revised proposed project if it desires a certificate of need for it. If, after the department gives the applicant notice that the department considers the original proposal so altered that the review process must begin again, the department will continue on the original review schedule if the applicant notifies the department that it chooses to have

review continue on the original application, rather than to commence a new review process on the revised application.

(10) remains as proposed.

16.32.109 INFORMATIONAL HEARING PROCEDURES (1) ~~During the course of the review period, a~~Any affected person may request an informational hearing to be held during the course of the review period by writing to the department. The department may also hold a hearing on its own initiative.

(2) Whenever an application is received by the department, the department will publish a notice of that fact in a newspaper of general circulation in the area to be served by the proposal, unless the application is subject to comparative review with another, in which case the newspaper notice will be published after receipt of all of the applications to be comparatively reviewed. A hearing request must be received by the department within 30 calendar days after the date the ~~monthly notice of letters of intent appears in the newspaper~~ newspaper notice is published.

(3) through (8) remain the same as proposed.

16.32.110 CRITERIA AND FINDINGS (1) The criteria listed in (a) through (k) below are statutory criteria required by 50-5-304, MCA, and ~~the following~~ will be considered by the department in making its decision:

(a) the degree to which the proposal being reviewed:

(i) demonstrates that the service is needed by the population within the service area defined in the proposal;

(ii) provides data that demonstrates the need for services contrary to the current state health plan, including but not limited to waiting lists, projected service volumes, differences in cost and quality of services, and availability of services; or

(iii) is consistent with the current state health plan.

(b) the need that the population served or to be served by the proposal has for the services;

(c) the availability of less costly quality-equivalent or more effective alternative methods of providing the services;

(d) the immediate and long-term financial feasibility of the proposal as well as the probable impact of the proposal on the costs of and charges for providing health services by the person proposing the health service;

(e) the relationship and financial impact of the services proposed to be provided to the existing health care system of the area in which such services are proposed to be provided;

(f) the consistency of the proposal with joint planning efforts by health care providers in the area;

(g) the availability of resources, including health manpower, management personnel, and funds for capital and operating needs, for the provision of services proposed to be provided and the availability of alternative uses of the resources for the provision of other health services;

(h) the relationship, including the organizational relationship, of the health services proposed to be provided to ancillary or support services;

(i) in the case of a construction project, the costs and methods of the proposed construction, including the costs and methods of energy provision, and the probable impact of the construction project reviewed on the costs of providing health services by the person proposing the construction project;

(j) the distance, convenience, cost of transportation, and accessibility of health services for persons who live outside urban areas in relation to the proposal; and

(k) in the case of a project to add long-term care facility beds;

(i) the need for the beds that takes into account the current and projected occupancy of long-term care beds in the community;

(ii) the current and projected population over 65 years of age in the community; and

(iii) other appropriate factors.

(2) In addition to the statutory criteria cited in (1) above, the department will consider the following in making its decision:

(1)(a) and (1)(b) remain as proposed but are renumbered (2)(a) and (2)(b).

16.32.112 APPEAL PROCEDURES (1) remains as proposed.

(2) Immediately after receipt of a request for a hearing, a copy of the request will be sent to all affected persons, as defined in 50-5-101, MCA, who participated in any informational hearing that was held concerning the affected proposal.

(2) remains the same but is renumbered (3).

~~(3)~~(4) If a hearing to reconsider a decision is requested, any affected person, other than the requestor of the hearing, who wishes to participate in the hearing must, at least 2 weeks ~~prior to the hearing date~~ after the date the request for hearing is received, submit a written notice of intent to participate to the department along with a check for $500, unless the affected person is an applicant whose proposal was approved and is the subject of the hearing, in which case only the notice of intent must be received by the department.

~~(4)~~(5) The fees required by (1) and ~~(3)~~(4) above must be paid by check made out to the department of public health and human services.

(5) through (10) remain as proposed but are renumbered (6) through (11).

(12) The hearing, any discovery, and other related matters are subject to the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6, MCA, and ARM 1.3.215 through 1.3.225 and ARM 1.3.230 through 1.3.233.

(13) The department hereby adopts and incorporates by reference ARM 1.3.215 through 1.3.225 and ARM 1.3.230 through 1.3.233, which contain attorney general's model rules for

contested cases, implementing the Montana Administrative Procedure Act. Copies of the rules may be obtained from the department's Office of Legal Affairs, P.O. Box 202951, Helena, Montana 59620-2951, phone 406-444-9503.

16.32.119 INCREASE IN CERTIFIED COST (1) The recipient of a certificate of need shall report to the department any increase in the cost of an approved project in excess of $150,000 or 15 percent of the approved budget for the project, whichever is ~~less~~ greater. ~~The department may require an additional certificate of need on the increased cost~~ Any cost increase that exceeds the foregoing threshold must be approved by the department.

AUTH: Sec. ~~50-5-103,~~ 50-5-302, MCA
IMP: Sec. 50-5-106, 50-5-301, MCA

16.32.128 SWING BEDS -- REVIEW CRITERIA (1) through (1)(a) remain as proposed.

(b) no more than 50% of the excess bed capacity of the hospital or medical assistance facility will be ~~certified~~ approved as swing beds. Excess bed capacity is the difference between the number of licensed ~~hospital~~ beds in the facility and the average acute care occupancy level of the facility over the three years prior to the date of the application for certificate of need.

~~(2) A long term care patient occupying a swing bed must be transferred to a long term care facility in the service area which provides the appropriate level of care as soon as such long term care bed becomes available and the facility in question notifies the hospital or medical assistance facility of that fact.~~

(3) remains as proposed but is renumbered (2).

16.32.139 ANNUAL FINANCIAL REPORTS BY HOSPITALS

(1) through (1)(h)(ii) remain as proposed.

(iii) whether a certificate of need ~~or Section 1122 approval~~ was received for any projects during the reporting period, and if so, the total capital authorization included in such approvals.

16.32.140 ANNUAL REPORTS BY LONG-TERM CARE AND PERSONAL CARE FACILITIES (1) through (1)(a) remain as proposed.

(b) a discussion of the organizational aspects of the ~~project~~ facility, including the following information:

(1)(b)(i) through (1)(d) remain as proposed.

(e) staff information, including the number and classification of full and part-time medical personnel, as required on the survey form;

(1)(f) through (1)(g) remain as proposed.

4. The Department has thoroughly considered all commentary received:

ARM 16.32.101 DEFINITIONS

COMMENT #1: The Montana Hospital Association (MHA) requested that the department take care to ensure that members of the Statewide Health Care Coordinating Council (SHCC), referred to in the definition of "current state health plan", is composed of persons with knowledge of health care issues, including hospital issues and particularly the likely effect of managed care on health planning efforts.

RESPONSE: While the law [50-5-101(44), MCA] states that the state health plan is approved by the SHCC and the governor. The SHCC itself was originally created under federal law that no longer exists, and Montana law does not specify its composition, nor does the department have the authority by rule to define that composition. However, we agree that such a council should be knowledgeable about health care issues and the concerns of the MHA will be passed on to the governor, who has historically appointed the members of the SHCC.

COMMENT #2: The Montana Health Care Association (MHCA) requested that the existing definition of "health service" as "a major subdivision, as determined by the department, within diagnostic, therapeutic, or rehabilitative areas of care..." be deleted or changed on the grounds that the department does not have the authority to define such subdivisions and that they were already defined in 50-5-101, MCA.

RESPONSE: The department has been unable to find, in 50-5-101, any definitions of areas of care that could reasonably be regarded as "major subdivisions" of care, other than those, such as "skilled nursing care", which are peculiar to certain types of health care facilities; nor does the MHCA specify which definitions it had in mind. Section 50-5-301(1)(c), MCA, subjects to CON review "the addition of a health service that is offered by or on behalf of a health care facility that was not offered by or on behalf of the facility within the 12-month period before the month in which the service would be offered and that will result in additional annual operating and amortization expenses of $150,000 or more". The "health services" in question are obviously discrete areas of service within those offered by a given type of facility and are undefined in the statute. The definition of "health service" was promulgated by rule some years ago to give the public notice of what the department reasonably believed the phrase to mean and will be retained.

COMMENT #3: The department should consolidate both rules relating to definitions into one.

RESPONSE: New Rule I was dropped and incorporated into ARM 16.32.101.

ARM 16.32.102 LONG TERM CARE--WHERE ALLOWED

COMMENT #4: The MHA referred to new rule language concerning swing beds and requested the rule specify that up to five such beds may be offered by a hospital without CON review and that the language "a hospital or medical assistance facility" should also be added, because a medical assistance facility (MAF) is also a licensed hospital.

RESPONSE: The department agreed that the rule's application to hospitals was unclear and added a paragraph specific to hospitals that refers to the statutory exception from CON review (applicable only to hospitals) for up to five swing beds. It also added a phrase to paragraph (1) clarifying the fact that the term "health care facility", under certificate of need law, does not include a hospital.

The department disagrees, however, with the assertion that a medical assistance facility is a licensed hospital. A MAF is not a hospital under either the statutes relating to licensure of health care facilities or those governing certificate of need review, but is a separately defined entity. Therefore, the standards applicable to a health care facility, a term which is defined in 50-5-301(3)(a), MCA, as including a MAF, are contained in paragraph (1), while those that apply solely to hospitals are in paragraph (2) of the rule.

ARM 16.32.103 SUBMISSION OF LETTER OF INTENT

COMMENT #5: Park Place Health Care Center requested clarification whether the reference in (1)(c)(v) to the "addition of health services" includes the addition of physical, occupational, or speech therapy on staff or by contract that adds operating expenses of $150,000 or more.

RESPONSE: "Health service" is defined in ARM 16.32.101 as "a major subdivision, as determined by the department, within diagnostic, therapeutic, or rehabilitative areas of care.." Since physical, occupational, and speech therapy programs are reasonably each a major subdivision within the rehabilitative area of care, each of them would be a "health service". It should also be noted that 50-5-301, MCA, requires CON review of such a new health service only if it was not in existence during the prior 12 months and it will cost at least an additional $150,000 in operating and amortization expenses.

COMMENT #6: St. Vincent Hospital and Health Center requested that the department ensure that applicants asking for comparative review with other applications should merit it, not simply by filing a letter of intent requesting such review, but

only if they submit a completed application within the time frames prescribed by the department and the applications to be comparatively reviewed are truly comparable. In lieu of requiring a complete application, St. Vincent suggested, as an alternative, that subsection (1)(c)(vii) of ARM 16.32.103 be amended to indicate that a person who wants comparative review with another applicant must, in addition to naming the other applicant, submit credible evidence demonstrating that a "competing project is under consideration, development or simultaneously filed, is similar or alike and as a result, comparative review is warranted".

RESPONSE: The department agrees that the mere filing of a letter of intent requesting comparative review does not mandate that the requested comparative review occur, although if a person wants comparative review of their proposal with another for which a letter of intent has already been filed, a summary of which has been published in the newspaper, that person must, by law, file a letter of intent requesting comparative review within the deadline specified in 50-5-302(5), MCA. ARM 16.32.103(1)(c)(vii) reads as it does simply to reflect the requirements of 50-5-302(5), MCA. Section 50-5-302, MCA, in subsections (4) and (12), clearly gives the department the discretion to determine whether proposals should be comparatively reviewed, so long as they pertain to "similar types of facilities or equipment affecting the same health service area". In addition, that statutory standard and the requirement that, to be comparatively reviewed, applications must be reviewable concurrently, given all relevant time constraints, are set out in ARM 16.32.106(10). Since the statutes and rules together already set out the standards for determining when comparative review may occur and ensure that a mere letter of intent requesting comparative review will not, by itself, necessitate comparative review, no change was made in ARM 16.32.103 relating to comparative review, other than to relocate the language in (1)(c)(vii) to a more grammatically appropriate spot in the rule.

COMMENT #7: St. Vincent also requested that the statutory language from 50-5-302(5), MCA, requiring the department to publish in the newspaper(s) a notice of the letters of intent received during the prior month, be repeated in the rule.

RESPONSE: The Montana Administrative Procedure Act, in 2-4-305(2), MCA, states that "[r]ules may not unnecessarily repeat statutory language". In addition, House Joint Resolution 5, passed by the 1995 Legislature, requested agencies delete unnecessary provisions, with a goal of reducing pages by 5-10% Therefore, since the requested language is a repetition of statutory language, reiterates an obligation that impinges upon the department rather than the public, and is not apparently

necessary to carry out any public purpose, the department felt, in this case, that the requested language should not be added.

COMMENT #8 AND RESPONSE: In (1)(c)(i), the department deleted the phrase requiring an indication whether a substantial change in existing services was proposed, since such a change is not necessarily subject to review; the reference in (c)(i) to a new service was left intact since it is reviewable. In addition, (1)(c)(v) was deleted as a duplication of (c)(i), and (c)(i) was amended to require the cost estimates needed to determine if the proposed added service is reviewable. Finally, a reference to hospital beds used as swing beds (those in which nursing or developmental disability care may be provided) was added [see subsection (1)(c)(vi)] to the listing in subsection (1)(c), since the swing bed category is one of those for which CON approval is most commonly requested; the number of beds involved is also to be indicated to enable the department to double-check whether the beds are reviewable, since a hospital may create up to five swing beds without undergoing CON review.

ARM 16.32.106 SUBMISSION OF APPLICATIONS

COMMENT #9: Both the Montana Health Care Association and St. Vincent objected to the deletion of the language noting the department has 20 working days to determine if an application is complete, and requested that the statutory language of 50-5-302(7) containing that requirement be inserted.

RESPONSE: As noted in the response to Comment #7, the Administrative Procedure Act prohibits unnecessarily repeating statutory language in rules. However, in this case, the public may be aided in its understanding of the review process if some reference is made to the time within which the department will be deciding whether the application is complete, so a reference to that time limit was added.

COMMENT #10: The Montana Hospital Association asserted that comparative review of competing applications should be limited to contemporaneous applications, and that the law did not intend to prompt competing organizations to apply for a CON in response to a competitor's application. In that context, the MHA requested clarification whether the provision in subsection (3) was intended to apply to the original requestor submitting a letter of intent for a proposal or to the person requesting comparative review with the original proposal, as well as whether the provision was intended to affect the deadlines for completing applications, i.e. providing more time for applications to be submitted.

RESPONSE: The department agrees the comparative review should occur only when review of all the applications involved can be reviewed within the same timelines, but disagrees that the law

does not intend to prompt competing organizations to respond to a competitor's proposal. Legislative intent on the subject is evidenced by amendments to the law made by the 1995 Legislature that require the department to publish, each month, notice of any letter of intent submitted during the prior month in a newspaper for the area to be served by the proposal, and require anyone who wants comparative review with an LOI described in the newspaper to submit an LOI for their own proposal, noting comparative review is requested, within 30 days after that publication.

As for the subsection (3) provision, its intent was not to affect the deadlines for completing applications, but to avoid the department having to start reviewing an application immediately after a letter of intent for that proposal is submitted and before the department knows whether anyone intends to file a competing application. However, the comment highlighted the fact that the subsection (3) provision could apply equally to an LOI requesting comparative review with an earlier proposal, which would inhibit the contemporaneous receipt and review of competing applications, contrary to the department's intent. Therefore, subsection (3) was amended to clarify that the mandatory delay in accepting an application applies only to the original proposal.

COMMENT #11: The Montana Health Care Association felt that subsection (8), which states that any application which is still incomplete on the deadline date for submitting additional information will be considered withdrawn, is an inaccurate statement of the law as applied to a single application that is not going to be comparatively reviewed with another. In other words, the Association believes the 1995 Legislature, which specifically stated that applications scheduled to undergo comparative review are considered withdrawn if they do not submit necessary and requested information to the department by the specified deadline, but did not indicate what happened under the same circumstances if no comparative review was involved, intended to preclude single, but incomplete, applications from being considered withdrawn.

RESPONSE: While there is certainly room for argument over the intent of the legislature, the department feels the more appropriate interpretation is that, since the legislature did not speak to the issue of how to treat a single but incomplete application, it thereby left it up to the department to determine that issue by rule. It does not make sense for the department to have to proceed with review of any application for which inadequate information was submitted. The department does not assume the legislature intended it to do so, absent any clear statement on the subject in the law. Therefore, it will retain the provision regarding as withdrawn any application for which inadequate information is submitted by the specified

deadline, whether or not the application is to be comparatively reviewed against another application.

COMMENT #12: Both the MHCA and St. Vincent found subsection (9) too vague, and St. Vincent requested that the word "altered" be replaced with "materially changed".

RESPONSE: The department agreed that the language more specifically indicates the intent of that portion of the rule and made the change.

COMMENT #13: Also in regard to subsection (9), the MHCA felt that an applicant that changed its proposal to the extent that a new application might be required should have the option of returning to and continuing with the original proposal. The MHCA also contends that, if a proposal is changed substantially from the original application, the department should deny the applicant a CON on that basis rather than require submittal of a revised, new application, especially since the department has not clearly defined when it would require a new application.

RESPONSE: The applicant always has the choice of returning to the original proposal; the rule was amended to reflect that fact. As for the contention that the department should deny a proposal for being substantially changed in mid-review, rather than require resubmission of a revised application, it is not apparent that the department has the authority to deny the application on those grounds, it is a waste of the department's limited resources to continue to review a proposal that the applicant no longer apparently wants, and the revised proposal is one which other affected parties had no notice at the letter of intent stage. Therefore, the department believes the proper manner of handling a substantially changed application is to require an applicant to start over the review process with a new letter of intent.

COMMENT #14: The MHCA also asked what change in financial feasibility would constitute a change significant enough for the department to require the applicant to start over, and was concerned that the proposed rule did not give applicants adequate notice of the circumstances under which that would occur.

RESPONSE: The department agreed that the language relating to financial feasibility was vague and specified what degree of change would be considered significant, an amount that was set to correspond to ARM 16.32.119's threshold amount (see Comment #28).

COMMENT #15: St. Vincent suggested that, in subsection (10), the words "if requested" be inserted after "concurrently", on grounds that the change was consistent with its previous

comments on comparative review and still allowed the department discretion.

RESPONSE: The requested change would prevent the department from comparatively reviewing applications otherwise appropriate for such review if the applicants did not request comparative review. Such a limitation of the department's discretion is not contemplated by the statutes concerning comparative review and was, therefore, not incorporated into the rule.

ARM 16.32.107 NOTICE OF ACCEPTANCE OR EFFECTIVE WITHDRAWAL OF APPLICATION

COMMENT #16: The MHCA felt that this rule largely duplicated the provisions of 16.32.106(8) and was therefore superfluous; it also reiterated that only an application being comparatively reviewed could be considered withdrawn for failure of the applicant to submit additional requested information.

RESPONSE: Since 16.32.106(8) refers to the fact that an application for which inadequate information is submitted will be considered withdrawn and 16.32.107 adds the procedure whereby an applicant is notified of that fact, the department considers the two rules to complement, rather than duplicate, each other, so no change was made. As for the issue whether a single application can be considered withdrawn, the response to Comment #11 states the department's position.

COMMENT #17: St. Vincent requested that the statutory maximum review period of 90 days be incorporated into the rule.

RESPONSE: Refer to the response to Comment #7. The language in question is in the law. Since the department could not identify any compelling reason why that language should be reiterated in the rule, the requested language was not added.

COMMENT #18: St. Vincent requested that the reference in subsection (2) to an applicant being given "an opportunity" to submit additional information be amended to read "opportunities" in order to allow an applicant to submit additional information after the original supplementary submission is found still inadequate.

RESPONSE: While the department agrees that allowing an applicant to submit additional information more than once would be a good idea, allowing, as St. Vincent expressed it, "more give and take between the applicant and the Department", the amendments to the law made by the 1995 Legislature left the department with a single 15-day period after receipt of additional information within which to determine if the application is complete, and eliminated, in 50-5-302(7), MCA, the provision allowing more supplementary submissions and more

15-day periods for the department to determine completeness. Therefore, the department is limited to 15 days after additional information is submitted to determine if the application is complete, a time frame that does not reasonably allow for further requests from the department for information and responses from the applicant. Therefore, the requested change was not made.

ARM 16.32.109 INFORMATIONAL HEARING PROCEDURES

COMMENT #19: St. Vincent requested restoration of the original language in subsection (2) requiring a request for an informational hearing to be made within 30 days after notice that an application is complete is published in the newspaper, rather than 30 days after the notice of a letter of intent for the proposal is published in the newspaper, because the legislature most likely intended the informational hearing to be held after the application was complete.

RESPONSE: The period in the rule during which an informational hearing could be requested was originally triggered by publication of the notice that an application was complete. Since that notice requirement was eliminated by the 1995 Legislature, the rule was proposed to be amended so that the request period was triggered instead by publication of the notice of letters of intent. However, the department agrees that it is more appropriate to have an informational hearing requested and held after the full application is received, so the rule was amended accordingly. However, since the department's 90-day review period commences on the date it receives the original application rather than the date the application is declared complete and a portion of the review period may have run by the time the application is complete, leaving little time to have a hearing requested and held, the time period for requesting an informational hearing was set to date from initial receipt of the application, rather than from the date it is declared complete. In addition, since affected parties would not otherwise be aware an application was received and might not know the deadline for requesting a hearing was approaching, the department amended the rule to obligate itself to publish a newspaper notice of each application received. Finally, subsection (1) was corrected on the department's initiative to conform to the statutory provision in 50-5-302(11), MCA, allowing an informational hearing to be held, rather than the request for a hearing to be made, during the review period.

ARM 16.32.110: CRITERIA AND FINDINGS

COMMENT #20: St. Vincent requested that all of the statutory review criteria be listed in the rule as well, to aid the applicant. The Montana Health Care Association (MHCA) thought

that the criteria in subsection (2) that were proposed to be deleted were at least as valuable as those that were left, and requested that they be reinstated.

RESPONSE: While noting the reasons cited earlier for excluding statutory language from rules, the department in this case agreed to add the statutory criteria expressly to the rule because a clear understanding of the criteria is essential to an applicant, who must provide the department with information relevant to each, and such understanding is much more easily attained if the criteria and necessary findings are listed in one place, i.e. the rule, rather than split between the statute and rule. As for the deleted criteria in subsection (2), they were not reinstated because the same findings, although not precisely the same language, are found in the statutory listing.

ARM 16.32.111: DEPARTMENT DECISION

COMMENT #21: St. Vincent felt the department was incorrect, given the amendments to 50-5-306, MCA, passed by the 1995 Legislature, in referring to the hearing by which a department CON decision may be contested as a "reconsideration hearing", and that the proceeding in question was subject to the Montana Administrative Procedure Act, was not a "reconsideration" hearing, and was not a "de novo proceeding as was the case in the past".

RESPONSE: The 1995 Legislature did indeed amend 50-5-306, MCA, extensively and, in the process, eliminated the phrase "reconsideration hearing", referring instead to "contested case hearing". However, the change in name has no legal effect. The hearing in question is a contested case proceeding subject to the Montana Administrative Procedure Act and was a contested case proceeding both before and after the 1995 amendments. The legal nature of the hearing remains unchanged and is unaffected by the name by which it is called. The hearing is in fact a hearing to reconsider the department's decision, and 50-5-302, MCA, giving the department CON rulemaking authority, continues to refer, in 50-5-302(1)(d), MCA, to "reconsideration hearings".

As for the issue of whether the hearing is a de novo hearing, e.g. a second hearing on the same issues, the hearing provided by 50-5-306, MCA, is the first hearing available under the law to contest the department's final decision whether to grant a CON, and is therefore not a de novo hearing, nor was it a de novo hearing prior to the 1995 amendments.

In any case, the name by which the hearing is called has no impact on its legal status. Since historically the term has been commonly used and understood, the CON law continues to refer to a "reconsideration" hearing, and the hearing is in fact held to reconsider the department's decision, the references to "reconsideration hearing" were retained.

ARM 16.32.112: APPEAL PROCEDURES

COMMENT #22: St. Vincent once again requested deletion of references to a "reconsideration hearing" and substitution of "boilerplate" notice of hearing language for that in subsection (2).

RESPONSE: The references to a reconsideration hearing were not deleted, for the reasons stated in the response to Comment #21. Subsection (2) was retained unchanged since the only alternative "boilerplate" language available for notices of hearing appears in the Attorney General's Model Rules and is not squarely applicable to CON cases.

COMMENT #23: St. Vincent and the Montana Hospital Association asserted that the requirement that a party requesting a hearing pay $500 should be eliminated as interfering with the right to participate in government. St. Vincent requested that subsection (2) language, as well as subsections (3) and (4) in their entirety, referencing the fee be deleted.

RESPONSE: The department cannot delete the fee since it is required by the CON law, in 50-5-310(3), MCA. However, the issues raised concerning the fee are being seriously considered by the department, as is the possibility of asking the legislature to amend the law to delete the fee.

COMMENT #24: The Montana Hospital Association asked that these rules either reference other rules setting out administrative and contested case hearing processes or set them out explicitly in the CON rules.

RESPONSE: The department agreed and added references to both the Montana Administrative Procedure Act and relevant Attorney General's model rules for contested cases.

COMMENT #25: The Montana Health Care Association (MHCA) objected to allowing an affected party to intervene and participate in a hearing already requested by another party, especially if they are allowed to do so up to two weeks before the hearing. The MHCA felt that was unfair to existing parties who have already been preparing their cases and contrary to the Montana Administrative Procedure Act and 50-5-306, MCA. The Association also felt that it should be assumed that the applicant will participate in any appeal of an application that was approved.

RESPONSE: The department does not agree that the law precludes an affected person from intervening in a hearing requested by someone else. Prior to the 1995 amendments, 50-5-306(5), MCA, allowed any affected person, whether or not they participated in the hearing, to appeal the department's decision to district

court. The 1995 amendments limited that right to affected parties who participated in the hearing, but did not restrict participation to the party who requested the hearing alone. In addition, there are occasions in which an affected party might have no reason to request a hearing on a particular decision but clearly would have an interest in participating in one if it were requested by someone else, e.g. when the applicant's proposal is denied a CON, the non-applicant affected party agrees with the denial, but the applicant appeals the decision.

In regard to the objection to allowing an affected person to intervene up to two weeks prior to the hearing, the department felt a potential intervenor might reasonably need two weeks to decide whether to intervene once it found out a hearing was set. Since the hearing must be held within 30 days after the request is made, unless the time frame is extended by the hearing officer, the effect of allowing an affected party two weeks to intervene is to give them up to two weeks before the hearing to do so. However, in practice the parties to most hearings agree to have the hearing set more than 30 days in the future to give themselves more time to prepare, in recognition of which the department amended the rule to require an intervenor to submit a request to participate within two week after the date the request for a hearing is received. Therefore, in most cases all parties to the hearing will be identified well in advance of the hearing date.

As for the MHCA's last point, it is assumed that the applicant will be a party to the hearing, an assumption that is acknowledged in subsection (3) of the proposed rule, which ensures that the applicant receives notice of a hearing request initiated by another person.

ARM 16.32.114: ABBREVIATED REVIEW

COMMENT #26: The Montana Health Care Association requested reinstatement of the rule concerning abbreviated review, now proposed to be repealed, since the law appears to have contemplated one and, even if the procedure was not often used, it should be available when a case warrants it.

RESPONSE: While the law does give the department the authority to establish rules governing abbreviated review, it does not mandate such rules. As indicated in the reasons for the repeal set out in the original notice of rulemaking, normal review allows for the same sort of condensed timeline in appropriate cases without the application of a special rule for the purpose, so the department decided it was unnecessary and is repealing it.

ARM 16.32.118: DURATION OF CERTIFICATE; TERMINATION; EXTENSION

COMMENT #27: The Montana Health Care Association questioned why a certificate of need was considered non-transferable to a person other than the original applicant.

RESPONSE: Certificates of need are granted based, in part, upon factors peculiar to the particular applicant, such as the adequacy of its staff, its financial soundness, etc. It is inherent in certificate of need review that a certificate of need is granted to a particular applicant and is not simply approval of a proposal without reference to who proposed it.

ARM 16.32.119: INCREASE IN CERTIFIED COST

COMMENT #28: The Montana Health Care Association felt that the rule, which indicated that the department might require a new certificate of need for a proposal whose cost greatly exceeded that originally proposed, was too vague and did not let the public know when a new CON would be required.

RESPONSE: Although this rule was not originally proposed to be amended, its subject matter is well within the scope of the notice of proposed rulemaking. The department reassessed the level of increased cost that should be considered a significant departure from the original proposal for which the certificate of need was received and increased the amount that would trigger the reporting requirement to $150,000 or 15% of the originally-approved budget, whichever figure is greater rather than less. The department also clarified that only an amount reaching that threshold may be subject to the department's approval. The Department also deleted from the history reference to a section of the law that is no longer authority for certificate of need rules.

ARM 16.32.128: SWING BEDS--REVIEW CRITERIA

COMMENT #29: The Montana Health Care Association contended there is no statutory authority to grant swing beds to any facility other than a hospital, and that new subsection (3) conflicts with 50-5-301(1)(b) and (h) of the law.

RESPONSE: Subsection (3) of the rule was added to clearly inform the public the circumstance under which swing beds in a medical assistance facility (MAF) would be subject to review, since the statutory provisions applicable to MAFs are different from those that apply to hospitals. Section 50-5-301(1)(h), MCA, applies strictly to swing beds proposed by hospitals. Section 50-5-301(1)(b), MCA, does not conflict with subsection (3) of the rule; rather, 50-5-301(1)(b), MCA, does not apply to swing beds at all because it applies to an increase in bed number or a relocation of beds, neither of which apply to swing beds, which are already in existence and are not being relocated or increased. The only provision of the CON law that appears to potentially apply to a MAF that proposes to utilize swing beds is 50-5-301(1)(c), MCA, which covers the addition of a new service to a health care facility that was not offered within

the prior 12 months and which will cost $150,000 or more in annual operating and amortization expenses, conditions triggering review that are reiterated in the rule's subsection (3).

The department did note that subsection (1)(b) of the rule erroneously referred to excess bed capacity as the difference between the number of licensed "hospital" beds and average occupancy level. Since the subsection applies to both hospital and MAFs, the word "hospital" was deleted.

COMMENT #30: The Montana Hospital Association (MHA) contended that MAFs are hospitals, and that, therefore, applying provisions to MAFs that are different from those for hospitals is incorrect under the law. Specifically, the MHA wanted the department to indicate that MAFs, as hospitals, can create up to five swing beds without undergoing CON review.

RESPONSE: The confusion about the distinction between a hospital and a medical assistance facility appears to be caused by the fact that federal certification standards for Medicare/Medicaid refer to MAFs as "limited service hospitals". However, under Montana licensure and CON law, hospitals and MAFs are defined separately and are distinct entities. In addition, in the CON law a MAF is explicitly included in the definition of "health care facility" and subject to all the CON provisions applicable to health care facilities, while a hospital is specifically exempted from that definition. Therefore, the exemption in 50-5-301(1)(h), MCA, for up to five hospital swing beds from CON review is not available to a MAF.

COMMENT #31: The MHA requested that language be added to subsection (1)(a) to allow approval of swing beds regardless of the occupancy level of area long term care facilities if the latter are restricting admission to their facilities to patients with certain medical needs.

RESPONSE: The department declined to add such a provision because it has no evidence such restrictive admission is occurring. Also, such an exception is unnecessary, given the fact that up to five swing beds can be established without CON review, through which adequate patient-days of service are available.

COMMENT #32: The MHA asserted that limiting approval of swing beds to 50% of a facility's "excess" capacity had no rational or statutory basis, noting that federal Medicaid/Medicare certification standards contained no such limit. The MHA also objected to using the number of licensed beds to determine excess capacity because the actual capacity may be different, as when construction prevents use of all of the beds or when double rooms are utilized as singles, and the department should

encourage the fullest use of existing facilities rather than artificially limiting them.

RESPONSE: While the law does not itself set a limit on the number of swing beds that may be approved, the department clearly, via 50-5-304, MCA, has the authority to establish review criteria by rule. As for the variance from federal certification requirements, the purpose of certification is totally different from that of certificate of need statutes and rules, the latter having as their main thrust approval of only those health care facilities, beds, etc., that the public needs.

As for the use of the number of licensed beds, rather than the number of beds actually being used (which could be less), to determine excess capacity, the licensed number is one that is more reliable in that a facility can always revert to the licensed number of beds on its own initiative. In addition, that number is readily ascertainable by the department, as opposed to potentially fluctuating bed capacity, and is a number that gives the benefit of the doubt to the facility, since it will always equal or exceed the actual capacity. Using the licensed number rather than actual capacity, if the actual capacity is less, will in fact give the facility more "excess capacity" and therefore more swing beds than if actual capacity were used, thereby using the facility more intensely than if actual capacity were used in the calculation of excess capacity. For the foregoing reasons, the 50% capacity restriction was retained.

COMMENT #33: The MHA requested deletion of subsection (2) of the rule because it duplicates and conflicts with Medicaid rules ARM 46.12.510, 511, and 512 regarding patient transfers and their rights regarding transfers.

RESPONSE: The department deleted subsection (2) as unenforceable and unnecessary, given the corresponding Medicaid rules.

The department also, on its own initiative, corrected the phrase "certified as swing beds" in subsection (1)(b) to read "approved as swing beds", since approval is the appropriate term.

16.32.136 CERTIFICATE OF NEED APPLICATION; INTRODUCTION AND COVER LETTER

COMMENT #34: The MHA requested that the department allow one paper copy of a CON application, plus an electronic file, to be submitted in lieu of the six copies proposed in the rule.

RESPONSE: This would increase the department's cost to make copies and it has already reduced the required copy number from nine to six. Computer systems are so varied as to make

consistency in electronic submissions next to impossible, so the department made no change.

ARM 16.32.138; ANNUAL OPERATIONAL REPORTS BY HOSPITALS

COMMENT #35: The MHCA suggested that, since staffing information is requested for long term care facilities and home health agencies, the same information from hospitals should be of value and required.

RESPONSE: Since subsection (15) of the rule does require staffing information for hospital beds, no change was necessary.

ARM 16.32.139; ANNUAL FINANCIAL REPORTS BY HOSPITALS

COMMENT #36: The MHCA pointed out that subsection (8)(c) referred to section 1122 review, which no longer exists.

RESPONSE: The department agrees and deleted the reference.

ARM 16.32.140; ANNUAL REPORTS BY LONG TERM CARE AND PERSONAL CARE FACILITIES

COMMENT #37: The Montana Health Care Association suggested that annual reports from the other types of residential care facilities besides personal care facilities would be of equal value and should be required. It also pointed out that, in subsection (2) [now (1)(b)], the word "facility" would be more appropriate than "project".

RESPONSE: Although the department concedes that, ideally, annual reports should be required of the other types of residential care facilities added by the 1995 Legislature, it has decided not to do it at this time, largely because of the difficulty of getting reports now from the facilities currently subject to the rule. The department is presently considering whether to request voluntary reporting from all of the residential facilities to evaluate the full continuum of care and the need to require certificate of need review of such facilities in the future.

As for amending the word "project" to read "facility", the department agreed and made the change.

COMMENT #38: The MHCA requested that the definition of "medical personnel" in subsection (1)(e) be clarified to indicate what classifications of personnel are intended to be included.

RESPONSE: The department amended the rule to indicate that the classifications of medical personnel to be reported will be listed on the survey form.

COMMENT #39: The MHCA suggested that the department might get more valuable information for evaluating CON applications if it asked for patient origin data on a city basis rather than by county.

RESPONSE: The department made no change at this time, primarily because it would mean more work for long term care facilities, but is considering the issue and would be interested in the opinion of the MHCA's membership on the issue.

Rule Reviewer

Director, Public Health and Human Services

Certified to the Secretary of State July 8, 1996.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of rules 46.12.1919 and 46.12.1920 pertaining to targeted case management for high risk pregnant women	)))))))	CORRECTED NOTICE OF THE AMENDMENT OF RULE

TO: All Interested Persons

1. On June 6, 1996, the Department of Public Health and Human Services published notice of the amendment of 46.12.1919 and 46.12.1920 pertaining to targeted case management of high risk pregnant women at page 1566 of the 1996 Montana Administrative Register, issue number 11.

2. An internal cross-reference to a particular section inadvertently referenced the prior alpha-numeric designation for the section rather than the designation accorded in the rule as amended. This correction is being made to correct that incorrect cross-reference. The rule is amended with the following changes:

46.12.1920 CASE MANAGEMENT SERVICES FOR HIGH RISK PREGNANT WOMEN, REIMBURSEMENT (1) Remains as amended.

(2) Case management services for high risk pregnant women provided prior to January 1, 1996 are reimbursed, in accordance with (2)(a) through ~~(4)~~ (2)(d), for the allowable costs of providing case management services to eligible medicaid recipients.

(2)(a) through (2)(d) remain as amended.

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

3. All portions of the January 25, 1996 notice of amendment not specifically changed by this notice of correction remain the same.

Russell E. Cater
Rule Reviewer

Director, Public Health and Human Services

Certified to the Secretary Of State July 8, 1996.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of rules 46.12.1930, 46.12.1948, and 46.12.1951 pertaining to targeted case management for the mentally ill	)))))	NOTICE OF THE AMENDMENT OF RULES

TO: All Interested Persons

1. On February 22, 1996, the Department of Public Health and Human Services published notice of the proposed amendment of rules 46.12.1930, 46.12.1948, and 46.12.1951 pertaining to targeted case management for the mentally ill at page 535 of the 1996 Montana Administrative Register, issue number 4.

2. The Department has amended rule 46.12.1948 as proposed.

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

46.12.1930 CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE AND DISABLING MENTAL ILLNESS, REIMBURSEMENT (1) through (3) remain as proposed.

(a) for individual case management services:

Each 15 minute unit: .....

Region I	Region II	Region III	Region IV	Region V
~~$11.67~~	~~$10.03~~	~~$10.02~~	$ ~~9.23~~	~~$10.40~~
~~13.83~~	~~11.48~~	8.81	~~10.59~~	~~10.77~~
14.21	11.65		10.97	10.90

(b) for group case management services:

Each 15 minute unit: .....

Region I	Region II	Region III	Region IV	Region V
$ ~~3.89~~	$ ~~3.34~~	$ ~~3.34~~	$ ~~3.08~~	$ ~~3.47~~
~~4.61~~	~~3.83~~	2.94	~~3.53~~	~~3.59~~
4.74	3.88		3.66	3.63

(4) remains as proposed.

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

46.12.1951 CASE MANAGEMENT SERVICES FOR YOUTH WITH SEVERE EMOTIONAL DISTURBANCE, REIMBURSEMENT (1) through (3) remain as proposed.

(a) for individual case management services: each 15 minute unit:

Region I	Region II	Region III	Region IV	Region V
~~$11.67~~	~~$10.03~~	~~$10.02~~	~~$ 9.23~~	~~$10.40~~
~~13.83~~	~~11.48~~	8.81	~~10.52~~	~~10.77~~
14.21	11.65		10.97	10.90

(b) for group case management services: each 15 minute unit:

Region I	Region II	Region III	Region IV	Region V
$ ~~3.89~~	$ ~~3.34~~	$ ~~3.34~~	$ ~~3.08~~	$ ~~3.47~~
~~4.61~~	~~3.83~~	2.94	~~3.53~~	~~3.59~~
4.74	3.88		3.66	3.63

(4) remains as proposed.

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

4. The Department has thoroughly considered all commentary received:

COMMENT #1: Two providers commented that mental health case management services for adults and children are different services with different costs and should have different Medicaid reimbursement rates.

RESPONSE: The Department has not set separate rates for adult and child case management in the past. Separate rates will be considered when rates are set for FY 1997.

COMMENT #2: The comment was made that the rates in this proposed rule were calculated in a manner different from the procedure used to calculate other community mental health Medicaid rates.

RESPONSE: The proposed rates were calculated in the same manner. FY 1994 cost reports prepared by the community mental health centers were used. This is the same procedure which is used to establish other community mental health Medicaid rates.

COMMENT #3: The comment was made that while it is legitimate to use 1994 costs to set the rates, the higher cost of child and adolescent case management coupled with the dramatic increase in this service when compared to adult case management, results in

a substantial underestimate of true blended cost of targeted case management in the proposed rule.

RESPONSE: The Department has decided against establishing separate child and adult case management rates at this time but it does acknowledge both that case management for youth costs more to provide than case management for adults and that the quantity of child-adolescent case management in comparison to adult case management has dramatically increased since 1994, which is the base year for the rates proposed. One method to take into account the changes in the adult vs. child service mix is to use 1994 costs, but adjust the blended case management rate based on the relative quantity of child vs. adult case management occurring more recently. The Department has revised the rates in this rule based upon the relative mix of child and adult case management occurring during FY 1995. Because the Region 3 rates would be less than the proposed rate if re-calculated, those rates remain as proposed.

Rule Reviewer

Director, Public Health and Human Services

Certified to the Secretary of State July 8, 1996.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of RULES I (42.25.1801); II (42.25.1802); III (42.25.1803); IV (42.25.1804); V (42.25.1805); VI (42.25.1806); VII (42.25.1807); VIII (42.25.1808); IX (42.25.1809); X (42.25.1810); XI (42.25.1811); XII (42.25.1812); and XIII (42.25.1813) and REPEAL OF ARM 42.25.1001, 42.25.1002, 42.25.1003, 42.25.1004, 42.25.1005, 42.25.1007, 42.25.1008, 42.25.1009, 42.25.1010, 42.25.1011, 42.25.1012, 42.25.1013, 42.25.1014, 42.25.1015, 42.25.1016, 42.25.1017, 42.25.1018, 42.25.1027, 42.25.1028, 42.25.1029, 42.25.1030, 42.25.1201, 42.25.1202, 42.25.1206, 42.25.1207, 42.25.1208, 42.25.1209, 42.25.1210, 42.25.1301, 42.25.1302, 42.25.1303, 42.25.1304, 42.25.1305, 42.25.1306, 42.25.1307, 42.25.1308, 42.25.1309, 42.25.1310, 42.25.1401, and 42.25.1402 relating to Oil and Gas Rules for the Natural Resources Tax Bureau	) NOTICE OF ADOPTION and REPEAL of OIL AND GAS RULES

TO: All Interested Persons:

1. On April 25, 1996, the Department published notice of the proposed adoption and repeal of oil and gas rules relating to natural resources taxes at page 1107 of the 1996 Montana Administrative Register, issue no. 8.

2. A Public Hearing was held on May 20, 1996, to consider the proposed adoption and repeal. No one appeared to testify and no written comments were received.

3. The Department has adopted and repealed the rules as proposed.

CLEO ANDERSON
Rule Reviewer

MICK ROBINSON
Director of Revenue

Certified to Secretary of State July 8, 1996

VOLUME NO. 46 OPINION NO. 19

CITIES AND TOWNS - Authority of county that has established free public library to contract with city library board of trustees to assume all county library functions;
COUNTIES - Authority of county that has established free public library to contract with city library board of trustees to assume all county library functions;
COUNTIES - Creation by county that offered library services prior to 1986 of new taxing unit to provide library services and avoid statutory tax limitations;
INTERGOVERNMENTAL COOPERATION - Authority of county that has established free public library to contract with city library board of trustees to assume all county library functions;
LIBRARIES - Authority of county that has established free public library to contract with city library board of trustees to assume all county library functions;
LIBRARIES - Creation by county that offered library services prior to 1986 of new taxing unit to provide library services and avoid statutory tax limitations;
LOCAL GOVERNMENT - Authority of county that has established free public library to contract with city library board of trustees to assume all county library functions;
LOCAL GOVERNMENT - Creation by county that offered library services prior to 1986 of new taxing unit to provide library services and avoid statutory tax limitations;
TAXATION AND REVENUE - Creation by county that offered library services prior to 1986 of new taxing unit to provide library services and avoid statutory tax limitations;
MONTANA CODE ANNOTATED - Sections 7-11-1101 to -1112, 7-33-2105(3), -2109(2), 15-1-101, 15-10-401 to -412, 22-1-301, -303, -304, -309, -312, -315, -316, -401 to -413, 22-15-316;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 74 (1990), 42 Op. Att'y Gen. No. 113 (1988), 42 Op. Att'y Gen. No. 98 (1988), 42 Op. Att'y Gen. No. 80 (1988), 41 Op. Att'y Gen. No. 91 (1986).

HELD: 1. A county in Montana that offered library services prior to 1986 cannot form a new taxing unit and avoid the tax limitations of I-105 by establishing a public library pursuant to Mont. Code Ann. § 22-1-303, or by forming a multijurisdictional service district to provide library services pursuant to Mont. Code Ann. § 7-11-1105.

2. A county that has established a county free library pursuant to Mont. Code Ann. § 22-1-303 is authorized to contract directly with the board of trustees of the free public library of any incorporated city to assume all county library functions and to pay the sum agreed upon out of the county free library fund.

June 25, 1996

Mr. Russell R. Andrews
Teton County Attorney
P.O. Box 899
Choteau, MT 59422

Dear Mr. Andrews:

You have requested my opinion on several questions which I have phrased as follows:

1. Do county public library services that have evolved over time (as opposed to being established pursuant to Mont. Code Ann. § 22-1-303), have the taxing powers enumerated in Mont. Code Ann. § 22-1-304, and are they subject to the tax limitations of Mont. Code Ann. §§ 15-10-401 to -412?

2. For the future, may a county that has offered library services prior to 1986, establish library services pursuant to statute so as to avoid the tax limitations of Mont. Code Ann. §§ 15-10-401 to -412?

3. May a county establish a county public library pursuant to Mont. Code Ann. § 22-1-303, then contract with city public libraries to provide all governance and services, and fund the contract with the public library fund authorized by Mont. Code Ann. § 22-1-304?

You state that Teton County has recently discovered that it did not follow statutory procedures for the creation of a free county library, even though it has levied taxes and contracted for library services for county residents with the libraries in Great Falls, Choteau, Fairfield, and Dutton. Your first question seeks a ruling as to the legal status of the entity providing the library services.

A city or county "public library," as that term is defined in Mont. Code Ann. § 22-1-301, is a species of public corporation whose authority and relationships to general city or county governments are defined by state law. See Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945); Local 2390 v. City of Billings, 171 Mont. 20, 555 P.2d 507 (1976); 42 Op. Att'y Gen. No. 98 (1988); 41 Op. Att'y Gen. No. 91 (1986); McQuillin Municipal Corporations § 2.03a (3d ed. 1990).

The case of Henderson v. School District No. 44, 75 Mont. 154, 160-62, 242 P. 979, 980 (1926), made several important distinctions regarding the organization of public corporations,

and the case is still recognized as good law. Mancoronal v. Northern Mont. Jt. Refuse Disposal Dist., No. 95-DV-001 (Mont. 9th Jud. Dist. Ct. Feb. 9, 1996) (order granting defendant's motion for summary judgment). Henderson held that public corporations are either de jure (organized in compliance with existing law), de facto (organized in certain unsuccessful attempts to comply with existing law), or void (organized without attempting to comply with an existing law). The legality of the organization of a de jure corporation "is impregnable to assault in the courts from any source." The legality of the organization of a de facto corporation "can be questioned only by the state in a direct proceeding." See Mont. Code Ann. § 27-28-101(3). In the case of a void corporation, "the attempted exercise of corporate powers may be attacked, by a private individual who will be affected thereby, in an appropriate proceeding." Henderson, 75 Mont. at 161-62; see also McQuillin Municipal Corporations §§ 12.102 to .107 (3d ed. 1990).

It appears that Teton County public library services are either a de facto corporation or a void corporation, since the county, according to the facts as you state them, failed to comply with the procedural steps required to create the corporate entity. The legal consequences of a determination that an entity is one or the other are significant and far-ranging. I am unable to answer your first question without a factual determination that past public library services in Teton County amount to either a de facto corporation or a void corporation. It is not within the legitimate scope of an Attorney General's Opinion to determine a factual question, so I cannot answer your questions about the past actions of the county regarding library services, nor can I give my opinion whether the city libraries of Choteau, Dutton, and Fairfield were lawfully established.

Regarding the options open to Teton County for providing library services in the future, there are several ways in which the county can proceed. The county may establish a public library pursuant to Mont. Code Ann. § 22-1-303; then, pursuant to Mont. Code Ann. § 22-1-312, -315, or -316, the county library may merge or combine with another library. Also, the county may join a library federation under Mont. Code Ann. §§ 22-1-401 to -413. Finally, the county may enter into interlocal agreements with one or more municipalities to form a multijurisdictional library service district under Mont. Code Ann. §§ 7-11-1101 to -1112. The Teton County Commissioners would prefer to establish either a free county library or a multijurisdictional service district.

A primary focus of your second question regarding the county's provision of library services in the future is the selection of a method of providing those services that avoids the tax limitations of Mont. Code Ann. §§ 15-10-401 to -412 (popularly known as I-105). In understanding these tax limitations, we must start with the operative words of the statute: "[T]he

actual tax liability for an individual property is capped at the dollar amount due in each taxing unit for the 1986 tax year." Mont. Code Ann. § 15-10-412(2). As you can see, to answer your question I must determine what is the "taxing unit" with regard to the county's provision of library services. The term is described precisely in statute:

> The phrase . . . "taxing unit" includes a county, city, incorporated town, township, school district, irrigation district, or drainage district or a person, persons, or organized body authorized by law to establish tax levies for the purpose of raising public revenue.

Mont. Code Ann. § 15-1-101(2). Teton County is clearly a "taxing unit." 43 Op. Att'y Gen. No. 74, at 286-87 (1990); 42 Op. Att'y Gen. No. 80 at 314-15 (1988). To answer your question, I must also determine if a smaller governmental unit, the public corporation that directly offers the library services, is a taxing unit.

The respective budgetary powers of public library boards of trustees and local government governing bodies are set forth in statute:

> The governing body of any city or county which has established a public library may levy in the same manner and at the same time as other taxes are levied a special tax in the amount necessary to maintain adequate public library service . . . .

Mont. Code Ann. § 22-1-304.

> The library board of trustees shall have exclusive control of the expenditure of the public library fund, of construction or lease of library buildings, and of the operation and care of the library. The library board of trustees of every public library shall:
>
> . . . .
>
> (6) prepare an annual budget, indicating what support and maintenance of the public library will be required from public funds, for submission to the appropriate agency of the governing body.

Mont. Code Ann. § 22-1-309.

A comparison with rural fire districts, discussed as taxing units in 42 Op. Att'y Gen. No. 80 (1988), is instructive. That opinion concluded that

> a fire district operated by the county and not by a board of trustees is not a "taxing unit." A rural

> fire district operated by a board of trustees, however, is a "taxing unit" within the meaning of section 15-10-412, MCA.

42 Op. Att'y Gen. No. 80 at 315 (1988). Attorney General Greely determined the difference to be that when the board of county commissioners operated the district, the commissioners established the tax levy. When the commissioners appointed a board of trustees to operate the fire district, the statutes gave the trustees the authority to establish tax levies. Mont. Code Ann. §§ 7-33-2105(3) and -2109(2).

Although public library boards of trustees do have certain powers that are granted by statute, 42 Op. Att'y Gen. No. 98 (1988), 41 Op. Att'y Gen. No. 91 (1986), they are not authorized by law to establish tax levies. Accordingly, I find that county library boards must be distinguished from rural fire districts, and that library boards are not "taxing units" under the reasoning of 42 Op. Att'y Gen. No. 80 (1988).

It has been argued that the holding in a previous Attorney General's Opinion implies the contrary position. The previous opinion held as follows:

> A board of county commissioners does not have the authority to refuse, within statutory millage limits, to levy some or all of the property taxes necessary to satisfy an annual budget adopted by county library trustees.

41 Op. Att'y Gen. No. 91 at 396 (1986). In the situation you present, it might be argued that this holding authorizes library trustees in Teton County in effect to set the mill levy within the statutory millage limits. For several reasons, I do not believe that the holding in 41 Op. Att'y Gen. No. 91 currently has that effect.

Initially, a distinction must be made between a board of county commissioners' authority relative to a board of county library trustees and its authority relative to a board of city library trustees. It should be noted that the holding in 41 Op. Att'y Gen. No. 91 dealt with two county-level entities. A county library board of trustees is formed pursuant to Mont. Code Ann. § 22-1-308, and has the powers and duties enumerated in Mont. Code Ann. § 22-1-309. A city library board of trustees may be formed and operate pursuant to these same statutes; in addition, a city library board may assume the functions of a county library pursuant to Mont. Code Ann. § 22-1-315, and the trustees may contract directly with the board of county commissioners. If the city library trustees do so contract, the county is obligated to pay only "such sum as may be agreed upon," Mont. Code Ann. § 22-1-315(2), and thus the city library board would be further constrained in their adoption of a budget. In sum,

the holding in 41 Op. Att'y Gen. No. 91 does not apply directly to all library funding situations.

In any event, it should be remembered also that 41 Op. Att'y Gen. No. 91 discussed the relative authority of county library trustees and county commissioners under the legal regime that existed prior to the passage of I-105. We now must harmonize Mont. Code Ann. §§ 22-1-304, 22-1-309 and 15-10-412. Schuman v. Bestrom, 214 Mont. 410, 415, 693 P.2d 536, 538 (1985). A key phrase in the holding in 41 Op. Att'y Gen. No. 91 was "within statutory millage limits." Thus, the opinion recognizes that whatever power exists in the library board of trustees relative to taxation, that power is subject to statutory limits on the power of the county to tax. The I-105 limits were not in existence when the prior opinion was written, but it is clear that the reference to "statutory millage limits" in the prior opinion expresses a concept broad enough to encompass the I-105 limits.

Thus, it is my conclusion that the holding in 41 Op. Att'y Gen. No. 91 does not support the proposition that library trustees in Teton County could in effect set mill levies at will as long as the levies were within the millage limits established in Mont. Code Ann. § 22-1-304.

I also conclude that multijurisdictional service districts for libraries are not taxing units under I-105. Multijurisdictional service districts are established by interlocal agreement between municipalities and/or counties. Mont. Code Ann. §§ 7-11-1101 and -1105. They have no independent governing body or any budgetary powers independent of the governing bodies of the local governments organizing the districts. Mont. Code Ann. § 7-11-1112. See also Mont. Code Ann. § 7-11-1111(4). Multijurisdictional service districts do not fit the statutory definition of taxing units.

In answer to your second question, then, I conclude that Teton County cannot form a new taxing unit and avoid the tax limitations of I-105 by establishing a public library pursuant to Mont. Code Ann. § 22-1-303, or by forming a multijurisdictional service district to provide library services pursuant to Mont. Code Ann. § 7-11-1105.

Your final question has to do with the power of the county to contract with municipal libraries in order to discharge the duty which the county has assumed to provide library services to county residents. Specifically, you ask whether the board of county commissioners may contract directly with the boards of trustees of the municipal libraries of the county, whether the municipal libraries may assume all county library functions, and whether the funds for these contracts may come directly from the county library fund. The operative statute states:

(1) Instead of establishing a separate county free library, the board of county commissioners may enter into a contract with the board of library trustees or other authority in charge of the free public library of any incorporated city, and the board of library trustees or other authority in charge of such free public library is hereby authorized to make such a contract.

(2) Such contract may provide that the free public library of such incorporated city shall assume the functions of a county free library within the county with which such contract is made, and the board of county commissioners may agree to pay out of the county free library fund into the library fund of such incorporated city such sum as may be agreed upon.

(3) Either party to such contract may terminate the same by giving 6 months' notice of intention to do so.

Mont. Code Ann. § 22-1-315.

The plain words of Mont. Code Ann. § 22-1-315(1) answer your first query in the affirmative. When that is the case, we should go no farther in construing a statute. Gulbrandson v. Carey, 272 Mont. 494, 500, 901 P.2d 573, 577 (1995). In answering your second query, we must examine the phrase "the free public library of such incorporated city shall assume the functions of a county free library." Mont. Code Ann. § 22-1-315(2). Does this mean "all functions" or merely "some functions"? The phrase should be construed in the context of the rest of the act, City of Billings v. Smith, 158 Mont. 197, 212, 490 P.2d 221, 230 (1971). I believe that a reasonable construction of this phrase would authorize the city library to assume "all functions" of the county library, because the board of county commissioners may contract directly with the board of trustees of a city library, thus leaving no county board of library trustees to administer any remaining functions of the county library. Mont. Code Ann. § 22-1-315(1). Your third query is also answered in the affirmative by the plain words of Mont. Code Ann. § 22-1-315(2), which authorizes payment for services "out of the county free library fund."

THEREFORE, IT IS MY OPINION:

1. A county in Montana that offered library services prior to 1986 cannot form a new taxing unit and avoid the tax limitations of I-105 by establishing a public library pursuant to Mont. Code Ann. § 22-1-303, or by forming a multijurisdictional service district to provide library services pursuant to Mont. Code Ann. § 7-11-1105.

2. A county that has established a county free library pursuant to Mont. Code Ann. § 22-1-303 is authorized to contract directly with the board of trustees of the free public library of any incorporated city to assume all county library functions and to pay the sum agreed upon out of the county free library fund.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/rfs/bjh

VOLUME NO. 46 OPINION NO. 20

COUNTY ATTORNEY - Absence of power to create positions of county employment without approval of county commissioners;
COUNTY ATTORNEY - Requirement that county provide administrative support;
COUNTY COMMISSIONERS - Obligation to provide administrative support for county attorney;
COUNTY COMMISSIONERS - Power to create new positions of employment;
COUNTY COMMISSIONERS - Requirement that commissioners approve reasonable claims for support services necessary to allow county attorney to perform official duties;
OPINIONS OF THE ATTORNEY GENERAL - 46 Op. Att'y Gen. No. 10 (1995), 43 Op. Att'y Gen. No. 77 (1990), 42 Op. Att'y Gen. No. 23 (1987), 10 Op. Att'y Gen. 167.

HELD: 1. The county is obligated to provide administrative support services which are reasonably necessary to allow the county attorney to perform the duties of the elective office.

2. The county attorney cannot compel the commissioners to authorize the hiring as a county employee of a legal secretary for the county attorney absent a showing that any other employment arrangement would prevent the county attorney from performing the minimum statutory duties of the job.

June 28, 1996

Mr. John Huntley
Fallon County Attorney
P.O. Box 760
Baker, MT 59313

Dear Mr. Huntley:

You have requested my opinion on two related questions, which I state as follows:

1. Is the county obligated to fund secretarial services for the elected part-time county attorney which are reasonably required for the performance of the duties of the office?

2. Can the county attorney employ a secretary as a county employee without the prior consent of the county commissioners, and thereby obligate the county to pay that employee's salary and benefits as a county employee?

The answer to your first question is clear from case law and prior opinions of this office. The county is obligated to provide office space and support services which are reasonably necessary to allow an elected official to perform the duties of the elective office. Expenses incurred by the officer for such matters are a proper charge against the county, and the commissioners are under a clear legal duty to pay them to the extent the commissioners, in the proper exercise of their discretion, determine that the charges are reasonable. 46 Op. Att'y Gen. No. 10 at 5-7 (1995). The commissioners' discretion in determining what charges are reasonable is broad, but not without limitation, and the commissioners may be sued in mandamus to compel performance of their duty to provide the necessary support if their exercise of discretion exceeds legal limits. State ex. rel. Taylor v. County Comm'rs, 128 Mont. 102, 270 P.2d 994 (1954); see Reep v. County Comm'rs, 191 Mont. 162, 171, 622 P.2d 685, 690 (1981) (commissioners obligated to provide sufficient staff to allow auditor to perform minimum duties required). The commissioners are also subject to suit if their denial of a claim against the county exceeds the discretion they are allowed by law. In re Hyde, 73 Mont. 363, 236 P. 248 (1925).

Your second question raises the issue of how positions of county employment are to be created. The commissioners exercise control over the county payroll, and case law and prior opinions of this office have clearly indicated that the decision as to whether to create an additional position of employment under the county is left to the commissioners, even when the position is a deputy position which the officer is authorized by statute to appoint. For example, in 43 Op. Att'y Gen. No. 77 (1990), Attorney General Racicot held that the clerk of the district court lacked the power to appoint a deputy clerk without approval by the commissioners of the funding for the position, despite the presence of a statute authorizing the clerk to appoint a deputy. In 42 Op. Att'y Gen. No. 23 (1987), Attorney General Greely held that county officers may appoint deputies as allowed by law, but the deputies are entitled to no compensation unless allowed by the commissioners.

Two decisions of the Montana Supreme Court also bear on this question. In Spotorno v. Board of County Commissioners, 212 Mont. 253, 687 P.2d 720 (1984), the Court held that the county auditor could not sue in mandamus to compel the commissioners to fund the appointment of a deputy auditor that she was authorized to appoint by statute. The Court distinguished the earlier decision in Reep, 191 Mont. at 171, in which the Court had reversed a grant of mandamus and remanded the case for factual findings as to whether an additional deputy position was necessary to allow the auditor to perform the duties of the office. In Spotorno, the plaintiff county auditor did not advance the argument that the deputy position was required to allow her to fulfill her statutory duties.

I read these cases and prior opinions to hold that the commissioners have the final word through the budget process as to the creation of positions of employment with the county, and the concomitant discretion to determine whether to create county employee positions to provide assistance to a part-time county attorney or to require claims by the part-time county attorney for reasonable expenses incurred in procuring that assistance for him- or herself. The answer to your question therefore depends on whether in all cases the county attorney requires the assistance of a legal secretary who is an employee of the county in order to perform the minimum duties required by law.

In 46 Op. Att'y Gen. No. 10 (1995), I observed the importance of administrative support for county attorneys. I wrote:

> In today's law office environment, the assistance of secretarial personnel, at a minimum, to handle correspondence, answer telephones, and perform other general office management tasks is a necessity, particularly for a government office that must remain open to the public. I hold that reasonable charges therefore must be paid by the county.

In addition to the more pedestrian tasks I listed in that opinion, county attorneys also require the assistance of a legal secretary to prepare legal documents.

I cited 10 Op. Att'y Gen. 167 at 168 for the proposition that the commissioners must exercise sound discretion in determining whether, as a matter of fact, any particular claim is reasonable in amount. However, clearly the commissioners are obligated to make some allowance for necessary secretarial services for the county attorney. I cannot express an opinion as to the specific issue of whether a position of employment with the county must be created under the circumstances you present because to do so would require that I make findings of fact on a matter left in the first instance to the discretion of the commissioners. However, it is my opinion that the commissioners are responsible for providing, in some fashion, for the administrative support needs of the county attorney.

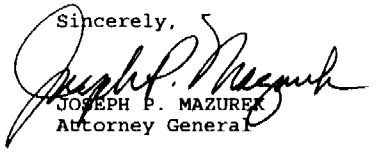
THEREFORE, IT IS MY OPINION:

1. The county is obligated to provide administrative support services which are reasonably necessary to allow the county attorney to perform the duties of the elective office.

2. The county attorney cannot compel the commissioners to authorize the hiring as a county employee of a legal secretary for the county attorney absent a showing that any other employment arrangement would prevent

the county attorney from performing the minimum statutory duties of the job.

Sincerely,



JOSEPH P. MAZUREK
Attorney General

jpm/cdt/brf

VOLUME NO. 46 OPINION NO. 21

CITIES AND TOWNS - Power of mayor to designate assistant police chief without approval of city council;
POLICE DEPARTMENTS - Authority of mayor to supervise;
POLICE DEPARTMENTS - Procedure for appointment of assistant police chief in council-mayor municipal government;
MONTANA CODE ANNOTATED - Sections 7-3-213(3), 7-32-4103, -4104;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 45 (1986).

HELD: In a council-mayor form of government, the mayor, in the exercise of his statutory authority to manage and supervise the municipal police force and absent an ordinance to the contrary, may designate an officer to serve as assistant police chief without prior approval of the municipal council.

July 3, 1996

Mr. Andrew P. Suenram
Dillon City Attorney
P.O. Box 1366
Dillon, MT 59725

Dear Mr. Suenram:

You have requested my opinion on the following question:

> In a municipal council-mayor local government, does the mayor have the authority, in the absence of an ordinance denying him the power, to appoint an assistant police chief without the prior approval of the municipal council?

Dillon is a city with general government powers which has adopted the municipal council-mayor form of municipal government. Your letter informs me that the mayor has accepted the recommendation of the chief of police that an assistant chief be appointed, and has made an appointment from within the department. Members of the council have asked for your opinion as to whether council approval of the appointment is required, and having received your opinion, have asked you to forward the inquiry to me.

Your letter also informs me that the council has adopted an ordinance, Dillon Municipal Code § 2.52.070, pursuant to the power recognized in Mont. Code Ann. § 7-32-4104, requiring council approval for new appointments to the city police force. You state that the ordinance makes no reference to council approval for internal promotions and rank assignments once an officer is initially appointed.

Your letter and accompanying memorandum suggest that the mayor has the sole power of appointment under Mont. Code Ann. §§ 7-3-213(3) and 7-32-4103. The former section empowers the mayor to "appoint" and remove "department heads" with the consent of a majority of the council and to "appoint . . . all other employees of the local government." The latter section gives the mayor "charge and supervision" over the police department, authorizes the mayor to "appoint" all officers of the department, and authorizes the mayor to "make rules, not inconsistent with the provisions of this part, the other laws of the state, or the ordinances of the city or town council, for the government, direction, management, and discipline of the police force."

Your letter appears to recognize that the municipal council in a council-mayor form of government has the power under Mont. Code Ann. § 7-32-4104 to legislate in this area by adopting an ordinance that would establish a procedure for selection of subordinate officers within the police department subject to council approval. Your question arises in a context in which the council has chosen not to adopt such an ordinance. Thus, the answer to your question is governed by the statutes that set out the mayor's management authority over the executive function and the council's role, if any, in the exercise of that power.

In 41 Op. Att'y Gen. No. 45 (1986), Attorney General Greely interpreted the laws dealing with the mayor's appointing power in a council-mayor government structure. The question presented was whether the mayor could appoint an administrative assistant without the approval of the council. General Greely opined that generally when the legislature intended to require council approval of a mayoral appointment it said so explicitly. 41 Op. Att'y Gen. at 190. Since the statutes did not require council approval for the appointment of the employee at issue, General Greely held that the mayor could make the appointment without council approval.

Similar reasoning should be applied to the mayor's supervisory authority over the police force. The statutes generally leave the administrative management of the municipality's affairs to the mayor absent some affirmative action by the council that creates a council role in a particular decision. In the absence of some statutory requirement that a particular mayoral decision be subject to council approval, the presumption should be that the mayor can make the decision without first submitting it to the council.

In this case, I find the mayor's power to designate a particular officer within the police force to perform certain duties associated with the status as "assistant chief" to be within the mayor's power to have "charge and supervision" over the police department. Mont. Code Ann. § 7-32-4103. See Larkin v. City of Butte, 52 Mont. 410, 413, 158 P. 316, 317 (1916). That power

is, in my opinion, sufficient to allow the mayor to make decisions about the internal management structure of the police force, such as determining whether to appoint an assistant chief, and if such appointment is to be made, who should fill the position, and determining the duties to be assigned to the position.

Your letter suggests that the mayor's power of appointment allows him to make this designation. In light of the conclusion expressed above, that is a question I need not reach. Whether the designation of a particular rank for a specific officer within the police department constitutes an "appointment" for purposes of the statutes allowing the mayor to "appoint" municipal employees generally, Mont. Code Ann. § 7-3-213(3), or police officers specifically, Mont. Code Ann. § 7-32-4103, is far from clear. The cases and opinions of this office dealing with the "appointment" power generally involve the initial hiring of an officer. See, e.g., State ex rel. Wynne v. Quinn, 40 Mont. 472, 475, 107 P. 506, 508 (1909) (hiring of chief of police); 41 Op. Att'y Gen. No. 45 (1986) (power to hire administrative assistant). I have found no authority in Montana construing the term "appoint" in statutes similar to the ones involved here to apply to the internal promotion and duty assignments of officers previously hired. Since I find the power to designate an assistant chief in the mayor's power to manage and supervise the police force, I need not decide whether its existence is also supported by the mayor's power to appoint.

THEREFORE, IT IS MY OPINION:

> In a council-mayor form of government, the mayor, in the exercise of his statutory authority to manage and supervise the municipal police force and absent an ordinance to the contrary, may designate an officer to serve as assistant police chief without prior approval of the municipal council.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/cdt/brf

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules, amendment or repeal of existing rules filed with the Secretary of State, except rules proposed by the Department of Revenue. Proposals of the Department of Revenue are reviewed by the Revenue Oversight Committee.

The Administrative Code Committee has the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. In addition, the Committee may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt or amend a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with the existing or proposed rules. The address is Room 138, Montana State Capitol, Helena, Montana 59620.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter	1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.
Statute Number and Department	2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 1996. This table includes those rules adopted during the period April 1, 1996 through June 30, 1996 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 March 31, 1996, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1995 and 1996 Montana Administrative Registers.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number. These will fall alphabetically after department rulemaking actions. Accumulative Table entries will be listed with the department name under which they were proposed, e.g., Department of Health and Environmental Sciences as opposed to Department of Environmental Quality.

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BOARD APPOINTEES AND VACANCIES

Section 2-15-108, MCA, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of 2-15-108, MCA, is that the Secretary of State publish monthly in the ***Montana Administrative Register*** a list of appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments effective in June 1996, appear. Vacancies scheduled to appear from August 1, 1996, through October 31, 1996, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of July 1, 1996.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES FROM JUNE, 1996

Appointee	Appointed by	Succeeds	Appointment/End Date
Board of Plumbing (Commerce)			
Mr. Tim Coleman	Governor	not listed	6/12/1996
Belgrade			5/4/2000
Qualifications (if required): mechanical engineer			
Board of Regents of Higher Education (Education)			
Mr. Michael Green	Governor	not listed	6/1/1996
Malta			6/1/1997
Qualifications (if required): student representative			
Governor's Council on Families (Public Health and Human Services)			
Judge Gary Acevedo	Governor	not listed	6/25/1996
Ronan			6/25/1998
Qualifications (if required): public member			
Mr. Kirk Astroth	Governor	not listed	6/25/1996
Bozeman			6/25/1998
Qualifications (if required): public member			
Ms. Bonnie Bowman McGowan	Governor	not listed	6/25/1996
Highwood			6/25/1998
Qualifications (if required): public member			
Mr. Peter Bruno	Governor	not listed	6/25/1996
Glendive			6/25/1998
Qualifications (if required): public member			
Judge Katherine Curtis	Governor	not listed	6/25/1996
Columbia Falls			6/25/1998
Qualifications (if required): public member			

BOARD AND COUNCIL APPOINTEES FROM JUNE, 1996

Appointee	Appointed by	Succeeds	Appointment/End Date
Governor's Council on Families (Public Health and Human Services) Cont.			
Mr. Stephen Duncan Bozeman Qualifications (if required): public member	Governor	not listed	6/25/1996 6/25/1998
Ms. M.J. Fors Great Falls Qualifications (if required): public member	Governor	not listed	6/25/1996 6/25/1998
Ms. Kathleen Jensen Westby Qualifications (if required): public member	Governor	not listed	6/25/1996 6/25/1998
Rep. Betty Lou Kasten Brockway Qualifications (if required): public member	Governor	not listed	6/25/1996 6/25/1998
Ms. Jani McCall Billings Qualifications (if required): public member	Governor	not listed	6/25/1996 6/25/1998
Mr. Michael McCarvel Helena Qualifications (if required): public member	Governor	not listed	6/25/1996 6/25/1998
Mr. Bill Pena Seeley Lake Qualifications (if required): public member	Governor	not listed	6/25/1996 6/25/1998
Ms. Kathy Peoples Butte Qualifications (if required): public member	Governor	not listed	6/25/1996 6/25/1998

BOARD AND COUNCIL APPOINTEES FROM JUNE, 1996

Appointee	Appointed by	Succeeds	Appointment/End Date
Governor's Council on Families (Public Health and Human Services) Cont.			
Mr. Stanley Rathman Choteau Qualifications (if required): public member	Governor	not listed	6/25/1996 6/25/1998
Mr. Wade Riden Chinook Qualifications (if required): public member	Governor	not listed	6/25/1996 6/25/1998
Mr. John Vincent Gallatin Gateway Qualifications (if required): public member	Governor	not listed	6/25/1996 6/25/1998
Ms. Kim Vissor Missoula Qualifications (if required): public member	Governor	not listed	6/25/1996 6/25/1998
Independent Living Council (Public Health and Human Services)			
Ms. Kathleen Babel Glendive Qualifications (if required): none specified	Director	Alweiss	6/1/1996 0/0/0
Microbusiness Advisory Council (Commerce)			
Mr. David T. Bond Whitefish Qualifications (if required): microbusiness owner	Governor	reappointed	6/30/1996 6/30/2000
Ms. Mary Brydich Helena Qualifications (if required): representative of communities with populations more than 15,000	Governor	reappointed	6/30/1996 6/30/2000

BOARD AND COUNCIL APPOINTEES FROM JUNE, 1996

Appointee	Appointed by	Succeeds	Appointment/End Date
Microbusiness Advisory Council (Commerce) Cont.			
Ms. Concetta Eckel Helena	Governor	Smith	6/30/1996 6/30/2000
Qualifications (if required): microbusiness owner			
Mr. Steven Ohs Glendive	Governor	Brown	6/30/1996 6/30/2000
Qualifications (if required): representative of communities with populations less than 15,000			
Ms. Dale Renee Pierre Pablo	Governor	Greybull	6/30/1996 6/30/2000
Qualifications (if required): minority representative			
Mr. Gerald Sherman Billings	Governor	Boutilier	6/30/1996 6/30/2000
Qualifications (if required): representative of the banking industry			
Missouri River Basin Advisory Council (Natural Resources and Conservation)			
Ms. Diane Brandt Glasgow	Governor	not listed	6/3/1996 11/3/1996
Qualifications (if required): public member			
Mr. Chuck Carlson Fort Peck	Governor	not listed	6/3/1996 11/3/1996
Qualifications (if required): public member			
Mr. Bud Clinch Helena	Governor	not listed	6/3/1996 11/3/1996
Qualifications (if required): Director of the Department of Natural Resources and Conservation			

BOARD AND COUNCIL APPOINTEES FROM JUNE, 1996

Appointee	Appointed by	Succeeds	Appointment/End Date
Missouri River Basin Advisory Council (Natural Resources and Conservation) Cont.			
Mr. Tom Huntley Sidney Qualifications (if required): public member	Governor	not listed	6/3/1996 11/3/1996
Mr. Ron Miller Glasgow Qualifications (if required): public member	Governor	not listed	6/3/1996 11/3/1996
Mr. Steve Page Glasgow Qualifications (if required): public member	Governor	not listed	6/3/1996 11/3/1996
Mr. Jim Rector Glasgow Qualifications (if required): public member	Governor	not listed	6/3/1996 11/3/1996
Mr. Scott Ross Glasgow Qualifications (if required): public member	Governor	not listed	6/3/1996 11/3/1996
Vocational Rehabilitation Divisions Advisory Council (Public Health and Human Services)			
Mr. Ian Wall Helena Qualifications (if required): None specified	Director	Pope	6/1/1996 6/1/1998

BOARD AND COUNCIL APPOINTEES FROM JUNE, 1996

Appointee	Appointed by	Succeeds	Appointment/End Date
Western Interstate Commission on Higher Education		(Education)	
Mr. Dick Crofts	Governor	Baker	6/3/1996
Helena			6/19/1997
Qualifications (if required): Interim Commissioner of Higher Education			
Mr. Francis J. Kerins	Governor	not listed	6/19/1996
Helena			6/19/2000
Qualifications (if required): public member			

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
9-1-1 Advisory Council (Administration)		
Mr. Bill Wade, Circle Qualifications (if required): none specified	Director	9/26/1996
Mr. Dave Mason, Helena Qualifications (if required): none specified	Director	9/26/1996
Sheriff Lee Edmisten, Virginia City Qualifications (if required): none specified	Director	9/26/1996
Mr. James Anderson, Helena Qualifications (if required): none specified	Director	9/26/1996
Dr. Drew Dawson, Helena Qualifications (if required): none specified	Director	9/26/1996
Mr. Dan Green, Helena Qualifications (if required): none specified	Director	9/26/1996
Ms. Judy Frazer, Kalispell Qualifications (if required): none specified	Director	9/26/1996
Mr. Marshall Kyle, Missoula Qualifications (if required): none specified	Director	9/26/1996
Major Irwin L. Garrick, Helena Qualifications (if required): none specified	Director	9/26/1996
Mr. Mike Sederholm, Lewistown Qualifications (if required): none specified	Director	9/26/1996
Mr. Tom Kelly, Columbus Qualifications (if required): none specified	Director	9/26/1996

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
9-1-1 Advisory Council (Administration) Cont.		
Ms. Kay McKenna, Helena Qualifications (if required): none specified	Director	9/26/1996
Mr. Art Bicsak, Great Falls Qualifications (if required): none specified	Director	9/26/1996
Mr. Al Brockway, Helena Qualifications (if required): none specified	Director	9/26/1996
Lieutenant Billi Heigh, Helena Qualifications (if required): none specified	Director	9/26/1996
Mr. Rick Newby, Miles City Qualifications (if required): none specified	Director	9/26/1996
AIDS Advisory Council (Public Health and Human Services)		
Ms. Alison James, Clancy Qualifications (if required): student representative	Governor	8/18/1996
Ms. Pam Carter, Bozeman Qualifications (if required): none specified	Governor	8/18/1996
Rep. John Bohlinger, Billings Qualifications (if required): legislator	Governor	8/18/1996
Reverend D. Gregory Smith, Helena Qualifications (if required): none specified	Governor	8/18/1996
Ms. Pam Bragg, Helena Qualifications (if required): public member	Governor	8/18/1996

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
AIDS Advisory Council (Public Health and Human Services) Cont.		
Mr. David Herrera, Billings Qualifications (if required): none specified	Governor	8/18/1996
Mr. Terry Cyr, Missoula Qualifications (if required): public member	Governor	8/18/1996
Mr. Frank Gary, Butte Qualifications (if required): public member	Governor	8/18/1996
Mr. Steve Bennetts, Great Falls Qualifications (if required): none specified	Governor	8/18/1996
Ms. Rita Munzenrider, Kalispell Qualifications (if required): none specified	Governor	8/18/1996
Pastor Paul Goodman, Billings Qualifications (if required): none specified	Governor	8/18/1996
Dr. Connie O'Connor, Helena Qualifications (if required): none specified	Governor	8/18/1996
Ms. Verbena Savior, Poplar Qualifications (if required): none specified	Governor	8/18/1996
Mr. David G. Rice, Havre Qualifications (if required): none specified	Governor	8/18/1996
Dr. Elizabeth Olberding, Helena Qualifications (if required): none specified	Governor	8/18/1996
Ms. Terri Dunn, Whitefish Qualifications (if required): none specified	Governor	8/18/1996

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
AIDS Advisory Council (Public Health and Human Services) Cont.		
Mr. Marshall Miller, Helena	Governor	8/18/1996
Qualifications (if required): none specified		
Alternative Health Care Board (Commerce)		
Dr. Michael Bergkamp, Helena	Governor	9/1/1996
Qualifications (if required): naturopath		
Board of Education Joint Planning and Coordination Committee (Education)		
Mr. Wilbur Anderson, Dillon	Governor	10/13/1996
Qualifications (if required): member of the Board of Public Education		
Mr. Wayne Buchanan, Helena	Governor	10/13/1996
Qualifications (if required): Executive Secretary of the Board of Public Education		
Mr. Jim Kaze, Havre	Governor	10/13/1996
Qualifications (if required): member of Board of Regents		
Ms. Nancy Keenan, Helena	Governor	10/13/1996
Qualifications (if required): Superintendent of Public Instruction		
Dr. Jeff Baker, Helena	Governor	10/13/1996
Qualifications (if required): Commissioner of Higher Education		
Governor Marc Racicot, Helena	Governor	10/13/1996
Qualifications (if required): Governor		
Board of Medical Examiners (Commerce)		
Dr. Richard Beighle, Missoula	Governor	9/1/1996
Qualifications (if required): doctor of medicine		

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
Board of Outfitters (Commerce)		
Mr. Kurt Hughes, Miles City	Governor	10/1/1996
Qualifications (if required): representative of District 5		
Mr. Jerry Wells, Helena	Governor	10/1/1996
Qualifications (if required): represents Department of Fish, Wildlife, and Parks		
Ms. Rita Orr, Libby	Governor	10/1/1996
Qualifications (if required): public member		
Board of Private Security Patrol Officers and Investigators (Commerce)		
Rep. Gay Ann Masolo, Townsend	Governor	8/1/1996
Qualifications (if required): public member		
Board of Psychologists (Commerce)		
Dr. Evan Lewis, Jefferson City	Governor	9/1/1996
Qualifications (if required): licensed psychologist		
Building Codes Advisory Council (Commerce)		
Mr. Don Cape, Belgrade	Director	9/30/1996
Qualifications (if required): mobile homes		
Ms. Mitzi Schwab, Helena	Director	9/30/1996
Qualifications (if required): Department of Health and Environmental Sciences		
Mr. Craig Kerzman, Kalispell	Director	9/30/1996
Qualifications (if required): municipal building officials		
Mr. Richard Grover, Missoula	Director	9/30/1996
Qualifications (if required): Board of Plumbers		
Mr. Bruce Suenram, Helena	Director	9/30/1996
Qualifications (if required): State Fire Marshall		

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
Building Codes Advisory Council (Commerce) Cont.		
Mr. Lee Ebeling, Great Falls Qualifications (if required): engineers	Director	9/30/1996
Mr. Stan Todd, Big Timber Qualifications (if required): building contractors	Director	9/30/1996
Mr. Robert Ross, Kalispell Qualifications (if required): home builder	Director	9/30/1996
Ms. Linda Cockhill, Helena Qualifications (if required): public member	Director	9/30/1996
Mr. John Allen, Helena Qualifications (if required): State Electrical Board	Director	9/30/1996
Mr. Jay Whitney, Helena Qualifications (if required): architect	Director	9/30/1996
Family Support Services Advisory Council (Public Health and Human Services)		
Ms. Sue Forest, Missoula Qualifications (if required): personnel preparation representative	Governor	9/9/1996
Ms. Sharon Wagner, Helena Qualifications (if required): Department of Health and Environmental Sciences representative	Governor	9/9/1996
Ms. Colleen Thompson, Glasgow Qualifications (if required): Headstart representative	Governor	9/9/1996
Ms. Sylvia Danforth, Miles City Qualifications (if required): service provider representative	Governor	9/9/1996

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
Family Support Services Advisory Council (Public Health and Human Services) Cont.		
Ms. Millie Kindle, Malta	Governor	9/9/1996
Qualifications (if required): parent representative		
Ms. Maria Pease, Lodge Grass	Governor	9/9/1996
Qualifications (if required): parent representative		
Mr. Pete Surdock, Helena	Governor	9/9/1996
Qualifications (if required): represents Department of Corrections and Human Services		
Mr. Dan McCarthy, Helena	Governor	9/9/1996
Qualifications (if required): represents Office of Public Instruction		
Ms. Jackie Jandt, Helena	Governor	9/9/1996
Qualifications (if required): represents Department of Social and Rehabilitation Services		
Ms. Linda Botten, Bozeman	Governor	9/9/1996
Qualifications (if required): service provider representative		
Mr. Phil Mattheis, Florence	Governor	9/9/1996
Qualifications (if required): medical/health care representative		
Rep. Matt McCann, Harlem	Governor	9/9/1996
Qualifications (if required): legislator		
Ms. Janice Lane, Forsyth	Governor	9/9/1996
Qualifications (if required): parent representative		
Ms. Kathy Cashell, Butte	Governor	9/9/1996
Qualifications (if required): parent representative		

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
Family Support Services Advisory Council (Public Health and Human Services) Cont.		
Mr. Ted Maloney, Missoula Qualifications (if required): public member	Governor	9/9/1996
Ms. Georgia Rutherford, Browning Qualifications (if required): parent representative	Governor	9/9/1996
Ms. Sandi Marisdotter, Helena Qualifications (if required): service provider representative	Governor	9/9/1996
Ms. Chris Volinkaty, Missoula Qualifications (if required): service provider representative	Governor	9/9/1996
Ms. Barbara Stefanic, Laurel Qualifications (if required): preschool services representative	Governor	9/9/1996
Ms. Gwen Beyer, Polson Qualifications (if required): parent representative	Governor	9/9/1996
Mr. John Holbrook, Helena Qualifications (if required): state insurance governance representative	Governor	9/9/1996
Ms. Lynda Hart, Helena Qualifications (if required): represents Department of Family Services	Governor	9/9/1996
Ms. Beth Kenny, Helena Qualifications (if required): parent representative	Governor	9/9/1996
Ms. Christine Gutschenritter, Great Falls Qualifications (if required): represents Montana School for the Deaf and Blind	Governor	9/9/1996

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
Historic Preservation Review Board (Historical Society)		
Mr. Dennis L. Deppmeier, Billings Qualifications (if required): historical architect	Governor	10/1/1996
Mr. Kirk Michels, Livingston Qualifications (if required): architectural historian	Governor	10/1/1996
Historical Records Advisory Council (Historical Society)		
Mr. Brian Cockhill, Helena Qualifications (if required): represents Historical Society	Governor	10/6/1996
Mr. Timothy Bernardis, Crow Agency Qualifications (if required): public member	Governor	10/6/1996
Ms. Connie Erickson, Helena Qualifications (if required): public member	Governor	10/6/1996
Ms. Peggy Lamberson Bourne, Great Falls Qualifications (if required): public member	Governor	10/6/1996
Mr. Robert M. Clark, Helena Qualifications (if required): public member	Governor	10/6/1996
Ms. Marie L. Torosian, St. Ignatius Qualifications (if required): public member	Governor	10/6/1996
Ms. Kathryn Otto, Helena Qualifications (if required): state archivist	Governor	10/6/1996
Ms. Ellen Crain, Butte Qualifications (if required): public member	Governor	10/6/1996

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
Indian Burial Preservation Board (Commerce)		
Mr. John Pretty On Top, Crow Agency	Governor	8/22/1996
Qualifications (if required): representative of Crow Tribe		
Mr. Duncan Standing Rock, Sr., Box Elder	Governor	8/22/1996
Qualifications (if required): representative of Chippewa-Cree Tribe		
Mr. Gilbert Horn, Harlem	Governor	8/22/1996
Qualifications (if required): representative of Gros Ventre Tribe		
Mr. Mickey Nelson, Helena	Governor	8/22/1996
Qualifications (if required): representative of coroners' association		
Mr. Germaine White, Pablo	Governor	8/22/1996
Qualifications (if required): representative of Little Shell		
Lewis and Clark Bicentennial Celebration Advisory Council (Historical Society)		
Ms. Nancy Maxson, Missoula	Governor	8/26/1996
Qualifications (if required): represents Glacier Country		
Mr. Darrell Kipp, Browning	Governor	8/26/1996
Qualifications (if required): represents Glacier Country		
Ms. Mary Partridge, Miles City	Governor	8/26/1996
Qualifications (if required): represents Custer Country		
Mr. Loren Stiffarm, Harlem	Governor	8/26/1996
Qualifications (if required): represents Russell Country		
Dr. Robert Bergantino, Butte	Governor	8/26/1996
Qualifications (if required): represents Gold West Country		

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
Lewis and Clark Bicentennial Celebration Advisory Council (Historical Society) Cont.		
Ms. Betty White, Ronan Qualifications (if required): represents Glacier Country	Governor	8/26/1996
Mr. John G. Lepley, Fort Benton Qualifications (if required): represents Russell Country	Governor	8/26/1996
Ms. Edythe McCleary, Hardin Qualifications (if required): represents Custer Country	Governor	8/26/1996
Mr. Mike Labriola, Great Falls Qualifications (if required): represents Russell Country	Governor	8/26/1996
Mr. Robert Mann, Plentywood Qualifications (if required): represents Missouri River Country	Governor	8/26/1996
Ms. Gloria Wester, Laurel Qualifications (if required): represents Custer Country	Governor	8/26/1996
Ms. Diane Zimmerman, Missoula Qualifications (if required): represents Glacier Country	Governor	8/26/1996
Ms. Jeanne French, Plentywood Qualifications (if required): represents Missouri River Country	Governor	8/26/1996
Mr. Jack Hines, Big Timber Qualifications (if required): represents Yellowstone Country	Governor	8/26/1996
Mr. Tim Crawford, Helena Qualifications (if required): represents Gold West Country	Governor	8/26/1996
Ms. Jan Blayden, Missoula Qualifications (if required): represents Glacier Country	Governor	8/26/1996

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
Lewis and Clark Bicentennial Celebration Advisory Council (Historical Society) Cont.		
Mr. Dennis Seibel, Bozeman	Governor	8/26/1996
Qualifications (if required): represents Yellowstone Country		
Colonel Harold Stearns, Missoula	Governor	8/26/1996
Qualifications (if required): representative of military affairs		
Mental Disabilities Board of Visitors (Governor)		
Ms. Helen C. Green, Big Sandy	Governor	8/1/1996
Qualifications (if required): represents mental disabilities organization		
Ms. Arlene Breum, Missoula	Governor	8/1/1996
Qualifications (if required): represents mental disabilities organization		
Ms. Marjorie Fehrer, Bozeman	Governor	8/1/1996
Qualifications (if required): consumer		
Mr. Wallace A. King, Helena	Governor	8/1/1996
Qualifications (if required): professional		
Mr. Robert W. Visscher, Livingston	Governor	8/1/1996
Qualifications (if required): professional		
Montana Public Health Improvement Task Force (Public Health and Human Services)		
Ms. Lil Anderson, Billings	Governor	9/30/1996
Qualifications (if required): representing county health officers from large cities		
Mr. Peter Blouke, Helena	Governor	9/30/1996
Qualifications (if required): Director of the Department of Public Health and Human Services		

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
Montana Public Health Improvement Task Force (Public Health and Human Services) Cont.		
Dr. Terry Dennis, Billings	Governor	9/30/1996
Qualifications (if required): ex-officio		
Mr. Curt Chisholm, Helena	Governor	9/30/1996
Qualifications (if required): representing the Department of Environmental Quality		
Mr. Peter Frazier, Great Falls	Governor	9/30/1996
Qualifications (if required): representing a local health department from large cities		
Ms. Cindy Morgan, Thompson Falls	Governor	9/30/1996
Qualifications (if required): representing local boards from rural counties over 5,000		
Dr. Kermit Smith, Billings	Governor	9/30/1996
Qualifications (if required): representing the Indian Health Service or Indian tribes		
Ms. Ellen Leahy, Missoula	Governor	9/30/1996
Qualifications (if required): representing county health officers from large cities		
Mr. Kyle Hopstad, Lewistown	Governor	9/30/1996
Qualifications (if required): representing health care providers		
Ms. Cynthia Lewis, Helena	Governor	9/30/1996
Qualifications (if required): representing the Health Care Advisory Council		
Ms. Ruth Haugland, Dillon	Governor	9/30/1996
Qualifications (if required): representing local boards from rural counties over 5,000		
Ms. Sandra Kinsey, Baker	Governor	9/30/1996
Qualifications (if required): public health representative from a county under 5,000		
Rep. Bill Tash, Dillon	Governor	9/30/1996
Qualifications (if required): representing the House of Representatives		

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
Montana Public Health Improvement Task Force (Public Health and Human Services) Cont.		
Sen. Mignon Waterman, Helena	Governor	9/30/1996
Qualifications (if required): representing the Montana Senate		
Ms. Karen Hinick, Butte	Governor	9/30/1996
Qualifications (if required): representing a local health department from large cities		
Noxious Weed Seed Free Advisory Council (Agriculture)		
Mr. Terry Turner, Havre	Director	9/17/1996
Qualifications (if required): representing weed districts		
Mr. LaMonte Schnur, Townsend	Director	9/17/1996
Qualifications (if required): forage producer		
Private Security Patrol Officers and Investigators (Commerce)		
Mr. Greg Noose, Bozeman	Governor	8/1/1996
Qualifications (if required): represents Peace Officers Standards and Training Advisory Council		
Public Health Improvement Advisory Council (Public Health and Human Services)		
Ms. Jodi Martz, Butte	Governor	9/30/1996
Qualifications (if required): representing concerned citizens		
Public Health Improvement Task Force (Public Health and Human Services)		
Mr. Dale Taliaferro, Helena	Governor	9/30/1996
Qualifications (if required): ex-officio member		
Ms. Kathleen Winters, Bozeman	Governor	9/30/1996
Qualifications (if required): ex-officio member		
Reserved Water Rights Compact Commission (Natural Resources and Conservation)		
Rep. David E. Wanzenried, Kalispell	Speaker	10/12/1996
Qualifications (if required): none specified		

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
Small Business Compliance Advisory Council (Public Health and Human Services)		
Ms. Juanita Stovall, Billings Qualifications (if required): public member	Governor	10/1/1996
Ms. Sandy Newton, Jefferson City Qualifications (if required): public member	Governor	10/1/1996
State Advisory Council on Food and Nutrition (Public Health and Human Services)		
Sen. Ethel Harding, Polson Qualifications (if required): member of the Senate	Governor	8/30/1996
Ms. Lynn Paul, Bozeman Qualifications (if required): represents the MSU Extension Service	Governor	8/30/1996
Mr. David Thomas, Helena Qualifications (if required): none specified	Governor	8/30/1996
Mr. Gary Watt, Helena Qualifications (if required): represents OPI School Food Services Program	Governor	8/30/1996
Ms. Judy Morrill, Bozeman Qualifications (if required): represents food and nutrition programs for elderly	Governor	8/30/1996
Water and Wastewater Operators Advisory Council (Environmental Quality)		
Mr. Michael Holzwarth, Colstrip Qualifications (if required): water treatment operator	Governor	10/16/1996
Wheat and Barley Committee (Agriculture)		
Mr. Lanny Christman, Dutton Qualifications (if required): represents District IV	Governor	8/20/1996
Mr. Jim Squires, Glendive Qualifications (if required): represents District VII	Governor	8/20/1996

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
Whirling Disease Task Force (Fish, Wildlife, and Parks)		
Mr. Jim Ahrens, Helena Qualifications (if required): none specified	Governor	10/1/1996
Mr. Matt Cohn, Helena Qualifications (if required): none specified	Governor	10/1/1996
Mr. Thomas Anacker, Bozeman Qualifications (if required): none specified	Governor	10/1/1996
Mr. Mike Hayden, Alexandria, VA Qualifications (if required): none specified	Governor	10/1/1996
Dr. Roger Herman, Kearneysville, WV Qualifications (if required): none specified	Governor	10/1/1996
Mr. Karl Johnson, Bozeman Qualifications (if required): none specified	Governor	10/1/1996
Mr. Robin Cunningham, Gallatin Gateway Qualifications (if required): none specified	Governor	10/1/1996
Dr. Marshall Bloom, Hamilton Qualifications (if required): none specified	Governor	10/1/1996
Mr. Pat Graham, Helena Qualifications (if required): none specified	Governor	10/1/1996
Mr. Bob LeFever, Butte Qualifications (if required): none specified	Governor	10/1/1996
Mr. Bud Lilly, Bozeman Qualifications (if required): none specified	Governor	10/1/1996

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1996 through October 31, 1996

Board/current position holder	Appointed by	Term end
Whirling Disease Task Force (Fish, Wildlife, and Parks) Cont.		
Mr. Roger Nelson, Livingston Qualifications (if required): public member	Governor	10/1/1996
Mr. Dud Lutton, Helena Qualifications (if required): none specified	Governor	10/1/1996
Mr. Art Neill, Butte Qualifications (if required): none specified	Governor	10/1/1996
Ms. Chris Somers, Butte Qualifications (if required): none specified	Governor	10/1/1996
Ms. Marsha "Josh" Turner, Helena Qualifications (if required): none specified	Governor	10/1/1996
Mr. Bruce Whittenberg, Helena Qualifications (if required): none specified	Governor	10/1/1996
Mr. John Bailey, Livingston Qualifications (if required): none specified	Governor	10/1/1996
Mr. Kirby Alton, Thousand Oaks, CA Qualifications (if required): none specified	Governor	10/1/1996
Mr. Ed Williams, Ennis Qualifications (if required): none specified	Governor	10/1/1996