MONTANA ADMINISTRATIVE REGISTER

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INDEX COPY

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 1

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

Page Number

TABLE OF CONTENTS

NOTICE SECTION

BEFORE THE BOARD OF NURSING HOME ADMINISTRATORS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment, repeal and adoption of rules pertaining to nursing home administrators	) AMENDED NOTICE OF PROPOSED AMENDMENT, REPEAL AND ADOPTION OF RULES PERTAINING TO NURSING HOME ADMINISTRATORS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 19, 1996, the Board of Nursing Home Administrators published a notice of proposed amendment, repeal and adoption of rules at page 3174, 1996 Montana Administrative Register, issue number 24. The notice of proposed action is amended as follows because staff inadvertently omitted mailing the proposed notice to interested persons within three days from the date of publication of the notice, as required by section 2-4-302, MCA. The Board is extending the comment period to February 13, 1997, to provide the public adequate time to submit comments pertaining to the proposed amendments, repeals and adoptions. The proposed amendments, repeals and adoptions will remain the same as published in the original notice under MAR Notice No. 8-34-28.

2. Interested persons may submit their data, views or arguments concerning the proposed amendments, repeals and adoptions in writing to the Board of Nursing Home Administrators, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by facsimile to (406) 444-1667, to be received no later than 5:00 p.m., February 13, 1997.

3. If a person who is directly affected by the proposed amendments, repeals and adoptions wishes to present his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request along with any comments he has to the Board of Nursing Home Administrators, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by facsimile to (406) 444-1667, to be received no later than 5:00 p.m., February 13, 1997.

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

Administrative Register. Ten percent of those persons directly affected has been determined to be 28 based on the 282 licensees in Montana.

BOARD OF NURSING HOME
ADMINISTRATORS
RAYMOND HOFFMAN, CHAIRMAN

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Carol Grell
CAROL GRELL, RULE REVIEWER

Certified to the Secretary of State, January 3, 1997.

BEFORE THE BOARD OF PSYCHOLOGISTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment, repeal and adoption of rules pertaining to the practice of psychology	) NOTICE OF PROPOSED AMENDMENT, REPEAL AND ADOPTION OF RULES) PERTAINING TO THE PRACTICE OF) PSYCHOLOGY

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On February 15, 1997, the Board of Psychologists proposes to amend ARM 8.52.402, 8.52.603A, 8.52.609, 8.52.617, 8.52.701 and 8.52.702; repeal ARM 8.52.401, 8.52.403, 8.52.404, 8.52.405, 8.52.406, 8.52.601, 8.52.612, 8.52.614 and 8.52.615; and adopt new rules I and II pertaining to the practice of psychology.

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

"8.52.402 BOARD MEETINGS (1) through (5) will remain the same.

(6) ~~Ordinarily meetings will be announced one month in advance through appropriate means and media.~~ Special meetings may be called at any time deemed necessary by the board when members agree. Meetings may be by telephone and balloting may be by mail or telephone.

~~(7) The board will conduct open meetings in a manner consistent with sections 2-3-201, 203, 212, MCA.~~

~~(8) The board shall establish rules for the conduct of its meetings, within the general sense of Roberts Revised Rules of Order.~~

~~(9) The ranking officer remaining from the previous board shall convene the first meeting of the new board and conduct the election of officers.~~"

Auth: Sec. 37-17-202, MCA; IMP, Sec. 37-17-201, 37-17-202, MCA

"8.52.603A USE OF TITLE (1) through (1)(b) will remain the same.

~~(c) a qualified assistant employed by, or otherwise directly accountable to, a licensed psychologist.~~

~~(2) Nothing in these rules shall be construed to prevent the teaching of psychology, the conduct of psychological research, or the provision of psychological services or consultation to organizations or institutions, provided that such teaching, research, or services does not involve the delivery or supervision of direct psychological services to individuals or groups of individuals who are themselves, rather than a third party, the intended beneficiaries of such~~

~~services, without regard to the source or extent of payment for services rendered.~~

(3) will remain the same."

Auth: Sec. 37-1-131, 37-17-202, MCA; IMP, Sec. 37-17-104, 37-17-301, MCA

"8.52.609 LICENSEES FROM OTHER STATES OR CANADIAN JURISDICTIONS (1) When a person applies for licensure under this provision, the board shall obtain information from the other state(s) or Canadian jurisdiction(s), and determine whether the requirements ~~for~~ in place at the time of obtaining such other license(s) or certificate(s) ~~are~~ were substantially equivalent to the current requirements of Montana law.

(2) Persons seeking a license on the basis of having been examined and then issued a license by another state or Canadian jurisdiction shall submit to the board information concerning the nature of the prior examination with their completed application forms. The information shall be evaluated by the board, which may request additional information before making a decision to waive the written examination. The ~~requirements~~ qualifications of the ~~other state~~ candidate must be verified by the board as at least substantially equivalent to ~~those~~ the requirements of the state of Montana.

(3) through (5) will remain the same."

Auth: Sec. 37-1-131, 37-17-202, MCA; IMP, Sec. 37-1-304, 37-17-304, MCA

"8.52.617 UNPROFESSIONAL CONDUCT For the purpose of implementing the provisions of 37-17-311(c), MCA, the board defines "unprofessional conduct" as follows:

(1) will remain the same.

(2) ~~Engaging in a sexual relationship with a patient~~ Accepting for professional services patients or clients with whom they have engaged in sexual intimacies:

(a) engaging in sexual intimacies with current patients or clients;

(b) engaging in sexual intimacies with a former professional services patient or client for at least two years after termination of professional services. The psychologist who engages in such activity after the two years following termination of professional services bears the burden of demonstrating that there has been no exploitation, in light of all relevant factors including:

(i) the amount of time that has passed since professional services terminated;

(ii) the nature and duration of the professional services;

(iii) the circumstances of the termination;

(iv) the patient's or client's personal history;

(v) the patient's or client's current mental status;

(vi) the likelihood of adverse impact on the patient or client; and

(vii) any statements or actions made by the psychologist during the course of professional services suggesting or

inviting the possibility of post-termination sexual or romantic relationship with the patient or client.

(3) through (21) will remain the same."

Auth: Sec. 37-1-131, 37-1-319, 37-17-202, ~~37-17-311~~, MCA; IMP, Sec. 37-1-319, 37-17-311, MCA

REASON: The proposed amendments will add American Psychological Association ethical standard changes to the Board's unprofessional conduct rule, as these changes on sexual relations with clients and former clients were adopted nationally several years ago, and need to be added to Board rules to be made enforceable state-wide, for the protection of the public.

"8.52.701 CONTINUING EDUCATION REQUIREMENTS (1) through (3)(a) will remain the same.

(a)(i) through (xi) will remain the same, but the ending commas will be changed to semi-colons.

(b) and (c) will remain the same.

(c)(i) and (ii) will remain the same, but the ending commas will be changed to semi-colons.

(iii) number of hours and date of each presentation attended~~, and~~;

(iv) description of the presentation format~~.~~; and

(v) name of licensee.

(d) will remain the same."

Auth: Sec. 37-1-319, 37-17-202, MCA; IMP, Sec. 37-1-306, ~~37-17-202,~~ MCA

"8.52.702 CONTINUING EDUCATION PROGRAM OPTIONS

(1) through (1)(b)(iv) will remain the same.

(A) Initial ~~P~~presentation of meeting paper or poster presentation based on thorough review of the literature, and including theoretical ideas, with application to clinical work~~.~~;

(B) Initial ~~P~~presentation of a workshop in the field of psychology~~.~~;

(C) and (D) will remain the same, but the ending periods will be changed to semi-colons.

(E) Teaching a formally organized class in psychology or related subjects which meets the criteria specified in ARM 8.52.701(3)(a);

(F) Formal case presentation in a group setting (e.g. grand rounds), properly documented and conducted by appropriately credentialed and/or licensed professionals.

(c) through (iii) (D) will remain the same."

Auth: Sec. 37-1-319, 37-17-202, MCA; IMP, Sec. 37-1-306, ~~37-17-202,~~ MCA

3. The Board proposes to repeal ARM 8.52.401 (authority 37-17-202, MCA; implementing 37-17-202, MCA), 8.52.403 (authority 37-17-202, MCA; implementing 37-17-201, MCA), 8.52.404 (authority 37-17-202, MCA; implementing 37-17-201, MCA), 8.52.405 (authority 37-17-202, MCA; implementing 37-17-202, MCA), 8.52.406 (authority 37-17-202, MCA; implementing 37-17-202, MCA), 8.52.601 (authority 37-17-202, MCA; implementing

37-17-104, MCA), 8.52.612 (authority 37-17-202, MCA; implementing 37-17-202, MCA), 8.52.614 (authority 37-17-202, MCA; implementing 37-17-311, MCA) and 8.52.615 (authority 37-17-202, MCA; implementing 37-17-311, MCA) in their entirety. The rules are located at pages 8-1409 through 8-1411, 8-1417, 8-1426 and 8-1427, Administrative Rules of Montana.

4. The proposed new rules will read as follows:

"I SCREENING PANEL (1) The board screening panel shall consist of three board members including two psychologist board members who have served longest on the board, and one public member who has served longest on the board. The chairman may reappoint screening panel members, or replace screening panel members as necessary at the chairman's discretion."

Auth: Sec. 37-17-202, MCA; IMP, Sec. 37-1-307, MCA

"II COMPLAINT PROCEDURE (1) A person, government or private entity may submit a written complaint to the board charging a licensee or license applicant with a violation of board statute or rules, and specifying grounds for the complaint.

(2) Complaints must be in writing, and shall be filed on the proper complaint form prescribed by the board.

(3) Upon receipt of the written complaint form, the board office shall log in the complaint and assign it a complaint number. The complaint shall then be sent to the licensee complained about for a written response. Upon receipt of the licensee's written response, both complaint and response shall be considered by the screening panel of the board for appropriate action including dismissal, investigation or a finding of reasonable cause of violation of a statute or rule. The board office shall notify both complainant and licensee of the determination made by the screening panel.

(4) If a reasonable cause violation determination is made by the screening panel, the Montana Administrative Procedure Act shall be followed for all disciplinary proceedings undertaken."

Auth: Sec. 37-17-202, MCA; IMP, Sec. 37-1-308, 37-1-309, MCA

REASON: The proposed amendments and adoption of new rules will implement changes mandated by passage of the Uniform Professional Licensing and Regulation Procedures Act (HB 518) by the 1995 Legislature. The reason for the proposed repeals is that the Uniform Professional Licensing and Regulation Procedures Act, referred to above, made these rules repetitive of statutory language, and therefore unnecessary.

5. Interested persons may submit their data, views or arguments concerning the proposed amendments, repeals and adoptions in writing to the Board of Psychologists, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by

facsimile to (406) 444-1667, to be received no later than 5:00 p.m., February 13, 1997.

6. If a person who is directly affected by the proposed amendments, repeals and adoptions wishes to present his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request along with any comments he has to the Board of Psychologists, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by facsimile to (406) 444-1667, to be received no later than 5:00 p.m., February 13, 1997.

7. If the Board receives requests for a public hearing on the proposed amendments, repeals and adoptions from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed amendments, repeals and adoptions from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 20 based on the 198 licensees in Montana.

BOARD OF PSYCHOLOGISTS
JEFF OLSGAARD, CHAIRMAN

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Carol Grell
CAROL GRELL, RULE REVIEWER

Certified to the Secretary of State, January 3, 1997.

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

In the matter of the proposed amendment, repeal and adoption of rules pertaining to respiratory care practitioners	NOTICE OF PROPOSED AMENDMENT, REPEAL AND ADOPTION OF RULES PERTAINING TO RESPIRATORY CARE PRACTITIONERS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On February 15, 1997, the Board of Respiratory Care Practitioners proposes to amend, repeal and adopt rules pertaining to the practice of respiratory care. These amendments, repeals and adoptions were originally proposed at page 1464, 1996 Montana Administrative Register, issue number 11. The adoption notice was inadvertently not filed within the six months allowed by the Montana Administrative Procedure Act. The proposed amendments, repeals and adoptions appear exactly the same as in the original notice.

2. The proposed amendment of ARM 8.59.402, 8.59.501, 8.59.502, 8.59.503, 8.59.505, 8.59.506, 8.59.602 and 8.59.702 will read as follows: (new matter underlined, deleted matter interlined)

"8.59.402 DEFINITIONS (1) will remain the same.

~~(2) The board defines "unqualified practice" as that term is set forth in 37-28-101, MCA, as follows:~~

~~(a) performing acts beyond the authorized scope of respiratory care for which the individual is licensed,~~

~~(b) assuming duties and responsibilities within the practice of respiratory care without adequate preparation or when competency has not been maintained,~~

~~(c) performing new respiratory care techniques or procedures without proper education and practice,~~

~~(d) assigning functions of licensed respiratory care practice to persons not qualified to perform such functions or delegating respiratory care responsibilities to others contrary to Title 37, chapter 28, MCA, and the regulations enacted pursuant thereto.~~

(2) For the purposes of 37-28-102(3)(a), "respiratory care" does not include the delivery, assembly, testing, simulated demonstration of the operation, or demonstration of safety and maintenance of respiratory therapy equipment by home medical equipment ("HME") personnel to a client's home, pursuant to the written prescription of a physician. "Respiratory care" does include any instruction to the client regarding clinical use of the equipment, or any monitoring, assessment or other evaluation of therapeutic effects.

(3) and (4) will remain the same."

Auth: Subsections (2) and (3) are advisory only but may be a correct interpretation of the statute, Sec. 37-28-104, MCA; IMP, Sec. 37-28-101, 37-28-102, MCA

REASON: The proposed amendments are necessary because the substance in (2)(a) through (d) regarding unqualified practice is more appropriately included under the rule setting forth unprofessional conduct, ARM 8.59.702. It is necessary, pursuant to 2-4-308, MCA, to note that (2) interprets the scope of practice of a respiratory care therapist to exclude performance of respiratory care by home medical equipment delivery personnel.

"8.59.501 APPLICATION FOR LICENSURE ~~(1) Any person seeking a license shall complete and submit to the board of respiratory care practitioners an application form which is provided by the board office, accompanied by the application fee and required documents.~~

~~(2) If the application is incomplete the application will be returned to the applicant.~~

~~(3) Each application shall be accompanied by:~~

~~(a) the required fee;~~

~~(b) a photocopy of the applicant's national board of respiratory care certificate which certifies successful completion of the entry level certification examination, or registry examination administered by the national board of respiratory care; or~~

~~(c) a completed request for verification of credentials form from the national board of respiratory care.~~

~~(4) Date of high school graduation, or GED or its equivalent.~~

~~(5) Name and location of school of respiratory care, in compliance with 37-28-202(1)(ii), MCA.~~

~~(6) Name and address of employer with dates of employment verified.~~

~~(7) The board may request such additional information or clarification of information provided in the application as it deems reasonably necessary.~~

~~(8) An applicant who has not worked in the profession of respiratory care for a period of three or more years must provide documentation of having acquired 20 continuing education units, as defined by rule, within 24 calendar months preceding application, or will re-test under an entry level certification examination or registry examination promulgated by the national board of respiratory care with the passing score set by the national board of respiratory care.~~

(1) An application for a license or temporary practice permit must be made on a form provided by the board and completed and signed by the applicant with the signature acknowledged before a notary public.

(2) The application must be typed or legibly written in ink, accompanied by the appropriate application and license fees, and contain sufficient evidence that the applicant possesses the qualifications set forth in Title 37, chapter 28, MCA, and rules promulgated thereunder.

(3) The board shall require the applicant to submit original or certified documents in support of the application. The board may permit such documents to be withdrawn upon substitution of a true copy.

(4) The board shall require the applicant to submit a recent, passport-type photograph of the applicant.

(5) The board shall review fully-completed applications for compliance with board law and rules and shall notify the applicant in writing of the results of the evaluation of the application. The board may request such additional information or clarification of information provided in the application as it deems reasonably necessary. Incomplete applications shall be returned to the applicant with a statement regarding incomplete portions.

(6) The applicant shall correct any deficiencies and re-submit the application. Failure to re-submit the application within 60 days shall be treated as a voluntary withdrawal of the application. After voluntary withdrawal, an applicant will be required to submit an entirely new application to begin the process again.

(7) All requests for reasonable accommodations under the Americans with Disabilities Act of 1990, at 42 U.S.C. sections 12101, et seq., must be made on forms provided by the board and submitted with the application prior to any application deadline set by the board.

(8) An applicant who presents from an unlicensed state must provide documentation of active employment. An applicant who has not worked in the profession of respiratory care for a period of up to three years must provide documentation of having acquired continuing education equivalent to that which would have been required had the applicant been a licensee in this state. An applicant who has not worked in the profession of respiratory care for over three years shall provide evidence that they have successfully passed the NBRC certification or registration examination within one year prior to application for licensure."

Auth: Sec. 37-28-104, MCA; IMP, Sec. 37-28-201, 37-28-202, MCA

REASON: The board proposes the amendments to generally set forth the application procedure and to make the rule uniform with other licensing boards in the bureau. Specific information that is needed to evaluate an applicant will be elicited on the forms proposed by the board. The requirement to submit sworn applications, certified copies of credentials, and photographs is intended to prevent fraud and to provide identification of licensure applicants and licensees. The rule as proposed makes reference to the board's commitment to ensuring access under the Americans with Disabilities Act. The substance of all current subsections are maintained in the proposed rule with minor changes in style.

"8.59.502 EXAMINATION (1) The board determines that a scaled score of 75 on a 0 to 99 scale of the certification examination for entry-level respiratory therapy practitioners examination, or the registry examination, utilized by the national board of respiratory care, shall be prescribed as the accepted testing requirement for licensing in this state.

(2) Except as provided in ARM 8.59.501(8), applicants for original licensure shall provide evidence that they have successfully passed the examination within one year prior to application for licensure."

Auth: Sec. 37-28-104, MCA; IMP, Sec. 37-28-104, 37-28-202, MCA

REASON: The proposed amendment is necessary to ensure the competency of the entry level practitioner who waits longer than one year to obtain licensure in this state and who does not possess a current license in another state. Despite having taken the licensing examination, after one year or longer without practicing, such persons need to re-establish competency by virtue of the licensing examination.

"8.59.503 TEMPORARY PRACTICE PERMIT ~~(1) Any person seeking a temporary permit shall complete and submit to the board of respiratory care practitioners an application form which is provided by the board office.~~

~~(2) If the application for temporary permit is not completed in accordance with the instructions, the application will be returned to the applicant.~~

~~(3) Each application shall be accompanied by:~~

~~(a) a check or money order in the amount required,~~

~~(b) a letter explaining the reason temporary permit is being sought, i.e.:~~

~~(i) awaiting documentation, reciprocity proof from other states; or~~

~~(ii) awaiting exam results from the NBRC; or~~

~~(iii)~~ (1) An applicant for a temporary practice permit ~~student respiratory care practitioner who either expects to~~ must have graduated ~~within 30 calendar days or has graduated~~ within the 6 12 months immediately prior to the date of application ~~for a temporary permit~~.

(4) will remain the same, but will be renumbered (2).

~~(5) The board may request such additional information or clarification of information provided in the application as it deems reasonably necessary.~~

~~(6)~~ (3) Temporary permit holders ~~and students~~ must practice only under clinical supervision."

Auth: Sec. 37-1-305, 37-28-104, MCA; IMP, Sec. 37-28-206, MCA

REASON: These proposed amendments are necessary because the substance of (1) through (3)(ii) and (5) regarding application requirements is now set forth under ARM 8.59.501. Other changes are necessary to be consistent with 37-1-305, MCA, which limits the availability of temporary practice permits to individuals who have met all licensure requirements other than passage of a licensing examination. Students who have not graduated, therefore, are not eligible for a temporary permit. Further, statutory interpretation of 37-28-102(5) and 37-28-201, MCA, indicate that student practitioners are exempt from licensure requirements. The requirement that students work under clinical supervision is set forth in the statute and need not be repeated by rule.

"8.59.505 PROCEDURES FOR RENEWAL ~~(1) Renewals shall be due annually on May 1.~~

~~(2) Renewal forms will be provided by the board.~~

~~(a)~~ (1) The board shall mail the renewal notice ~~will be mailed~~ approximately 6-8 weeks in advance of the renewal date ~~of renewal~~ to the licensee's address on file with the board. Failure to receive the renewal notice does not relieve the licensee from the obligation to renew in a timely manner.

~~(b) A second notice will be mailed by certified mail 60 days after the renewal date.~~

~~(c) The 90th day after the renewal date a certified letter will be mailed to lapsed licensees advising them that their licenses are expired because of a failure to renew.~~

~~(3) Documentation of having complied with the continuing education requirement is due at the time of renewal.~~

~~(4) A license to practice respiratory care lapses and is invalid 90 days after the expiration date printed on the face of the license, pursuant to section 37-28-203, MCA.~~

~~(5) An applicant whose license has expired may apply for relicensure between 91 days and 3 years following the renewal date by providing documents of having acquired 20 continuing education units, as defined by rule, within 24 calendar months preceding re-application and by paying the application fee of $60.00.~~

~~(6) After 3 years following the relicense date the applicant must reapply according to 37-1-141, MCA, and in addition will re-test under procedures promulgated by the national board of respiratory care with the passing score set by the national board of respiratory care.~~

(2) Licensees may renew their licenses for a period of three years from the expiration date of the license by submitting a renewal form, one renewal fee and one late fee, and documentation of the continuing education that would have been required had the license been renewed in a timely manner. A license that is not renewed within three years of the most recent renewal date automatically terminates. The terminated license may not be reinstated, and a new original license must be obtained by passing the certifying examination and paying the appropriate fees."

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

REASON: The amendment is necessary to simplify the procedure for when a license terminates and to promote consistency among licensing boards in the bureau. The underlying issue is the determination of the length of time a practitioner remains competent after the practitioner fails to renew and is therefore presumed to be out of the practice. The proposed amendment retains this length of time as three years but proposes to eliminate the 90-day deadlines as arbitrary, implements a fee for late renewal, and eliminates the requirement of additional continuing education credits beyond what is normally required in a license year.

"8.59.506 FEE SCHEDULE (1) will remain the same.

(a)	Application fee	$20~~.00~~
(b)	License fee	40~~.00~~
(c)	Renewal fee	40~~.00~~
(d)	Temporary permit	60~~.00~~
(e)	Late renewal fee	40
(f)	Inactive license fee	20"

Auth: Sec. 37-1-134, 37-28-104, MCA; IMP, Sec. 37-1-202, 37-28-203, MCA

REASON: This amendment is proposed to include a $40 late renewal fee and a $20 inactive license fee. These fees are necessary to make fees commensurate with program area costs.

"8.59.602 TRADITIONAL EDUCATION BY SPONSORED ORGANIZATIONS - CATEGORY I (1) will remain the same.

(a) Institutions approved by the joint review committee for respiratory therapy education, respiratory care accreditation board, or other successor accreditation organizations and courses approved by the American association for respiratory care, the Montana society for respiratory care, the American thoracic societies, the American college of cardiology, the American college of chest physicians, the American nurses association, the national society for cardiopulmonary technologists, the American lung association, the American lung association of Montana, the Montana heart association, the Montana and American medical association, the Montana hospital association, and respiratory care journal (American association of respiratory care sponsored).

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

(2) All units in this ~~section~~ category must be documented ~~on the renewal form~~ by evidence provided by the instructor or the sponsoring organization."

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

REASON: The proposed amendment to (1) is necessary to include other successor accreditation organizations. The board is proposing the amendment to (2) to include the instructor's signature requirement on the continuing education form.

"8.59.702 UNPROFESSIONAL CONDUCT ~~In order to implement the provisions of section 37-28-210, MCA,~~ In addition to 37-1-316, MCA, the board defines "unprofessional conduct" as follows:

~~(1) Unqualified practice, as defined by ARM 8.59.402.~~

~~(2) Abandoning, neglecting, or otherwise physically or emotionally abusing a patient requiring respiratory care.~~

~~(3)~~ (1) Intentionally~~~~ or negligently~~ ~~causing~~ physical, verbal, or mental ~~emotional injury or~~ abuse ~~to~~ of a client ~~or patient or sexual contact with a client or patient~~ in a clinical setting~~.~~;

~~(4)~~ (2) Failing to safeguard the ~~patient's~~ client's dignity ~~and~~ or right to privacy ~~in providing services.~~;

~~(5) Violating the confidentiality of information or knowledge concerning the patient.~~

~~(6) Inaccurately recording, falsifying or otherwise altering any record of a patient or health care provider.~~

~~(7) Exercising undue influence on the patient including the promotion or sale of services, goods, appliances or drugs in such a manner as to exploit the patient for financial gain of the respiratory care practitioner, or of a third party.~~

~~(8) Assisting any individual to violate any law or regulation guiding the actions of a respiratory care practitioner, including aiding and abetting any person not duly licensed as a respiratory care practitioner to represent himself as one or allowing another person to use one's respiratory care practitioner's license.~~

~~(9) Impersonating another licensed respiratory care practitioner or impersonating any applicant or acting as a proxy for any applicant in any respiratory care licensing examination.~~

~~(10) Advertising in any manner which is false, fraudulent, or misleading.~~

~~(11) Failure to cooperate with an investigation authorized by the board by refusing to respond to a complaint filed by a patient or refusing to comply with an administrative subpoena obtained by the board.~~

~~(12) Practicing respiratory care when unfit to perform procedures and make decisions in accordance with the license held because of physical, psychological or mental impediment.~~

~~(13) Practicing respiratory care when physical or mental ability to practice is impaired by alcohol or drugs.~~

(14) will remain the same, but will be renumbered (3).

~~(15) Possessing, obtaining, furnishing or administering prescription drugs to any person, including oneself, except as directed by a person authorized by law to prescribe drugs.~~

~~(16) Failure to disclose existence of a suspension, revocation, or restriction of the individual's license to practice respiratory care by competent authority in any state, federal or foreign jurisdiction, or failure to show cause why such suspension, revocation, or restriction should not be used to prohibit licensing in the state of Montana.~~

~~(17) Conviction of any misdemeanor or felony relating to the licensee's professional practice. For the purposes of this subsection, conviction includes, but is not limited to, those instances in which a plea of guilty or nolo contendere is the basis for conviction and all proceedings in which the sentence has been deferred or suspended. Nothing in this section denies rights guaranteed under section 37-1-201, MCA.~~

~~(18) Engaging in a clinical setting or in the course of treatment involving contact with the public while suffering from a contagious or infectious disease involving serious risk to public health without informing patient or exercising precautions to prevent transmission.~~

~~(19) Promotion for personal gain of any unnecessary or ineffective drug, device, treatment, procedure or service.~~

~~(20) Use of any other respiratory care practice that fails to conform to accepted standards and that reflects adversely on the health and welfare of the public.~~

(4) Falsifying, altering or making incorrect essential entries or failing to make essential entries of client records;

(5) Using a firm name, letterhead, publication, term, title, designation or document which states or implies an ability, relationship, or qualification that does not exist;

(6) Practicing the profession under a false name or name other than the name under which the license is held;

(7) Impersonating any licensee or representing oneself as a licensee for which one has no current license;

(8) Charging a client or a third-party payor for a service not performed;

(9) Submitting an account or charge for services that are false or misleading. This does not apply to charging for an unkept appointment;

(10) Filing a complaint with, or providing information to the board which the licensee knows or ought to know is false or misleading. This provision does not apply to any filing of complaint or providing information to the board when done in good faith;

(11) Violating, or attempting to violate, directly or indirectly, or assisting or abetting the violation of, or conspiring to violate any provision of Title 37, chapter 28, MCA, or rule promulgated thereunder, or any order of the board;

(12) Violating any state, federal, provincial, or tribal statute or administrative rule governing or affecting the professional conduct of any licensee;

(13) Being convicted of a misdemeanor or any felony involving the use, consumption, or self-administration of any dangerous drug, controlled substance, or alcoholic beverage, or any combination of such substances;

(14) Using any dangerous drug or controlled substance illegally while providing professional services;

(15) Acting in such a manner as to present a danger to public health or safety, or to any client including, but not limited to, incompetence, negligence, or malpractice;

(16) Maintaining an unsanitary or unsafe office or practicing under unsanitary or unsafe conditions;

(17) Performing services outside of the licensee's area of training, expertise, competence, or scope of practice or licensure;

(18) Failing to obtain an appropriate consultation or make an appropriate referral when the problem of the client is beyond the licensee's training, experience, or competence;

(19) Maintaining a relationship with a client that is likely to impair the licensee's professional judgment or increase the risk of client exploitation including providing services to employees, supervisees, close colleagues, or relatives;

(20) Exercising influence on or control over a client, including the promotion or the sale of services, goods, property, or drugs for the financial gain of the licensee or a third party;

(21) Promoting for personal gain any drug, device, treatment, procedure, product, or service which is unnecessary, ineffective, or unsafe;

(22) Charging a fee that is clearly excessive in relation to the service or product for which it is charged;

(23) Failing to render adequate supervision, management, training, or control of auxiliary staff or other persons, including licensee, practicing under the licensee's supervision or control according to generally-accepted standards of practice;

(24) Discontinuing professional services unless services have been completed, the client requests the discontinuation, alternative or replacement services are arranged, or the client is given reasonable opportunity to arrange alternative or replacement services;

(25) Delegating a professional responsibility to a person when the licensee knows, or has reason to know, that the person is not qualified by training, experience, license, or certification to perform the delegated task. A professional responsibility that may not be delegated, includes, but is not limited to, pulse oximetry;

(26) Accepting, directly or indirectly, employment from any person who is not licensed to practice the profession or occupation, or who is not licensed or authorized to operate a professional practice or business;

(27) Failing to cooperate with a board inspection or investigation in any material respect;

(28) Failing to report an incident of unsafe practice or unethical conduct of another licensee to the licensing authority;

(29) Failing to obtain informed consent from patient or patient's representative prior to providing any therapeutic, preventative, palliative, diagnostic, cosmetic, or other health-related care;

(30) Employing a nontraditional or experimental treatment or diagnostic process without informed consent from patient or patient's representative prior to such diagnostic procedure or treatment, or research, or which is inconsistent with the health or safety of the patient or public;

(31) Guaranteeing that a cure will result from the performance of medical services;

(32) Ordering, performing, or administering, without clinical justification, tests, studies, x-rays, treatments, or services;

(33) Possessing, using, prescribing for use, or distributing controlled substances or legend drugs in any way other than for legitimate or therapeutic purposes, diverting controlled substances or legend drugs, violating any drug law, or prescribing controlled substances for oneself;

(34) Prescribing, dispensing, or furnishing any prescription drug without a prior examination and a medical indication therefor;

(35) Failing to provide to a patient, patient's representative, or an authorized health care practitioner, upon a written request, the medical record or a copy of the medical record relating to the patient which is in the possession or under the control of the professional. Prior payment for professional services to which the records relate, other than photocopy charges, may not be required as a condition of making the records available;

(36) Engaging in sexual contact, sexual intrusion or sexual penetration, as defined in Title 45, chapter 2, MCA, with a client during a period of time in which a professional relationship exists; or

(37) Failing to account for funds received in connection with any services rendered or to be rendered."

Auth: Sec. 37-28-104, 37-1-319, MCA; IMP, Sec. 37-1-307, 37-28-210, MCA

REASON: The proposed amendments are necessary to eliminate unnecessary repetition of 37-1-316, MCA, as follows: current (8), (10), (12), (13), and (16) through (18), and a portion of (9). The substance of (1), (2), (6), (7), (11), (15), (19), and a portion of (9) will be maintained in the proposed new rule, but will incorporate uniform language that is being proposed for several licensing boards in the bureau. Additional unprofessional conduct sections are proposed to address unique situations for the profession.

3. The Board is proposing to repeal ARM 8.59.401, located at page 8-1633, Administrative Rules of Montana, (authority section 37-28-104, MCA; implementing section 2-4-201, MCA); ARM 8.59.504, located at page 8-1635.1, Administrative Rules of Montana, (authority section 37-28-104, MCA; implementing section 37-28-202, MCA); ARM 8.59.701, located at page 8-1635.13, Administrative Rules of Montana, (authority sections 37-1-101, 37-1-121, 37-1-131, MCA; implementing sections 37-1-101, 37-1-121, 37-1-131, MCA); ARM 8.59.703, located at page 8-1635.14, Administrative Rules of Montana, (authority section 37-28-104, MCA, implementing section 37-28-210, MCA). The reason for the proposed repeals is to delete language that unnecessarily repeats statutory language in 37-1-101, 37-1-121, 37-1-304, 37-1-308 and 37-1-314, MCA.

4. The proposed new rule will read as follows:

"I INACTIVE STATUS (1) A licensee who wishes to retain a license but who will not be practicing respiratory care may obtain inactive status by indicating this intention on the annual renewal form or by submission of an application and payment of the appropriate fee. An individual licensed on inactive status may not practice respiratory care during the period in which he or she remains on inactive status.

(2) An individual licensed on inactive status may convert his or her license to active status by submission of an appropriate application and payment of the renewal fee for the year in question. The application must contain evidence of one of the following:

(a) full-time practice of respiratory care in another state and completion of continuing education for each year of inactive status, substantially equivalent, in the opinion of the board, to that required under these rules; or

(b) completion of a minimum of 24 continuing education units within two years prior to application for reinstatement.

(3) In no case may an individual remain on inactive status for more than three years. Documentation of the continuing education that would have been submitted had the license been renewed in a timely manner shall be required."

Auth: Sec. 37-1-131, 37-1-141, 37-28-104, MCA; IMP, Sec. 37-1-319, MCA

REASON: The proposed amendments are necessary to inform licensees of the procedure for seeking inactive status and the reactivation of an inactive license.

5. Interested persons may submit their data, views or arguments concerning the proposed amendments, repeals and adoptions in writing to the Board of Respiratory Care Practitioners, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by facsimile to (406) 444-1667, to be received no later than 5:00 p.m., February 13, 1997.

6. If a person who is directly affected by the proposed amendments, repeals and adoptions wishes to present his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request along with any comments he has to the Board of Respiratory Care Practitioners, 111 N. Jackson, P.O. Box 200513, Helena, Montana 59620-0513, or by facsimile to (406) 444-1667, to be received no later than 5:00 p.m., February 13, 1997.

7. If the Board receives requests for a public hearing on the proposed amendments, repeals and adoptions from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed amendments, repeals and adoptions, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 40 based on the approximately 400 licensees in Montana.

BOARD OF RESPIRATORY CARE
PRACTITIONERS
RICH LUNDY, PRESIDENT

Carol Grell
CAROL GRELL
RULE REVIEWER

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, January 3, 1997.

BEFORE THE LOCAL GOVERNMENT ASSISTANCE DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed repeal and adoption of rules pertaining to the Federal Community Development Block Grant Programs	)))))	NOTICE OF PUBLIC HEARING ON THE REPEAL OF ARM 8.94.3705 AND 8.94.3706 AND ADOPTION OF NEW RULE I FOR THE FEDERAL COMMUNITY DEVELOPMENT BLOCK GRANT (CDBG) PROGRAM

TO: All Interested Persons:

1. On February 6, 1997, at 1:30 p.m., a public hearing will be held in the downstairs conference room at the Department of Commerce Building, 1424 Ninth Avenue, Helena, Montana, to consider the repeal and adoption of rules pertaining to the Federal Community Development Block Grant (CDBG) Programs.

2. The Division is proposing to repeal ARM 8.94.3705 (authority and implementing is 90-3-103, MCA); and 8.94.3706 (authority and implementing is 90-3-103, MCA). The text of these rules is located at pages 8-3419 and 8-3420, Administrative Rules of Montana. The rules are being proposed for repeal because all of the projects for these two years have been completed and closed out.

3. The proposed new rule will read as follows:

"I INCORPORATION BY REFERENCE OF RULES FOR ADMINISTERING THE 1997 CDBG PROGRAM (1) The department of commerce herein adopts and incorporates by this reference the Montana Community Development Block Grant Program 1997 Application Guidelines for Housing and Public Facilities Projects, the Montana Community Development Block Grant Program 1997 Application Guidelines for Economic Development Projects, and the Montana Community Development Block Grant Program 1997 Grant Administration Manual published by it as rules for the administration of the 1997 CDBG program.

(2) The rules incorporated by reference in (1) above, relate to the following:

(a) the policies governing the program,
(b) requirements for applicants,
(c) procedures for evaluating applications,
(d) procedures for local project start up,
(e) environmental review of project activities,
(f) procurement of goods and services,
(g) financial management,
(h) protection of civil rights,
(i) fair labor standards,
(j) acquisition of property and relocation of persons displaced thereby,
(k) administrative considerations specific to public facilities, housing rehabilitation and community revitalization and economic development projects,

(l) project audits,
(m) public relations, and
(n) project monitoring.

(3) Copies of the regulations adopted by reference in (1) of this rule may be obtained from Department of Commerce, Local Government Assistance Division, Capitol Station, Helena, Montana 59620."

Auth: Sec. 90-3-103, MCA; IMP, Sec. 90-3-103, MCA

REASON: This rule is necessary because the federal regulations governing the state's administration of the 1997 CDBG program and section 90-3-103, MCA, require the Department to adopt rules to implement the program.

4. Interested persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Local Government Assistance Division, Department of Commerce, Capitol Station, Helena, Montana 59620, to be received no later than 5:00 p.m., February 13, 1997.

5. The Department of Commerce will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you wish to request an accommodation, contact the Department no later than 5:00 p.m., January 23, 1997, to advise us of the nature of the accommodation that you need. Please contact Richard M. Weddle, Local Government Assistance Division, Capitol Station, Helena, Montana 59620; telephone (406) 444-2781, Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 444-2903. Persons with disabilities who need an alternative accessible format of this document in order to participate in this rule-making process should contact Richard M. Weddle.

6. Richard M. Weddle, attorney, has been designated to preside over and conduct this hearing.

LOCAL GOVERNMENT ASSISTANCE DIVISION

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

_____
CAROL GRELL, RULE REVIEWER

Certified to the Secretary of State, January 3, 1997.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the amendment of rule 18.8.511A concerning the Motor Carrier Services program	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Interested Persons.

1. On February 5, 1997, at 9 a.m. a public hearing will be held in the auditorium of the Montana Department of Transportation building, 2701 Prospect Avenue, Helena, Montana, to consider the amendment of the above-referenced rule.

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

18.8.511A WHEN FLAG VEHICLES ARE REQUIRED (1) remains the same.

(2) A flag vehicle is required at the front on all highways except interstate highways when the load or the vehicle exceeds 12.5 feet in width.

(3) through (6) remain the same.

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

3. The amendment of this rule is necessary to amend subsection (2) to ease the requirements of flagging overwidth loads for the motor carrier and agricultural implement industries and continue to provide safety for the traveling public. Required flashing lights and signs provide adequate warning to the traveling public and reduce traffic congestion by requiring fewer flag vehicles.

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 David A. Galt, Motor Carrier Services Division, P.O. Box 4639, Helena, MT 59604-4639, and must be received no later than February 14, 1997.

5. Melanie Symons has been designated to preside over and conduct the hearing.

MONTANA DEPARTMENT OF TRANSPORTATION

By: _____
MARVIN DYE, Director

_____
Lyle Manley, Rule Reviewer

Certified to the Secretary of State December 24, 1996.

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

In the matter of proposed new rules for the administration of the Yellowstone Controlled Groundwater Area	)	NOTICE OF PROPOSED ADOPTION
	)	NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On February 24, 1997, the Department of Natural Resources and Conservation proposes to adopt new Rule I through Rule XII establishing procedures for the Yellowstone Controlled Groundwater Area established by the United States National Park Service-Montana Compact.

2. The proposed rules provide as follows:

Rule I. PURPOSE AND SCOPE (1) The purpose of these rules and the goal of the department is to provide for the preservation of the hydrothermal system and features by allowing no impact to them within the reserved land of Yellowstone National Park. These rules are necessary to effectuate the Compact and to establish criteria which are necessary to implement Article IV of the Compact.

(2) All groundwater appropriations (wells or developed springs) with a priority date after January 31, 1994, are subject to the following rule provisions. A permit application must be filed with the department of natural resources and conservation if the development will be located within the boundaries of the Yellowstone Controlled Groundwater Area. A map of the boundaries is available from the department upon request.

AUTH: 85-20-401, MCA, Article IV
IMP: 85-20-401, MCA, Article IV.I.5.

Rule II. DEFINITIONS As used in these rules, the following definitions apply:

(1) "Application" means Form No. 600, Application for Beneficial Water Use Permit, submitted to the department by an applicant for a provisional permit to appropriate groundwater.

(2) "Appropriate" means to divert, impound or withdraw a quantity of water for beneficial use.

(3) "Appropriator" means a person who has a legal water right to divert, impound, or withdraw a quantity of water for beneficial use.

(4) "Beneficial use" means the use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, recreational, and stock uses.

(5) "Bozeman water resources regional office (BWRRO)" means the Montana water resources regional office of the department of natural resources and conservation, responsible

for processing all applications under the Yellowstone Controlled Groundwater Area, Article IV of the Compact.

(6) "Category 3 or 4 streams" means streams with special importance as defined in the Compact.

(7) "Change application" means a Form No. 606, Application to Change a Water Right filed pursuant to 85-2-402, MCA.

(8) "Compact" means the United States National Park Service-Montana Water Rights Compact, effective January 31, 1994 as provided in 85-20-401, et seq., MCA.

(9) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all the necessary parts of the form requiring the information have been filled in with the required information.

(10) "Credible information or evidence" means evidence sufficient to support a prima facie basis for the theory asserted.

(11) "Department" means the Montana department of natural resources and conservation in Helena and Bozeman, Montana provided for in Title 2, chapter 15, part 33, MCA.

(12) "Developed spring" means groundwater if some physical alteration of its natural state occurs at its point of discharge from the ground, such as simple excavation, cement encasement, or rock cribbing. An undeveloped spring is surface water if no development occurs at its point of discharge and the appropriation is made from the unenhanced natural surface flow.

(13) "Extension of time" means Form No. 607, Application for Extension of Time, that can be filed by a permittee with the BWRRO for the purpose of obtaining approval for additional time to complete the groundwater development.

(14) "Groundwater" means any water that is beneath the ground surface.

(15) "Hydrologically connected" for the purposes of Article IV of the Compact, means groundwater that is considered to be connected to the hydrothermal system within the reserved land of Yellowstone National Park based on scientific evidence according to the procedures in Article IV.

(16) "Hydrothermal feature" means a surface manifestation of a hydrothermal system, including but not limited to: hot springs, geysers, mud pots, and fumaroles.

(17) "Hydrothermal system" means the groundwater system, including cold water recharge, transmission and warm water discharge that is hydrologically connected to the hydrothermal features within the reserved land of Yellowstone National Park.

(18) "Meter" means a device provided by the department that must be installed and maintained by the permittee to record the volume of water appropriated and used by the permittee.

(19) "Montana bureau of mines and geology (MBM&G)" means the Montana bureau of mines and geology located at Butte, Montana.

(20) "National park service" means the U.S. department of the interior, national park service.

(21) "Notice of completion" means Form No. 617, Notice of Completion of Permitted Water Development, filed by permittee after completion of the groundwater well or spring and beneficial use of the water granted under a provisional permit.

(22) "Objection" means Form No. 611, Objection to Application that may be filed with the department by the national park service or other persons opposing a permit application.

(23) "Permit" means the provisional permit to appropriate groundwater as issued by the department.

(24) "Replacement well" means a new well to replace an old existing well with an established water right prior to January 31, 1994 or an issued provisional permit granted by the department after January 31, 1994 that is in the same source and the rate and volume have not increased.

(25) "Scientific evidence" means geologic, geophysical, geochemical and hydrologic information.

(26) "Specific conductance" means the unit of measurement of water to conduct an electrical current, expressed in mhos (pronounced mose) and reported in millionths of mhos or micromhos. Chemically pure water has a very low electrical conductance, meaning that it is a good insulator. Dissolved chemical constituents increase the conductance of water.

(27) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

(28) "Supplement" means a form provided by the BWRRO on which additional information is recorded concerning the development of a well or spring as required by Article IV.

(29) "Well" means any artificial opening or excavation in the ground, however made, by which groundwater is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(30) "Well log report" means Form No. 603, Well Log Report, that is completed by a licensed water well driller or contractor, detailing required information about the completed well.

(31) "Yellowstone Controlled Groundwater Area" means the land area around Yellowstone National Park that lies within the state of Montana and within the boundaries identified in Appendix 3 of the Compact or as modified pursuant to Article IV, section J.

AUTH: 85-20-401, MCA, Article IV
IMP: 85-20-401, MCA, Article IV.I.5.

Rule III. APPLICATION TYPES (1) Type "A" groundwater permit applications are for appropriations of 35 gpm or less, not to exceed 10 AF/yr. An applicant for an appropriation of water with a proposed use that does not require water with a temperature of 60°F or more, may drill the proposed well subject to state law and the terms of the Compact, but shall not put the water to beneficial use until receipt of a provisional permit. These applications follow an abbreviated

application and notice process.

(2) Type "B" groundwater permit applications are for appropriations of greater than 35 gpm or 10 AF/yr. An applicant for an appropriation of water with a proposed use that does not require water with a temperature of 60°F or more, may drill the proposed well subject to state law and the terms of the Compact, but shall not put the water to beneficial use until receipt of a permit. These applications must follow state law permit processing requirements in addition to certain Compact requirements.

AUTH: 85-20-401, MCA, Article IV
IMP: 85-20-401, MCA, Article IV.I.5.

Rule IV. APPLICATION FILING REQUIREMENTS (1) All permit applications must be filed with the department's Bozeman water resources regional office. Form No. 600, Application for Beneficial Water Use Permit must be used and the appropriate fee must accompany the application.

(2) All applications must include a statement of whether the proposed use requires water with a temperature of 60°F or more.

(3) A type "A" permit applicant is not required to prove the 85-2-311, MCA, permit issuance criteria.

(4) A type "B" permit applicant shall prove the criteria in 85-2-311, MCA, prior to issuance.

(5) If an application, its corresponding well log or other verification indicates water of 60°F or more, the application must follow additional requirements set out in Article IV, section G.2.c.

(6) If an application is located in a basin tributary to a Category 3 or 4 stream, the applicant must meet additional requirements set out in Article II, section B.2.b.

(7) Failure to meet the requirements in (2), (4), (5) or (6) renders the application defective and the application must be returned for completion according to state law.

AUTH: 85-20-401, MCA, Article IV
IMP: 85-20-401, MCA, Article IV.I.5.

Rule V. PROCESSING - NOTICE (1) The BWRRO shall review each type of permit application and determine if it is correct and complete.

(2) A copy of an "incorrect and incomplete" application must be returned to the applicant with a letter explaining the deficiencies. The BWRRO letter must contain a deadline for the applicant to correct the deficiencies and return the application copy.

(3) For type "A" permit applications no notice pursuant to 85-2-307, MCA is required. The BWRRO shall only send notice to the national park service by means of a letter within 30 days after receipt of a correct and complete permit application. Enclosed with each letter must be a copy of the correct and complete permit application, a well location map, and a copy of the drillers well log report and supplement. A copy of each BWRRO letter must be sent to the following:

(a) the applicant;
(b) the MBM&G in Butte, Montana along with a copy of the well log report form.
(4) For type "B" permit applications the BWRRO shall send notice as in (3) and a copy of the general notice provided under 85-2-307, MCA.
AUTH: 85-20-401, MCA, Article IV
IMP: 85-20-401, MCA, Article IV.I.5.

Rule VI. WELL LOG REPORT AND SUPPLEMENT (1) An applicant shall provide a well log report and supplement no later than 60 days after drilling the well.
(2) All applicants, when filing a well log report and supplement, shall provide the following information:
(a) 2½ acre land description (¼¼¼¼, Section, Township & Range);
(b) ground elevation at well head;
(c) well depth;
(d) groundwater level in well (static);
(e) flow rate or maximum pump rate;
(f) groundwater temperature measured at well head; and
(g) specific conductance of the well's groundwater.
(3) The Compact requires that with each groundwater development the specific conductance and temperature of the water encountered be measured and recorded on the well log report form, or supplement provided by the BWRRO.
(4) The temperature that must be reported on the well log report form is of the water produced when the well is completed. This should be taken at the end of an air test or pumping period and only after the temperature of the water has remained constant for several minutes. The water sample for specific conductance must be collected and recorded using the same procedure. The temperature of the water could increase during an air test if the air is hot and especially if the yield of the well is low. Therefore, if the water temperature is 60°F or more during an air test, it is recommended that the well be pumped to more accurately determine the water temperature.
(5) Water samples taken for the purpose of testing specific conductance should be placed in a clean plastic or glass container that holds at least 8 fluid ounces (250 ml). The BWRRO has sample bottles available and will provide the sample bottles to water well drillers who operate in the area on a regular basis. The sample bottle must be filled and capped with as little air in the container as possible. The container must be labeled with a name and address, department permit application number, date collected, and who collected the sample. The samples should be delivered to the BWRRO or make other arrangements to get the sample tested.
AUTH: 85-20-401, MCA, Article IV
IMP: 85-20-401, MCA, Article IV.I.5.

Rule VII. OBJECTIONS (1) Objections to type "A" permit applications must comply with the following procedures:

(a) The national park service may within 60 days from the date of the BWRRO's mailing of the well log report form, file an objection providing credible information that the proposed appropriation is of groundwater with characteristics to which the Compact restrictions concerning temperatures of 60° or more apply.

(b) No other objection may be filed by any person or entity.

(c) An objection must be filed on Form No. 611, Objection to Application. The objection must be received or postmarked on or before the 60 day time limit provided in the Compact to constitute a timely objection, along with the proper filing fee. An untimely objection may not be considered.

(d) Any national park service objection must set forth credible information that the appropriation is of groundwater with characteristics to which restrictions established pursuant to Article IV of the compact apply, or must provide credible information that the groundwater proposed to be appropriated is hydrologically connected to the hydrothermal system within the reserved land of Yellowstone National Park based on scientific evidence according to the procedures in Article IV of the Compact.

(2) Objections to type "B" permit applications must comply with the following procedures:

(a) Any objection filed by the national park service must be filed on Form No. 611, Objection to Application. The objection must be postmarked on or before the deadline date specified in the public notice or received within 60 days from the date of mailing a well log report to be timely. The objection must be accompanied by the proper filing fee. An untimely objection may not be considered.

(b) Any national park service objection must set forth credible information as described in (1)(d).

(c) When the national park service files a proper objection, the applicant shall provide credible information addressing the issue identified in the objection and the requirements in Article IV, section G.2.c.

AUTH: 85-20-401, MCA, Article IV
IMP: 85-20-401, MCA, Article IV.I.5.

Rule VIII. HEARINGS (1) All objections to permit applications, if correct and complete, timely filed, and unsettled between the parties, must proceed to a hearing following the department's administrative procedural rules for water right contested case hearings as provided in ARM 36.12.201 through 36.12.234.

AUTH: 85-20-401, MCA, Article IV
IMP: 85-20-401, MCA, Article IV.I.5.

Rule IX. PERMIT CONDITIONS (1) All permits issued by the department must contain at a minimum the following specific conditions:

(a) U.S. National Park Service - Montana Compact requires this right be issued in accordance with the Yellowstone

Controlled Groundwater Area provisions of the January 31, 1994, U.S. National Park Service - Montana Compact. The department may modify or revoke this permit if the provisions of the Compact are not met; the character of the groundwater produced changes such that a restriction applies pursuant to Article IV; or new restrictions are imposed as a result of Article IV, section J. Further modification may occur to limit the total withdrawal by day, month or year; to require a system of rotation of use within the controlled area; or adjust the total withdrawal from two or more wells in the area used by the same appropriator. The appropriator shall allow access to the well by the Montana bureau of mines and geology for water sampling as provided by the Compact. Further, this right is subject to the condition that the appropriator install an adequate metering device to allow the volume of water diverted to be recorded. The type and location of the meter must be determined by the department. The appropriator shall keep a written record of the volume of all waters diverted including the period of time, and shall submit said records by January 15 of each year and upon request to the Montana Bureau of Mines and Geology, Montana Tech, 1300 W. Park St., Butte, MT 59701-8997.

(b) The deadline to complete this permit and file a Notice of Completion of Permitted Water Development (Form No. 617) is December 31, (specify year). If you cannot meet the deadline, file Form No. 607, Application for Extension of Time, at least 30 days before the above deadline, otherwise the permit is void.

(c) This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

(d) Pursuant to 85-2-505, MCA, to prevent groundwater contamination, an operational back flow preventor must be installed and maintained by the appropriator if a chemical or fertilizer distribution system is connected to the well.

(e) This right is subject to 85-2-505, MCA, requiring a well to be constructed so it will not allow water to be wasted or contaminate other water supplies or sources, and a flowing well must be capped or equipped so the flow of the water may be stopped when not being put to beneficial use. The final completion of the well(s) must include an access port of at least .50 inch so the static level of the well may be accurately measured.

(f) This permit is subject to the authority of the department to revoke the permit in accordance with 85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with 85-2-115, MCA. Further, the United States may accompany the department for the purposes of confirming well log information pursuant to Article IV, section G.2.b.v. of the Compact.

(g) Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the department a Water Right Transfer Certificate, Form No. 608,

pursuant to 85-2-424, MCA.

(2) Additional permit conditions may be placed on the permit as agreed upon by the parties and approved by the department, as required by the department, the hearing examiner, or Article IV of the Compact.

AUTH: 85-20-401, MCA, Article IV
IMP: 85-20-401, MCA, Article IV.I.5.

Rule X. FILING OF NOTICE OF COMPLETION (1) Permittee shall file a notice of completion on Form No. 617 with the department pursuant to state law and Article IV of the Compact.

(2) A photograph or legible sketch of the actual flow meter installation must accompany Form No. 617.

AUTH: 85-20-401, MCA, Article IV
IMP: 85-20-401, MCA, Article IV.I.5.

Rule XI. METERS (1) Each groundwater use must be metered to record the total volume of water used.

(2) The department will provide the meter to be used at no cost to the permittee, but it is the responsibility of the permittee to properly install and maintain the meter. A meter will be provided after a provisional permit is issued.

(3) A permittee may upon prior approval from the department purchase, install, and maintain a different type of meter than provided by the department, but only if the meter records the total volume of water used.

(4) The following general guidelines should be followed to properly install a meter:

(a) install meter in a frost free location;

(b) place in a horizontal position for optimum performance;

(c) use leak tight connections;

(d) install shut-off valves before and after the meter to prevent excessive water loss during servicing;

(e) locate the meter in a supply line with a diameter as near to the meter size as possible;

(f) provide access to meter for reading and service;

(g) maintain a continuous electrical connection around the meter;

(h) locate meter after any sand traps in the system; and

(i) any hydrants or outside faucets should be located after the meter to allow for total water use recording.

(5) The department shall determine the size of the meter and connections depending on water use in gallons per minute (gpm) and size of supply line into and from the pressure tank.

(a) Commonly used meter sizes are:

(i) 5/8" meter will accept up to a 3/4" pipe and a 20 gpm intermittent flow or 10 gpm continuous flow;

(ii) 3/4" meter will accept up to a 1" pipe and a 30 gpm intermittent flow or 15 gpm continuous flow;

(iii) 1" meter will accept up to a 1¼" pipe and a 50 gpm intermittent flow or 25 gpm continuous flow; and

(iv) 1½" meter will accept up to a 2" pipe and 100 gpm intermittent flow or 50 gpm continuous flow.

(6) In cases where the meter is not installed to prevent freezing the meter, internal parts, or the base, the water meter must be removed, drained and later reinstalled. Gravity draining of the water lines is not sufficient to drain all the water from the bottom of the meter. Using air to blow out the water lines and meter, if done properly, may be sufficient to protect the meter from freezing.

(7) On or before January 15 of each year and upon request, the permittee shall report the annual metered water use to the MBM&G. The water use must be recorded on a form provided by the MBM&G.

AUTH: 85-20-401, MCA, Article IV
IMP: 85-20-401, MCA, Article IV.I.5.

Rule XII. REPLACEMENT WELLS (1) All groundwater appropriators shall file with the department a change application and obtain approval from the department prior to replacing an existing well or spring development.

(2) Approval to replace a well or spring development may only be to change the point of diversion, place of use, place of storage, or the use.

(3) Any well or spring development change must be from the same source and the rate and volume of water use may not increase.

(4) An increase in rate or volume of water used, period of appropriation or use, or change in source requires a new permit application and approval from the department in accordance with state law and the Compact provisions.

AUTH: 85-20-401, MCA, Article IV
IMP: 85-20-401, MCA, Article IV.I.5.

3. For the purposes of applying for water use permits for groundwater within Yellowstone National Park, Article IV of the United States National Park Service-Montana Compact requires the Department to adopt rules to carry out the purpose of the Yellowstone Controlled Groundwater Area.

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 number (406)444-6611.

5. Interested persons may submit their data, views or arguments concerning the proposed rules in writing to Teresa McLaughlin, Department of Natural Resources and Conservation, PO Box 201601, Helena, MT 59620-1601 and must be received no later than February 20, 1997.

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 submit a written request for a hearing along with any written comments he has to the above address and be received no later than February 20, 1997.

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 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 greater than 25 based on the population within the proposed controlled area.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

BY: _____
Arthur R. Clinch, Director

_____
Donald D. MacIntyre, Rule Reviewer

Certified to the Secretary of State January 2, 1997.

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

In the matter of the amendment of Rule 36.22.1423 pertaining to injection fees and well classification	))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On February 17, 1997, the Board of Oil and Gas Conservation of the Department of Natural Resources and Conservation proposes to amend Rule 36.22.1423, which pertains to injection fees and well classification.

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

36.22.1423 INJECTION FEE - WELL CLASSIFICATION Subsection (1) remains the same.

(2) ~~If administrative approval is requested, the board, or its authorized representative, may approve, modify, or reject any application submitted, stipulate the operating conditions, determine the appropriate test methods and test frequency, or limit the injection pressure and/or the quantity and quality of the fluids injected.~~ Wells will be classified as injection wells, under these regulations, if the well is: (a) actively used for injection; (b) has been completed for injection service but is idle or shut-in; (c) has been reported to EPA as an injection well; or (d) has been permitted by the board as an injection well, whether or not actually placed into injection service.

(3) A well will no longer be classified as an injection well when: (a) it has been permanently plugged in accordance with the board's rules; (b) it has been re-completed or converted to other approved uses, but not simply idled or shut-in; (c) the injection or disposal zone has been effectively isolated in a manner approved by the board; or (d) the work proposed under an approved permit was not done or could not be accomplished.

~~(3) Any operator or owner of an injection well may request an administrative review by the board, at its next regularly scheduled business meeting, or any modification, stipulation, or restriction placed on a permit by the board's staff. The injection well must be operated in compliance with the original permit conditions until the board's administrative review is complete.~~

AUTH: Sec. 82-11-111, MCA
IMP: Sec. 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127 and 82-11-137, MCA

3. Rule 36.22.1423 is being amended because it repeated Rule 36.22.1422(2) and (3). The original language is being restored.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to Jim Halvorson, Oil and Gas Conservation Division, 2535 St. John's Avenue, Billings, Montana 59102. Any comments must be received no later than February 13, 1997.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Jim Halvorson, Oil and Gas Conservation Division, 2535 St. John's Avenue, Billings, Montana 59102. A written request for hearing must be received no later than February 13, 1997.

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

BOARD OF OIL AND GAS CONSERVATION

THOMAS P. RICHMOND, ADMINISTRATOR

DONALD D. MacINTYRE, REVIEWER

Certified to the Secretary of State January 3, 1997.

BEFORE THE STATE ELECTRICAL BOARD
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment, repeal and adoption of rules pertaining to the electrical industry	))))	CORRECTED NOTICE OF AMENDMENT OF ARM 8.18.406

TO: All Interested Persons:

1. On August 8, 1996, the State Electrical Board published a notice of proposed amendment, repeal and adoption of rules pertaining to the electrical industry at page 2065, 1996 Montana Administrative Register, issue number 15. On November 21, 1996, the Board published an adoption notice amending, repealing and adopting the rules, exactly as proposed, at page 3039, 1996 Montana Administrative Register, issue number 22.

2. The Board's original notice indicated that ARM 8.18.406(5) would remain the same but be renumbered (4). The existing internal reference in (5) referring to "(4)(b)" should have been changed to "(3)(b)," since these subsections were renumbered. The Board also noted that (7) would remain the same, but should have noted that it would remain the same but be renumbered (6).

3. Replacement pages for this rule were submitted for the December 31, 1996 filing date.

STATE ELECTRICAL BOARD
CHARLES T. SWEET, CHAIRMAN

Carol Grell
CAROL GRELL
RULE REVIEWER

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, January 3, 1997.

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

In the matter of the amendment, repeal and adoption of rules pertaining to landscape architects	))))	NOTICE OF AMENDMENT, REPEAL AND ADOPTION OF RULES PERTAINING TO LANDSCAPE ARCHITECTS

TO: All Interested Persons:

1. On November 7, 1996, the Board of Landscape Architects published a notice of proposed amendment, repeal and adoption of rules pertaining to landscape architects at page 2944, 1996 Montana Administrative Register, issue number 21.

2. The board has amended ARM 8.24.404, 8.24.405, 8.24.406, 8.24.408 and 8.24.409 and repealed ARM 8.24.402, 8.24.407, 8.24.410, 8.24.411, 8.24.412, 8.24.413 exactly as proposed. The Board has amended ARM 8.24.403 and adopted new rule I (8.24.414) as proposed, but with the following changes: (authority and implementing sections remain the same as proposed)

8.24.403 APPLICATIONS (1) An application for license, ~~renewal,~~ examination or reinstatement must be made on a form provided by the board and completed and signed by the applicant, with the signature acknowledged before a notary public.

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

(4) The applicant shall submit a recent, passport-type photograph ~~of the applicant~~.

(5) through (7) will remain the same as proposed.

8.24.414 UNPROFESSIONAL CONDUCT (1) through (1)(e) will remain the same as proposed.

(f) ~~failure to report to the local building inspector action of a client taken contrary to the licensee's advice that violate applicable state or municipal building laws and regulations and materially and adversely affect the safety to the public of a finished project;~~ revealing information obtained in the course of their professional activities which they have been asked to maintain in confidence or which could adversely affect the interests of another. Unique exceptions to this rule would include situations where a landscape architect stops an act creating harm, a significant risk to the public health, safety and welfare which cannot otherwise be prevented, establishing claims or defenses on behalf of licensees or an order to comply with applicable law and regulations;

~~(g) failure to report to the board knowledge of a violation of the laws and rules of the board by another licensed landscape architect;~~

(h) and (i) will remain the same as proposed, but will be renumbered (g) and (h).

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

ARM 8.24.403

COMMENT NO. 1: Commentor states that the way (1) is worded gives the impression that, with each renewal, licensees are required to submit recent passport-type photographs of the licensee. Commentor believes that requiring a photograph each year is burdensome and that less frequent submission of notary seals and photos may be appropriate. Commentor cites to the expense of obtaining both notary seals and passport-type photos as being part of the burden imposed upon licensees by this requirement. The suggested correction provided by commentor is that the word "renewal" be taken out of (1).

RESPONSE: The Board agrees with commentor's suggestion and states that it was not the intent of the Board that in each instance where a licensee renews a license that a notary seal and photograph of the licensee is required. Therefore, the Board will strike the word "renewal" from (1) and will rely on ARM 8.24.406 to set forth the requirements for renewals.

NEW RULE I (8.24.414)

COMMENT NO. 2: Two commentors provided comment with regard to the proposed unprofessional conduct rule specifically (1)(f) and (g). The comments state in essence that (1)(f) and (g) are not consistent with the current Association of Landscape Architects Code and Guidelines for Professional Conduct. Commentors state that requiring professionals to police the implementation of projects by clients and fellow professionals goes beyond the role of the landscape architect as a design professional. The current ASLA Code and Guidelines for Professional Conduct contains provisions relative to client confidentiality which requires that members of the ASLA not reveal information obtained in the course of their activities which they are asked to maintain in confidence. Unique exceptions to this rule are to stop acts which create harm, significant risk to the public health, safety and welfare which cannot otherwise be prevented, establish claims or defenses on behalf of members or in order to comply with applicable laws or regulations. Moreover, commentors point out that in Mont. Code Ann. §37-1-316, revealing confidential information obtained as a result of a professional relationship is specific grounds for unprofessional conduct under the Uniform Licensing Act.

RESPONSE: The Board accepts the commentors suggestion and will delete subsections (1)(f) and (g) replacing with the wording as shown above.

COMMENT NO. 3: Commentor recommended the addition of a subsection (j) which would state "failure to adequately address the health, safety and welfare of the citizens of Montana."

RESPONSE: The Board rejects this comment choosing to rely on subsection (f) as reworded above, which encompasses the intent of the commentor's comment.

BOARD OF LANDSCAPE ARCHITECTS
JAMES FOLEY, CHAIRMAN

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Carol Grell
CAROL GRELL, RULE REVIEWER

Certified to the Secretary of State, January 3, 1997.

BEFORE THE BOARD OF PHYSICAL THERAPY EXAMINERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment, repeal and adoption of rules pertaining to the licensure of physical therapists, physical therapist assistants and foreign-trained physical therapists	))))))	NOTICE OF AMENDMENT, REPEAL AND ADOPTION OF RULES PERTAINING TO THE PRACTICE OF PHYSICAL THERAPY

TO: All Interested Persons:

1. On August 22, 1996, the Board of Physical Therapy Examiners published a notice of proposed amendment, repeal and adoption of rules pertaining to the practice of physical therapy at page 2245, 1996 Montana Administrative Register, issue number 16.

2. The Board has amended ARM 8.42.402, 8.42.403, 8.42.404, 8.42.405, 8.42.410, 8.42.411 and 8.42.412; repealed ARM 8.42.401, 8.42.413 and 8.42.701, and adopted new rules I (8.42.414) and II (8.42.415) exactly as proposed. The Board has amended ARM 8.42.406 and adopted new rule III (8.42.416) as proposed, but with the following changes:

8.42.406 LICENSURE OF OUT-OF-STATE APPLICANTS

(1) through (2)(a) will remain the same as proposed.

(b) copy of their certificate of graduation or official transcripts from a board-approved physical therapy school or physical therapist assistant curriculum;

(2) through (4) will remain the same as proposed.

8.42.416 CONTINUING EDUCATION (1) through (3) will remain the same as proposed.

(a) the activity must have significant intellectual or practical content. The activity must deal primarily with substantive physical therapy issues as contained in the physical therapy definition in Montana. In addition, the Board may accept continuing education activities from other professional groups or academic disciplines if the licensee demonstrates that the activity is substantially related to his or her role as a physical therapist or physical therapist assistant. A continuing education program is defined as a class, institute, lecture, conference, workshop, cassette, ~~or~~ videotape or correspondence course;

(b) and (c) will remain the same as proposed, but the ending commas will be changed to semicolons.

(d) excluded are programs that promote a company, individual, or product (hosted programs are not approved), and programs whose subject is practice economics except those programs specifically dealing with workers' compensation or public health;

(e) Presentation of a course will only be allowed for four hours of continuing education each two-year cycle. The course must be presented to a group including physical therapists and physical therapist assistants for continuing education credit. Licensees whose regular occupation is teaching of physical therapy related courses will not be allowed continuing education credit for these regular teaching duties.

(4) will remain the same as proposed.

(a) one continuing education credit shall be granted for each hour of participation in the continuing education activity excluding breaks and meals. Continuing education activities and courses taken after October 1, 1995, will be accepted by the board for the initial reporting period ~~April 30, 1998. Thereafter, a licensee must earn at least 20 continuing education credits within the 24 months prior to the renewal date in each even numbered year~~. A maximum of two credits by cassette or videotape will be allowed~~,~~;

(i) Commencing on or before April 30, 1998, licensees with even-numbered licenses shall submit at least 20 continuing education hours earned within the 24 months prior to the renewal date in each even-numbered year. Licensees in this category will not report continuing education on the odd-numbered years, but must renew their license each year.

(ii) Commencing on or before April 30, 1999, licensees with odd-numbered licenses shall submit at least 20 continuing education hours earned within the 24 months prior to the renewal date in each odd-numbered year. Licensees in this category will not report continuing education on the even-numbered years, but must renew their license each year.

(b) will remain the same as proposed, but the ending comma will be changed to a semicolon.

(c) all licensees must submit to the board, on the appropriate year's license renewal, a report summarizing their obtained continuing education credits. The board will review these reports and notify the licensee regarding his/her noncompliance by December 1. Licensees found to be noncompliant with the requirement will be asked to submit to the board for approval a plan to complete the continuing education requirements for licensure. Prior to the next ~~consecutive~~ reporting year's license renewal deadline, those licensees who were found to be in noncompliance will be formally reviewed to determine their eligibility for license renewal. Licensees who at this time have not complied with continuing education requirements will not be granted license renewal until they have fulfilled the board-approved plan to complete the requirements. Those not receiving notice from the board regarding their continuing education should assume satisfactory compliance. Notices will be considered properly mailed when addressed to the last known address on file in the board office. No continuing education used to complete delinquent continuing education plan requirements for licensure may be used to meet the continuing education requirements for the next continuing education reporting period~~,~~;

(d) and (e) will remain the same as proposed, but the ending commas will be changed to semicolons.
(f) will remain the same as proposed.

3. The Board accepted written comment through September 19, 1996, and has thoroughly considered all comments received. Those comments, and the Board's responses thereto, are as follows:

New Rule III (8.42.416)

COMMENT NO. 1: One comment was received stating new rule ARM 8.42.416, on submitting a report of continuing education (CE) credits should be done on a standardized form to decrease time in interpreting the reports and promote a uniform system.
RESPONSE: The Board noted the Department already sends out a standardized form for each of the licensing boards for reporting of CE credits with their renewal, and it is anticipated that this same standardized form would be used by the Board of Physical Therapy Examiners. This form will go out to all licensees with their renewal form, and be the required form for reporting CE credits.

COMMENT NO. 2: One comment was received stating new rule ARM 8.42.416(3)(c) on CE certificates of completion should also state that a licensee cannot receive CE credits if that person was the presenter of the course, because the intent of CE requirements is to promote continued competence, and not to allow someone to "qualify themself" for renewal of their license.
RESPONSE: The Board did not agree, and felt that preparation for and presenting a seminar is as valuable as taking a CE course, and does promote knowledge and skill in the profession. The Board will add a subsection to limit the CE credits allowed for presentation, as noted above, which states that presentation of course will be allowed for four hours of CE credit per two-year CE renewal cycle. The course must also have been presented to a group including physical therapists and/or physical therapist assistants for CE credit. Licensees whose regular occupation is teaching of PT related courses will not be allowed CE credit for those regular teaching duties.

COMMENT NO. 3: One comment was received stating ARM 8.42.416(4)(a) is not clear in stating that one CE credit shall be granted for each hour of participation, as some programs issue CEUs, which equal 10 contact hours of participation each. It is not clear whether this would equal ten CE credits.
RESPONSE: The Board noted that the term "CEU" is a term that is only used by certain providers, and which has not been adopted by the Board as its terminology. Instead, the clear language of the rule already states that one hour equals one credit.

COMMENT NO. 4: One comment was received stating new rule ARM 8.42.416(3)(a) defining a CE program does not address programs sponsored by APTA Specialty Sections in which a written lecture is received, and a test is filled out for CEUs. This type of program should be allowed, as they are offered by recognized experts in the physical therapy field, and approved by APTA.

RESPONSE: The Board noted that these courses are allowed and encouraged. The Board concurs with the comment, however, and will amend the rule to include language on "correspondence courses."

COMMENT NO. 5: One comment was received stating new rule ARM 8.42.416 on CE should state that any CE provider who has obtained a Prolog certificate from the APTA and the Montana Chapter should be pre-approved, as this will guarantee that the provider gives quality programs, and has well qualified instructors.

RESPONSE: The Board concurs, and will accept all programs with these certificates. The Board does not want to pre-approve courses on an individual basis, due to the lack of resources and staff available to undertake this task. However, since these courses will meet the definition of appropriate courses, as it is set forth in new rule ARM 8.42.416(3)(a), it will qualify for CE credit, but this does not need to be specified in the rule.

COMMENT NO. 6: One comment was received stating new rule ARM 8.42.416(3)(c) should not require a program or certificate of completion, as a purchased videotape or cassette from a recorded conference will not supply these certificates.

RESPONSE: The Board noted that those types of programs must be listed by the licensee, and the Board will allow the professional person's signature to attest to the fact that it was reviewed for CE hours.

COMMENT NO. 7: One comment was received stating new rule ARM 8.42.416(4)(b) should not waive the CE requirement for newly graduated therapists, as they may be interpreted to include newly licensed therapists who were licensed in another state. Instead, those persons who have not completed a two-year renewal cycle should apply for individual waivers.

RESPONSE: The Board did not agree, and noted that persons may be licensed at any time during a renewal cycle, and would not therefore have time to obtain sufficient credits before the renewal date. Therefore, an exemption for all persons who are newly licensed will be the most expeditious way to handle this, and be less burdensome than individual exemptions.

COMMENT NO. 8: One comment was received stating new rule ARM 8.42.416(4)(c) is not clear on its "appropriate year" for renewal language. Instead, 50% of the licensees should begin with 20 hours one year, and 50% in the next year.

RESPONSE: The Board concurred with the comment and will change the language as shown above to require even and odd year reporting depending on the licensee's license number.

COMMENT NO. 9: One comment was received stating new rule ARM 8.42.416 should include a date for receiving notice of noncompliance from the Board. The date should be September 1.

RESPONSE: The Board concurred with the comment, but will insert the date December 1, as this will allow for two board meetings after CE reports are due to review the reports.

COMMENT NO. 10: One comment was received stating new rule ARM 8.42.416(4)(f) should increase the percentage of audits from 5% to 10%, as 5% is not enough to ensure compliance.

RESPONSE: The Board did not agree, and noted that 5% of the licensees would be audited one year, and 5% the next, for a total of 10% of all licensees in any two-year renewal cycle. The Board does not have sufficient resources to audit beyond that amount.

ARM 8.42.403

COMMENT NO. 11: One comment was received stating ARM 8.42.403 on fees should not use the phrase "out of state applicants," as this sounds like the applicants are paying a different amount to get a license from another state.

RESPONSE: The Board noted that this rule simply lists that fee, and is not attempting to explain the process for people who are currently licensed in another state. The term "out-of-state applicants" is used consistently throughout these rules, however, and should not differ in this fee rule.

ARM 8.42.406

COMMENT NO. 12: One comment was received stating ARM 8.42.406 should use the word "official" in requiring transcripts, as the board wants formal information from the schools with the registrar's seal, and not a copy provided by the applicant.

RESPONSE: The Board concurs with the comment and will amend the rule as shown above.

ARM 8.42.410

COMMENT NO. 13: One comment was received stating ARM 8.42.410 should clarify the phrase "from a non-English speaking culture," as this is not a specific enough description in light of the wide variation of the use of the English language across the world.

RESPONSE: The Board noted that this section of the rule had not been proposed for change, and therefore a response is not necessary at this time.

COMMENT NO. 14: One comment was received stating the TOEFEL test required by ARM 8.20.410 is not adequate to determining competency for the practice of physical therapy. Instead, the Test of Written English (TWE) and Test of Spoken English (TSE) should be included in the requirements to demonstrate full competency in the use of the English language. Additionally, the passing score of 50% is not appropriate.

RESPONSE: The Board noted that this section of the rule had not been proposed for change, and therefore, a response is not necessary at this time. The Board will consider this type of rule change on a future rule notice, however.

BOARD OF PHYSICAL THERAPY
EXAMINERS
CHARLOTTE FANNON, PT, CHAIRMAN

Carol Grell

CAROL GRELL
RULE REVIEWER

BY: _____

ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, January 3, 1997.

BEFORE THE BUILDING CODES BUREAU
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to the Uniform and Model Codes, plumbing and electrical requirements, recreational vehicles, and boiler safety and adoption of a new rule pertaining to swimming pools	))))))	NOTICE OF AMENDMENT AND ADOPTION OF RULES ADMINISTERED BY THE BUILDING CODES BUREAU

TO: All Interested Persons:

1. On October 24, 1996, the Building Codes Bureau published a notice of public hearing on the proposed amendment and adoption of rules administered by the Building Codes Bureau, at page 2682, 1996 Montana Administrative Register, issue number 20. The public hearing was held on December 6, 1996, in Helena, Montana.

2. The Bureau has amended ARM 8.70.101, 8.70.105, 8.70.302, 8.70.303, 8.70.401, 8.70.402, 8.70.501 and 8.70.907, and adopted new rule I (8.70.1001) exactly as proposed.

3. No comments or testimony were received.

BUILDING CODES BUREAU
JAMES BROWN, BUREAU CHIEF

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Carol Grell
CAROL GRELL, RULE REVIEWER

Certified to the Secretary of State, January 3, 1997

BEFORE THE WEIGHTS AND MEASURES BUREAU
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of the rule establishing standards for petroleum products	))))	NOTICE OF AMENDMENT OF ARM 8.77.302 PERTAINING TO NIST HANDBOOK 130 - UNIFORM LAWS AND REGULATIONS

TO: All Interested Persons:

1. On November 7, 1996, the Weights and Measures Bureau published a notice of proposed amendment of the above-stated rule at page 2957, 1996 Montana Administrative Register, issue number 21.

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

3. No comments or testimony were received.

WEIGHTS AND MEASURES BUREAU

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Carol Grell
CAROL GRELL, RULE REVIEWER

Certified to the Secretary of State, January 3, 1997.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Adult Secondary Education	)	NOTICE OF AMENDMENT TO ARM 10.66.101 REQUIREMENTS Which Must be Met in Order to Receive High School Equivalency Diplomas

To: All Interested Persons

1. On November 7, 1996, the Board of Public Education published a notice of proposed amendments concerning ARM 10.66.101 Requirements Which Must be Met in Order to Receive High School Equivalency Diplomas at page 2959 of the 1996 Montana Administrative Register, Issue 21.

2. The Board has amended ARM 10.66.101 as proposed.

3. No Comments were received.

Wayne Buchanan, Executive Secretary
Board of Public Education

Certified to the Secretary of State on December 15, 1996.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the amendment of rule 18.12.501 of the Department of Transportation's aeronautical powers and duties.	))))	CORRECTED NOTICE OF AMENDMENT

TO: All Interested Persons.

1. On November 7, 1996, the Department of Transportation published notice at page 2983 of the Montana Administrative Register, Issue No. 21, of the amendment and repeal of rules concerning the Department's aeronautical powers and duties. Other rules from that notice not listed here are not affected by this corrected notice.

2. The notice of amendment and repeal listed an incorrect implementing statute for rule 18.12.501. Also, one implementing statute contained in the existing rule history is incorrect. The corrected citations read as follows:

18.12.501 PENALTIES (1) remains the same as amended. AUTH: Sec. 67-2-102, MCA; IMP: 67-1-105, ~~67-2-301, 67-3-202,~~ MCA

3. Replacement pages for the corrected notice of amendment was submitted to the Secretary of State on December 31, 1996.

MONTANA DEPARTMENT OF TRANSPORTATION

By: _____
MARVIN DYE, Director

_____
Lyle Manley, Rule Reviewer

Certified to the Secretary of State December 24, 1996.

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

In the matter of the 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 AMENDMENT, REPEAL, AND ADOPTION OF RULES PERTAINING TO MINIMUM STANDARDS AND GUIDELINES FOR THE STREAMBED AND LAND PRESERVATION ACT.

To: All Interested Persons.

1. On July 18, 1996, the Department of Natural Resources and Conservation published notice of the proposed amendment of rules 36.2.401 through 36.2.403, the repeal of rules 36.2.404 through 36.2.406, and the adoption of rules pertaining to the minimum standards and guidelines for the streambed and land preservation act, at page 1946 of the 1996 Montana Administrative Register, issue number 14. On September 5, 1996, the Department published a notice of public hearing at page 2366, 1996 Montana Administrative Register, issue number 17, because a request was received by an organization with more than 25 directly affected members.

2. Six public hearings were held, and public comments, written and oral, were received.

3. The Department has amended rule 36.2.401 as proposed and repealed rules 36.2.404, 36.2.405, and 36.2.406 as proposed. The Department has amended ARM 36.2.402, 36.2.403, and adopted new rules I through IV as proposed, but with the following changes:

36.2.402 DEFINITIONS As used in this sub-chapter and in Title 75, chapter 7, part 1, MCA, the following definitions apply:

Subsections (1) and (2) remain the same as proposed.

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

Subsection(4) remains the same as proposed.

(5) "Immediate banks" means the area ~~beginning at~~ above the mean high water mark ~~in the bed of~~ and directly adjacent to a stream ~~and extending to the point where an activity will not have an impact on the state of the stream~~ which when disturbed will physically alter or modify the state of a stream in contravention of 75-7-102, MCA.

(6) "Mean high water mark" means 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.

Subsections(7) and (8) remain the same as proposed.

~~(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.~~

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

Subsections (1)(a) through (2) remain the same as proposed.

RULE I (36.2.407) APPLICABILITY (1) The act and these rules apply to projects ~~that impact~~ on any natural 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 significant aquatic or and riparian attributes in need of protection or preservation ~~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.~~

RULE II (36.2.408) WRITTEN CONSENT REQUIRED - PROJECT REVIEW Subsection (1) remains the same as proposed.

(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, or deny 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.

Subsection (3) remains the same as proposed.

RULE III (36.2.409) EXCLUSION OF STREAMS (1) The district may exclude a stream, or portion thereof, upon a ~~finding~~ determination that the stream does not have significant aquatic and riparian attributes in need of protection or preservation under 75-7-102, MCA.

(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 twice with an interval of at least 14 days between the two publication dates. The first notice must be published at least 28 ~~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 significant aquatic and riparian attributes in need of protection or preservation, the district may exclude the stream, or portion thereof, from jurisdiction of this act by adoption of a district rule.

RULE IV (36.2.410) STANDARDS AND GUIDELINES Subsections (1) and (2) remain the same as proposed.

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

(4) Temporary structures used during construction must be designed to handle high flows reasonably 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.~~

Subsections (6) through (8) remain the same, but are renumbered (5) through (7).

~~(9)~~ (8) The district may:

Subsection (9)(a) remains the same as proposed, but is renumbered (8)(a).

~~(b) prohibit hazardous materials used in structures;~~

~~(c)~~ (b) ~~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; and

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

~~(e)~~ (c) require the applicant to ~~establish~~ provide project completion documentation, which may include photographs ~~monitoring programs and provide photographic documentation~~.

~~(10)~~ (9) Unless specifically authorized by the district, ~~the~~ the following projects ~~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 in a stream where it can erode or float into the stream;

(c) projects that permanently prevent ~~impede~~ fish migration;

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

~~(e) projects that restrict normal high flows;~~

~~(f)~~ (d) operation of construction equipment in a stream

~~without written consent of the supervisors~~; and

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

4. The Department has thoroughly considered comments and testimony received on the proposed rules. The following is a summary of comments received with the Department's responses to those comments:

36.2.402 DEFINITIONS

COMMENT: (3) Channel - a comment was received that this definition is unclear because the flow of water could change, depending upon the time of year.

RESPONSE: The Department agreed with the comment and eliminated the reference to water flow in the definition.

COMMENTS: (5) An immediate bank - several comments received stated that this definition is over broad, vague, confusing, goes beyond legislative intent. Some commented that the definition as written could include activities miles away from the stream, even if the impact to the stream is minor because the term does not include the word "significant." A few suggested that a specific number of feet from the high water mark be used to define immediate banks. Some suggested that the immediate banks encompass only up to the mean high water mark. Another comment was received to add the words "flood channels, braided channels, and riparian community" to the definition of immediate banks. Other comments were received in support of the definition.

RESPONSE: The Department agrees with the comments that the definition should more accurately reflect the intent of the act. The Department did not use a specific number of feet from a stream to define immediate banks, because it may not be applicable to the variable field conditions in Montana. The Department did not limit the definition to encompass only up to the mean high water mark, because to do so does not meet with the policy of the act which includes in 75-7-102, MCA, ". . . streams and the lands and property immediately adjacent to them . . ." The Department will address flood channels and braided channels in Rule I, Applicability. "Riparian community" was not included in the definition since these areas commonly would not be covered under the act.

COMMENT: (6) High water mark - comments were received opposing the new definition of mean high water mark because it was too open ended because of the term "not limited to." Some comments received suggested the old definition was better. One person who opposed the new definition, stated that it should be

consistent with current water laws. Another comment was received suggesting the Department reword the definition to read, "Mean high water mark means the line where water movement regularly removes permanent vegetation from the banks."

RESPONSE: The definition, as proposed, is consistent with the definition of ordinary high water mark found in 23-2-301(9), MCA, however, the term "not limited to" was deleted because the term is not necessary to give conservation districts the flexibility needed in determining the mean high water mark in the field. The Department acknowledges other comments, but made no further changes to the definition because as written, it reflects current conservation district interpretation of a mean high water mark.

COMMENT: (7) Natural Perennial Flowing Stream - Comments were received stating that the proposed amendment expands the jurisdiction of the act because now it can be interpreted to include intermittent streams - streams that flow only a few days a year - and therefore goes beyond legislative intent. Other comments were received to leave the definition as it is currently written.

RESPONSE: Natural perennial flowing streams in their existing state sometimes dry up because of diversion, impoundment, and extreme drought. Conservation districts currently administer the act on streams that would flow perennially if it were not for man-made causes. The amended definition would not extend the jurisdiction of conservation districts to intermittent streams, because the law applies only to streams that are perennial. No changes were made to the definition.

COMMENT: A few comments were received to add language that USGS maps will guide conservation districts in determining whether a stream is perennial.

RESPONSE: The Department acknowledged this comment, but many individual conservation districts currently do not use USGS maps to determine if a stream is perennial. The department will, however, provide this option to districts to adopt locally at their discretion.

COMMENT: (9) Stream - several comments opposed the addition of flood channels and braided channels to the definition of a stream because the terms expand the scope of the act and exceed legislative authority. The definition of stream in the administrative rules should match the definition in statute. Other comments received requested that the Department delete the second sentence of the definition because all perennial streams are important and conservation district officials do not have

the expertise necessary to make determinations of significant aquatic or riparian attributes. Concern was expressed that adding flood channels and braided channels would require individuals to get a permit for flood channels that have not had water in them for 100 years. Comments were received noting that the term "significant" was omitted prior to the words "aquatic or riparian attributes."

RESPONSE: The Department acknowledges that this definition is not necessary since the term is defined in statute and the definition was stricken. Flood channels and braided channels are currently covered under the act, and will be addressed in comments under Rule I, (36.2.407) Applicability. Responses pertaining to comments regarding the removal perennial-flowing streams from jurisdiction will be addressed in comments received on Rule III.

COMMENT: Comments were received that the term "project area" should not be deleted because the definition worked well in the past and is fine the way it is.

RESPONSE: The term project area was proposed to be deleted because it is not used anywhere in the act or the proposed rules and therefore is not necessary. The term "stream" defined in statute encompasses the stream, its bed and immediate banks, which is essentially the existing definition of project area. The definition was deleted as proposed.

COMMENT: (8) Plan of operation - A comment was received that routine maintenance requirements should not be subjected to uncertainties and possible costs associated with objections.

RESPONSE: By statute, if an applicant files a plan of operation for annual maintenance with a conservation district and it is approved, yearly written consent of the supervisors is not necessary. No change was made to this definition.

36.2.403 - STANDARD FORMS

COMMENT: Comments were received noting concern about conservation districts being able to add or create new forms because these should be consistent from district to district to make it easier for the public. At minimum, forms should be reviewed by DNRC for legalities.

RESPONSE: While the Department acknowledges that standard forms would provide consistency statewide, conservation districts have the authority to develop local rules that meet or exceed these minimum standards. As a result, additional information may be required of an applicant that is not addressed on the standard

forms. The Department clarified in (1) that the standard forms are available for use but are not required to be used.

RULE I (36.2.407) APPLICABILITY

COMMENTS: Subsection (1) - Several comments received expressed concern about the omission of the term "significant" before "aquatic or riparian attributes" as defined in statute. Without it, the definition exceeds statutory authority. Comments were received requesting that the last clause of the first sentence be deleted to remove the reference that streams can be removed from jurisdiction of the act because conservation districts do not have the expertise necessary to determine whether a stream has aquatic and riparian attributes in need of protection. Some felt that all perennial streams should be included, and that removing them from jurisdiction would conflict with water quality laws. Comments were received opposing subsection (1) because of its references to flood channels, overflow channels, or braided channels because these references expand the jurisdiction of the act.

RESPONSE: The 1995 legislature provided authority for conservation districts to remove perennial streams from jurisdiction of the act if the conservation district determines that the stream does not have significant aquatic or riparian attributes. Terms "significant" and "or preservation" were added to reflect statutory language. Flood channels, overflow channels and braided channels are important features of perennial-flowing streams and conservation districts currently administer the act on these channels. The Department changed the wording to state that the act applies to a stream and its channels, eliminating the reference to the type of channel covered by the act. The word "natural" was added before the term "perennial-flowing" to be consistent with the act.

COMMENTS: Subsection (2) comments were received supporting subsection (2) because it recognizes impacts to a perennial-flowing stream from other water sources. Several comments were received to remove the last clause in subsection (2) "unless activities on a ditch, intermittent stream, or wetland directly impact a perennial-flowing stream" because as worded it could be construed that activities in areas not covered in the act would now need written consent of the supervisors. Comments were received that if subsection (2) were used in its entirety, to add the words "significantly" or "cause significant adverse" before the word "impact." Other comments were that made these rules should only apply to a stream, its bed or immediate banks and in most cases the act should only apply to areas within the high water marks.

RESPONSE: The proposed amendment was not intended to expand the scope of the act or apply to ditches or intermittent streams. The subsection was deleted to avoid confusion.

RULE II (36.2.408) WRITTEN CONSENT REQUIRED - PROJECT REVIEW

COMMENT: Comments were received to reorder the words "deny, approve, or modify" to read "approve, modify, or deny" as written in statute. The other comment was to change the last word in (2) to "purpose."

RESPONSE: The Department reordered the terms as suggested, but did not change the last word in (2) to "purpose" because "project" is used in statute.

RULE III (36.2.409) EXCLUSION OF STREAMS

COMMENT: Several comments were received that Rule III should be stricken because conservation districts do not have the expertise, or funding necessary, to determine aquatic or riparian attributes in need of protection. One comment recommended adding language that this section does not change conservation districts' existing rules or exclusions of streams made prior to the adoption of these rules. Several comments were received expressing concern about the short 10-day notice period and that it should be extended to give citizens enough time to gather information about the stream being removed from jurisdiction. Several comments were received stating the conservation districts should not be required to have a public meeting in order to remove streams from jurisdiction of the act because it adds too much bureaucracy. Another comment received suggested that "directly affected parties" would be extremely difficult to define. Directly affected parties should be defined or eliminated. Comments were received concerning the omission of the word "significant" before the clause aquatic or riparian attributes.

RESPONSE: The Department proposed this rule in response to the 1995 legislative change to give conservation districts the authority to remove perennial-flowing streams. Prior to 1995, the act applied to all perennial-flowing streams, without exception so language was not added to incorporate existing exclusions. The Department agrees with comments concerning the short notice period and revised the public notice requirements in (2) to give a better opportunity for the public to be involved and to be consistent with conservation district law. This rule was not stricken, because to do so, would not provide the public a fair opportunity to have input into a decision to remove a stream from jurisdiction. The Department agreed that directly affected parties would be difficult to determine and

deleted this reference. The terms "significant" and "or preservation" have been added to reflect statutory language.

COMMENT: A few comments were received stating that a conservation district should not be required to have a public meeting when a project does not need a permit.

RESPONSE: The conservation district is not required to have a special public meeting when they determine a project does not need a permit. Rule III applies only when a conservation district proposes a rule to remove a perennial-flowing stream from jurisdiction that would otherwise be covered under the act. No changes were made as a result of this comment.

COMMENT: Several comments were made expressing concern that this rule provides no vehicle for public agencies to reverse "significance" determinations made by conservation districts. Some suggested that the Department of Environmental Quality or the Department of Fish, Wildlife and Parks be given the authority to review or approve an action by conservation districts to remove streams from jurisdiction of the act. Another suggestion was to add that conservation districts be required to notify the Department of Environmental Quality when proposing an action to remove a perennial-flowing stream from their jurisdiction so that department can provide water quality information to the district.

RESPONSE: The Department did not make the requested changes because there is no statutory authority for public agencies to reverse conservation district determinations of whether a stream has significant aquatic or riparian attributes. The Department of Fish, Wildlife and Parks, by statute, is a team member for purposes of this act and works closely with conservation districts. As such, the agency would be aware of their actions under this rule and could therefore provide advice or notify other appropriate agencies to provide input.

COMMENT: A comment requesting the following language be added to Rule III: "Perennial streams provide habitat for aquatic life other than game fish, and their riparian areas provide critical habitat for birds, amphibians and furbearers. In Montana's semiarid climate, stream corridors are our most productive and diverse communities, and their protection is critical even if they do no support a fishery. District supervisors should assume that all perennial streams have significant aquatic and riparian attributes worthy of protection under this act unless a stream can be shown to support no aquatic or riparian life."

RESPONSE: The act and these rules apply to all perennial-flowing streams, unless the district designates that it has no

significant aquatic and riparian attributes in need of protection or preservation under the act. The language requested was not included.

COMMENT: Several comments requested that criteria be developed to help conservation districts determine whether a stream had significant aquatic and riparian attributes in need of protection.

RESPONSE: The Department did not develop criteria as requested, but will consider doing so at a later date if it becomes necessary.

RULE IV (36.2.410) STANDARDS AND GUIDELINES

COMMENT: Several comments received opposed the adoption of this rule because commentors felt that it goes beyond legislative intent to minimize impacts. Other comments received expressed support for the proposed rule. Some felt that the adoption of this rule would increase conservation districts' workload and lawsuits. Some comments noted concern that this rule mandates a full review over minor repairs and day-to-day operations such as repairing fords and repairing or extending fences. Language should be added that exempts routine projects that have insignificant or lasting impacts on a stream.

RESPONSE: Rule IV does not exceed legislative intent, since by statute the Department, in consultation with the Montana Association of Conservation Districts, shall adopt and revise minimum standards and guidelines for the implementation of the act. Rule IV sets out minimum standards and guidelines for conservation districts that reflect conservation districts' current practices. The Department acknowledges support for the proposed rule, but changes were made in response to other comments to eliminate confusion about the intent of the rule. Those changes are outlined below. The proposed rule will not increase conservation district workload or increase lawsuits because Rule IV does not change conservation districts' current application of the act. No provisions were made to exclude minor activities from jurisdiction of the act as requested because all projects that physically alter or modify a stream that result in a change in its state are included under the act, including such projects as fords, if the activity fits the definition of a project.

COMMENT: One comment was received to eliminate subsection (2)(b). Another comment was received to amend subsection (2)(b) to read "future disturbance of the stream, including keeping structures out of floodplains and away from the meandering stream channel. Allowing construction in such areas means that

eventually efforts will be made to alter the stream so as to reduce flooding and meandering. Such alterations harm streams and downstream neighbors."

RESPONSE: Subsection (2) (b) is an important consideration for conservation districts when reviewing a project in order to minimize disturbance to streams as a result of projects. The comment to include references to keep structures out of the floodplain and away from a stream channel exceeds statutory authority to minimize impacts and was not adopted. No change was made to this rule.

COMMENTS: A few comments received requested that subsection (3) be changed to read "minimize" erosion rather than "prevent" erosion.

RESPONSE: The Department made the requested wording change.

COMMENT: A comment was received to delete the first sentence in (4). Another comment was received to add the word "reasonably" before "anticipated."

RESPONSE: The Department did not delete the first sentence, but added the word "reasonably" to the rule.

COMMENT: Comments were made regarding subsection (5) that this standard would not be achievable in projects like diversion boxes, gravel diversions, headgates, or projects that prevented natural streambed erosion, and therefore should be eliminated. Another comment suggested adding the word "normal" before "instream bed loads."

RESPONSE: This subsection was deleted.

COMMENT: A comment was received to reword subsection(6) to read "Channel alterations shall be designed to provide hydrologic stability." Another comment was to add "Channel alterations are to be discouraged. If allowed, they must be designed to retain original stream length, sinuosity, and gradient and otherwise reduce instability caused by the alterations."

RESPONSE: The Department did not incorporate either comment, because the existing rule adequately describes current conservation district practice.

COMMENT: One comment was received to amend subsection (7) to add the following language: "After project completion, streambank vegetation must be restored to its preproject state. Projects that permanently remove a significant amount of streambank vegetation must obtain the approval of the Department of Fish,

Wildlife and Parks and of the Department of Environmental Quality to ensure that water quality and fish habitat will not be significantly degraded. A significant amount of streambank vegetation is defined here as more than one acre, or more than 100 feet along the stream or the amount of whose removal will reduce undeveloped streambanks to less than 90 percent of the streambank for one mile on either side of the project."

RESPONSE: The Department did not incorporate the comment as requested because neither the Department of Fish, Wildlife and Parks nor the Department of Environmental Quality have the statutory authority under the act to approve projects. Additionally, subsection (3) states that disturbed sites must be reclaimed - this would include revegetation if the district determined it necessary.

COMMENT: A comment was received to amend subsection (8) to read "Projects intended to stabilize eroding streambanks must first determine the cause of the eroding streambank. If the erosion is part of the natural meandering of the stream, attempts to stabilize banks artificially often simply increase erosion upstream or downstream. Projects to stop natural stream meandering should be discouraged since they often harm downstream neighbors. Instead structures that were built in inappropriate areas should be moved. Where erosion is caused by altering the stream or disturbing its riparian area or watershed, the project should include efforts to correct these problems before resorting to instream cosmetic efforts such as armoring of streambanks with riprap, rock and other material. Before armoring is used, a DNRC hydrologist must determine that downstream neighbors will not be harmed and give approval."

RESPONSE: This comment was not incorporated because it goes beyond legislative intent and beyond the means of conservation districts to accomplish it. Further, the Department does not have the statutory authority to approve projects under the act.

COMMENT: A comment was received that the reference to hazardous materials referred to in (9)(b) could be construed to read materials that cause physical hazards in a stream.

RESPONSE: The Department agreed with the comment and deleted the subsection.

COMMENT: A few comments were made stating that subsection (9)(c) allows a conservation district to amend approval before completion of a project by requiring an engineering design. This should be changed to "prior to approval of a proposed project."

RESPONSE: The Department agreed with the comment and changed the subsection to reflect that conservation districts could require engineering designs prior to completion of project review rather than prior to project completion. This subsection is renumbered (8)(b).

COMMENT: A comment received suggested that (9)(d) goes beyond legislative intent because the policy of the act essentially is to prevent sedimentation and erosion, except as necessary. Also, the term "and after" could mean the water quality must be protected for "all circumstances forever." Another comment suggested the rule read "require the applicant to use materials and methods which are designed to protect water quality during construction." Another commentor asked how this standard relates to statutory and regulatory exemptions provided under the water quality laws and regulations.

RESPONSE: The Department deleted this subsection.

COMMENT: A comment was received that if monitoring is required under subsection (9)(e), that it should be reasonable. Others suggested that this goes beyond legislative authority and should be dropped. Another comment suggested subsection (9)(e) be amended to read "require the applicant to establish project monitoring using photographic documentation."

RESPONSE: The Department eliminated the reference to project monitoring to avoid the understanding that this could mean expensive water quality monitoring requirements and reworded the subsection to say that the district may require project completion documentation that could include photographs. This subsection is renumbered (8)(c).

COMMENT: General comments about subsection (10) were received stating that as written, the subsection exceeds statutory authority.

RESPONSE: Subsection (10) is renumbered (9)(a) through (9)(e). The rule was changed to specify that these sections apply only to projects and some of the standards were reworded to address comments received. The Department believes, as rewritten, the subsection meets legislative intent. Specific comments are addressed below.

COMMENT: A comment was received requesting that (10)(a) be changed to read "the placement of road fill material in a stream unless it is sufficiently coarse to avoid causing a significant siltation problem (requires approval of DEQ)."

RESPONSE: The Department acknowledges the comment, but did not

incorporate the requested language because the Department of Environmental Quality does not have the authority to approve projects under the act.

COMMENT: A comment was received that questioned how far from the stream conservation districts had jurisdiction. The comment expressed concern that as written material placed in the 100-year floodplain could be now covered by subsection (10)(b).

RESPONSE: This standard would include placement of debris or other material in a stream only if doing so constituted a project as defined in the act. The words "in a stream" were added to make this clearer.

COMMENT: Several comments expressed concern that now under (10)(c) ordinary projects like culverts or diversions would not be allowed because this standard prohibits projects that impede fish migration. Another comment stated that this standard gives too much power the Department of Fish, Wildlife and Parks.

RESPONSE: The purpose of this standard is to prohibit projects that completely and permanently block fish migration. Subsection (10)(c) was renumbered (9)(c) and changed to read that projects that permanently prevent fish migration are prohibited unless specifically authorized by a conservation district. The Department of Fish, Wildlife and Parks acts as an advisor to conservation districts as a team member under the act, and therefore, does not have authority to make decisions regarding the issuance of permits. This standard does not change this.

COMMENT: One comment received expressed concern that (10)(d), would now cover activities like snow-plowing under the act.

RESPONSE: The Department deleted this standard.

COMMENT: Several comments were received opposing subsection (10)(e), projects that restrict high flows, because common projects, such as irrigation diversions, are built to restrict flows.

RESPONSE: The Department deleted this standard.

COMMENT: One comment was received that subsection (10)(f) and (10)(g) are over broad since districts currently allow the use of construction equipment and gravel excavation in a stream. Another comment stated that these standards would conflict with the statutory exclusion of customary and historic maintenance and repairs of existing irrigation facilities.

RESPONSE: The Department changed the standard to read that if the activities are projects as defined under the act, they are prohibited unless specifically authorized by a conservation district. The operation of construction equipment or excavation of gravel in a stream is not currently excluded from conservation district review if these activities constitute a project. The standards were renumbered (9)(d) and (9)(e).

REPEAL OF RULE 36.2.404, REVIEW OF PROPOSED PROJECTS

COMMENT: One comment stated that the repeal of this rule is not necessary because the 1995 legislature did not make it invalid and therefore there is no justification for the repeal.

RESPONSE: The 1995 legislature incorporated the majority of rule 36.2.404 into statute, therefore making them redundant and unnecessary. With the repeal of this rule, proposed Rule IV is necessary to provide further guidance to conservation districts in their implementation of the act.

GENERAL COMMENTS

COMMENT: One comment received stated that this rule making action by the Department was improperly noticed because the Department did not state sufficient justification to amend, repeal, and adopted proposed rules.

RESPONSE: The Department has a responsibility to adopt and revise rules implementing the act in consultation with the Montana Association of Conservation Districts. The rules have not been amended since their adoption in 1976. The Montana Association of Conservation Districts appointed a committee of conservation district representatives to revise and update the rules. Amendments proposed are necessary to add definitions that were either missing in the original rules or to eliminate definitions that no longer made sense since the adoption of the rules in 1976. Some amendments to the definition section were proposed to make existing definitions as consistent as possible with other laws and more consistent with conservation districts' current implementation of the act.

Rule 36.2.404 was repealed because the 1995 legislature incorporated, with some modifications, the majority of this rule into statute and therefore it is no longer necessary. Rules 36.2.405 and 36.2.406 were repealed because they are not necessary and they are confusing since the act applies to all projects on a stream.

New rules were proposed to give more guidance to applicants and conservation districts for the implementation of the act. Rule

I is necessary to clarify where the act applies and to implement 1995 statute change. The rule clarifies the way conservation districts currently administer the act. Rule II is necessary to clarify conservation districts' review process and that written consent is required to carry out a project. Rule III is necessary to implement the 1995 legislative changes. It creates the requirement for public notice and public hearing so citizens may have an opportunity to provide information before a conservation district removes a perennial stream from jurisdiction of the act. Rule IV is necessary to replace review criteria found in the old 36.2.404. This section spells out minimum standards and guidelines for project construction and implementation that are necessary to minimize impacts to perennial streams. The rule incorporates existing conservation district practices and provides several standards for conservation districts to adopt at their discretion.

COMMENT: Several comments suggested the rules in their entirety be discarded and rewritten with the "regulated public" participating in the drafting of the rules.

RESPONSE: The Department has a statutory requirement to work with the Montana Association of Conservation Districts to adopt and revise rules setting minimum standards and guidelines implementing the streambed and land preservation act. To that end, the Department met numerous times with a conservation district committee and provided staff to develop the proposed rules. Conservation districts are comprised of elected officials who represent all segments of Montana's public. Public notice was provided in the Montana Administrative Rules Register, and six public hearings were conducted to gather comments. In addition, an informal meeting was held after the public hearings with conservation district representatives and some of the groups that opposed the rules to discuss concerns. All comments gathered during this process have been considered and appropriate changes have been made. The Department feels that opportunity for comments and suggestions for changes has been adequately provided.

COMMENT: Comments were received that the rules as written are confusing, open to interpretation, and would increase conservation district workload and increase lawsuits (these comments were not received from conservation districts).

RESPONSE: The rules are meant as a guideline for conservation districts administration of the act provide flexibility for supervisors to make decisions based upon the project site and the type of project being proposed. Rules that are too specific are not feasible due to the varying field conditions and project types being reviewed. The Department does not believe that the

adoption of these rules will result in an increased workload for conservation districts or an increase in lawsuits because the rules were written by conservation districts, based on their current implementation of the act.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

ARTHUR R. CLINCH, DIRECTOR

DONALD D. MacINTYRE, RULE REVIEWER

Certified to Secretary of State on January 3, 1997.

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
BEFORE THE BOARD OF WATER WELL CONTRACTORS

In the matter of the amendment and repeal of certain rules pertaining to water and monitoring well licensing and construction standards	)))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Interested Persons.

1. On August 8, 1996, the Board of Water Well Contractors published notice of a public hearing on the proposed amendment and repeal of certain rules pertaining to water and monitoring well licensing and construction standards at page 2120, of the 1996 Montana Administrative Register, issue number 15.

2. Written comments were received from Peter Klevberg, MWC Lic. No. 306, Great Falls, Montana; and Bill Uthman, DNRC, Helena, Montana. Comments were also received at the hearing by Jacqueline T. Lenmark, Attorney-at-law, Helena, Montana, representing the Montana Water Well Drillers Association; and Terry Campbell, DEQ, Helena, Montana.

3. The Board has amended rules 36.21.410, 36.21.415, 36.21.637, 36.21.641A, 36.21.647, 36.21.650, 36.21.653, 36.21.654, 36.21.661, 36.21.669A, 36.21.670, 36.21.702, 36.21.801, 36.21.805, 36.21.810 as proposed. The Board has repealed rules 36.21.401A, 36.21.501 through 36.21.506. The Board has amended rules 36.21.634, 36.21.635, 36.21.638, 36.21.645, 36.21.655, 36.21.656, 36.21.657, 36.21.658, 36.21.659, 36.21.660, 36.21.664, and 36.21.677 as proposed but with the following changes. In addition, the Board is amending 36.21.668 per comments received.

36.21.634 DEFINITIONS For purposes of this chapter, the following terms shall apply:

Subsections (1) through (27) remain the same.

(28) "Public water supply system" means a system for the provision of water for human consumption from any community well, water hauler for cisterns, water bottling plant, water dispenser or other water ~~that is designed to serve fifteen or more service connections or 25 or more persons at least 60 days out of the calendar year~~ supply that has at least fifteen service connections or that regularly serves at least 25 persons daily for a period of at least 60 days in a calendar year.

Subsections (29) through (39) remain the same.

AUTH: Sec. 37-43-202(3), MCA
IMP: Sec. 37-43-202(3), MCA

36.21.635 PUBLIC, COMMUNITY, NON-COMMUNITY PUBLIC, AND MULTI-FAMILY WATER SUPPLY WELLS Subsection (1) remains the same.

(2) The minimum construction standards set by the board of water well contractors in this sub-chapter (Title 36, chapter 21, sub-chapter 6) shall apply to all wells in Montana. However, for the above-stated wells, the department of ~~health and environmental sciences~~ environmental quality may adopt more specific or stringent standards.

AUTH: Sec. 37-43-202(3), MCA
IMP: Sec. 37-43-202(3), MCA

36.21.638 LOCATION OF WELLS (1) ~~Water wells shall not be located within:~~ At a minimum, unless contamination risk is evident, water wells shall not be located within:

Subsections (1)(a) through (2) remain the same.

AUTH: Sec. 37-43-202(3), MCA
IMP: Sec. 37-43-202(3), MCA

36.21.645 PLASTIC CASING Subsection (1) remains the same.

(a) by installing a larger size steel casing on the outside of the plastic casing with a minimum of 4 feet of overlap (figure 6-A at the end of this sub-chapter); or

Subsections (1)(b) through (5) remain the same.

AUTH: Sec. 37-43-202(3), MCA
IMP: Sec. 37-43-202(3), MCA

36.21.655 ~~DESIGN AND CONSTRUCTION -- SEALING OF~~ CONSOLIDATED FORMATIONS Subsections (1) and (2)(a) remain the same.

(i) Unperforated permanent casing shall be installed to extend to this same depth and the lower part of the casing shall be sealed into the rock formation with cement grout. The remainder of the annular space to land surface shall be filled with an appropriate sealing material (see Figure 2A at the end of this sub-chapter).

Subsection (3) remains the same.

AUTH: 37-43-202(3), MCA
IMP: 37-43-202(3), MCA

36.21.656 UNCONSOLIDATED FORMATIONS WITHOUT SIGNIFICANT CLAY BEDS Subsections (1) and (2) remain the same.

(3) The annular space between the upper drill hole and the well casing shall be kept at least one-half full with ~~bentonite slurry~~ appropriate sealing material throughout the driving of the permanent casing into the aquifer. After the permanent casing is set in its final position, the remaining annular space shall be filled to land surface with appropriate sealing material.

(4) If the oversized drill hole is extended to the same depth as the permanent casing, a suitable bridge shall be installed between the casing and the drill hole at a position directly above the production aquifer. The remaining annular space shall be completely filled and sealed to land surface with appropriate sealing material (see figure 3B at the end of this sub-chapter).

Subsections (5), (6), and (7) remain the same.

AUTH: Sec. 37-43-202(3), MCA
IMP: Sec. 37-43-202(3), MCA

36.21.657 UNCONSOLIDATED FORMATIONS WITH CLAY BEDS Subsection (1) remains the same.

(2) In drilled wells that penetrate an aquifer overlain by clay or other unconsolidated deposits such as sand and gravel in which significant (at least 6 feet thick) interbeds of clay are present, the well casing may be terminated in such

clay strata, provided that the casing be sealed in substantially the same manner as is required in the case of consolidated formations (see ARM 36.21.655 and figure 3C at the end of this sub-chapter).

AUTH: Sec. 37-43-202(3), MCA
IMP: Sec. 37-43-202(3), MCA

36.21.658 SPECIAL SEALING STANDARDS FOR FLOWING WELLS Subsections (1) and (2) remain the same.

(3) The well shall be completed with ~~seals,~~ packers~~, and neat cement~~ or appropriate sealing material ~~grout~~ that will eliminate leakage around the well casing.

Subsection (4) remains the same.

AUTH: Sec. 37-43-202(3), MCA
IMP: Sec. 37-43-202(3), MCA

36.21.659 SEALING OF ARTIFICIAL GRAVEL PACKED WELLS, PERMANENT SURFACE CASING NOT INSTALLED Subsection (1) remains the same.

(2) An upper drill hole having a diameter of at least 3 inches greater than the outside diameter of the production casing shall be drilled to extend from land surface into a clay or other formation of low permeability overlying the water-bearing zone. The annular space to this depth shall be filled with sealing material. If the clay or other impermeable formation is at or near land surface, the upper drill hole and unperforated production casing shall extend to a minimum depth of 18 feet below land surface, provided that the casing does not pass through the impermeable zone. A suitable bridge shall be installed in the annular space between the gravel pack and the sealing material. A gravel fill pipe may be installed for injecting gravel prior to sealing the top of the gravel pack (see ARM 36.21.656~~(3)(a)~~ for definition of a suitable bridge). Special care shall be taken to insure that the seal is watertight around the injection pipe. The injection pipe shall be capped with a watertight seal or plug (see figure 4A at the end of this sub-chapter).

AUTH: Sec. 37-43-202(3), MCA
IMP: Sec. 37-43-202(3), MCA

36.21.660 SEALING OF ARTIFICIAL GRAVEL PACKED WELLS, PERMANENT SURFACE CASING INSTALLED Subsection (1) remains the same.

(2) When permanent surface casing is installed, the well bore shall have a diameter of at least 3 inches greater than the surface casing for the introduction of sealing materials. A watertight seal shall be installed at the top of the gravel pack between the permanent surface and production casing. Sealing procedures and installation of gravel fill pipes are substantially the same as in ARM 36.21.659 above. If a temporary casing is used to maintain the oversized drill hole, the annular space to be sealed under conditions of ARM 36.21.659 and 36.21.660 shall be kept full with cement grout

or bentonite clay grout as the temporary casing is withdrawn (see figure 4B at the end of this sub-chapter).

Subsection (3) remains the same.

AUTH: Sec. 37-43-202(3), MCA
IMP: Sec. 37-43-202(3), MCA

36.21.664 TESTS FOR YIELD AND DRAWDOWN Subsections (1)(a) through (1)(d) remain the same.

(e) For public community, non-community public and multi-family water supply wells, the testing requirements set out in ~~the department of environmental quality rules~~ Title 17, chapters 30, 36, and 38, Administrative Rules of Montana shall apply ~~(Title 16, chapters 16 and 20, Administrative Rules of Montana). Copies may be obtained by contacting the department.~~

Subsections (2)(a) through (4) remain the same.

AUTH: Sec. 37-43-202(3), MCA
IMP: Sec. 37-43-202(3), MCA

36.21.668 WATER SAMPLES Subsections (1), (2), and (3) remain the same.

(4) Local health offices and the department of ~~health and~~ environmental ~~sciences~~ quality can be contacted for lists of certified labs who can perform these tests.

AUTH: Sec. 37-43-202(3), MCA
IMP: Sec. 37-43-202(3), MCA

36.21.677 METHOD OF PLACEMENT OF CONCRETE OR CEMENT GROUT

(1) Concrete or cement grout used as a sealing material in abandonment operations shall be introduced at the bottom of the well or required sealing interval, ~~and placed progressively to 6 feet from the top of the well. From 6 feet to 3 feet bentonite shall be added. The upper 3 feet shall be restored to its natural state.~~ All ~~such~~ cement sealing materials shall be placed ~~by the use of a grout pipe, tremie, or by dump bailer in order~~ to avoid segregation or dilution of the sealing materials.

AUTH: Sec. 37-43-202(3), MCA
IMP: Sec. 37-43-202(3), MCA

4. The Board has thoroughly considered all comments received. The comments and the Board's responses are as follows:

General Comments:

COMMENT: Commentors suggested that department names used in the rules are proper names and must be capitalized. It was also suggested using a broad generic department name designation to eliminate rule amendments of department names each time department reorganization occurs.

RESPONSE: ARM 1.2.519(1)(h)(ix) requires that official titles, titles of state, county, or municipal officers, agencies or institutions not be capitalized. Attempting to

utilize a broad generic department reference would not be acceptable since departments are given responsibility for administering specific statutes by the Montana legislature.

ARM 36.21.634 DEFINITIONS

COMMENT: Commentor suggested that Rule 36.21.634(28) should be amended so the definition of "public water supply system" specifically meets the definition in the Public Water Supply Act, 75-6-102, MCA, Definitions (revised by 1995 legislature).
RESPONSE: The Board accepts the new definition revised by the 1995 legislature and has amended the rule accordingly.

ARM 36.21.635 PUBLIC, COMMUNITY, NON-COMMUNITY PUBLIC, AND MULTI-FAMILY WATER SUPPLY WELLS

COMMENT: Commentor suggested that Rule 36.21.635(2) should be amended to change the Department of Health and Environmental Sciences to the Department of Environmental Quality, since the department name has been changed by legislative reorganization.
RESPONSE: The Board did not propose an amendment to sub-section (2) of this rule, however, it is an oversight that the department name was not changed. The Board accepts the name change comment and amends the rule accordingly.

ARM 36.21.636 DRILLING AGREEMENT and 36.21.647 TOP TERMINAL HEIGHT

COMMENT: Commentor suggested the DNRC amend Rules 36.21.636 and 36.21.647 to require the drilling agreement mandatory.
RESPONSE: Rule 36.21.647, which is specific to the well casing top terminal height has nothing to do with a drilling agreement, therefore it appears the comment is in error and presumably should be addressing rule 36.21.637, which references a drilling agreement. Rule 36.21.636 was not proposed to be amended by the Board. The Board recommends that a drilling agreement be used, however, it is the position of the Board that it has no authority to require a drilling agreement or interfere in business agreements between parties.

ARM 36.21.637 PROTECTION OF SITE

COMMENT: Commentor suggested that Rule 36.21.637(2) should be amended to require the well contractor to protect and cleanup the site during and after well construction.
RESPONSE: The Board has amended the word "shall" to "should" to make its authority position concerning a drilling agreement consistent throughout the Board rules. The Board should not require in all cases that the drill site be cleaned up and restored by the well contractor, since it is common practice that the well site is excavated by the landowner after the driller leaves the site to install the pitless adapter, water lines, and electrical wires, and in some cases a well house is

built over the well. This item is best left up to the landowner and well contractor to discuss and agree upon at each specific well site.

ARM 36.21.638 LOCATION OF WELLS

COMMENT: Commentor suggested that Rule 36.21.638(1) should allow Board discretion in cases where these locations of well standards do not apply.
RESPONSE: Rule 36.21.680 allows for the well contractor to request in advance a variance approval from the Board at any time it appears a specific rule cannot be met. However, the Board accepts the suggested amendment of subsection (1) and amends the rule accordingly.

ARM 36.21.641 INNER CASING

COMMENT: Commentor suggested that Rule 36.21.641A should not be amended to delete the reference to existing "sealing" standards.
RESPONSE: Rule 36.21.641A makes specific reference to the general casing sealing Rule 36.21.654, which as now amended in subsection (5) makes specific reference to special sealing techniques as required in Rules 36.21.655 through 36.21.660.

36.21.645 PLASTIC CASING

COMMENT: Commentor suggested that Rule 36.21.645 should retain the 8 feet of casing overlap and figure 6-A for the driller/contractor reference.
RESPONSE: Rule 36.21.645 is amended to require as a minimum, 4 feet of casing overlap, which is usually adequate to obtain a proper seal. This amendment also makes the rule consistent with the general sealing of casing Rule 36.21.654. The overlap can certainly be extended by the driller in those site specific cases when deemed necessary. The comment requesting the retention of figure 6-A for the reference of the driller/contractor has been reconsidered by the Board and the figure has been determined to be of greater assistance and direction to the driller/contractor if retained. The Board accepts the comment to retain figure 6-A and amends the rule accordingly.

ARM 36.21.650 CASING PERFORATIONS

COMMENT: Commentor suggested that Rule 36.21.650(3) should be amended to require the placement of perforations to prevent cascading water within the well casing when well is not pumping. Also Rule 36.21.650(4) is in conflict with the need to perforate multiple zones to achieve desired production rate.
RESPONSE: The suggested word changes to Rule 36.21.650(3) appear to be just another means of amending the rule with the same resultant meaning. The amendment to 36.21.650(4) is not

in conflict with the need or common practice to perforate multiple water bearing zones to achieve maximum well production. This rule does not prohibit the perforation of multiple water bearing zones as long as the perforations do not contribute to significant water quality degradation or the loss of water to the source.

ARM 36.21.653 WELL DEVELOPMENT PROCEDURES

COMMENT: Commentor suggested that Rule 36.21.653(1) should be amended further to alter the language to stipulate the water bearing formation shall determine development time and duration.
RESPONSE: The comment to further amend this rule simply weakens the rule by deleting who makes the determination to properly develop the well. The driller/contractor has the expertise on how best to develop the well. Further, the rule already provides that development is dependent on the type of water bearing formation encountered.

ARM 36.21.654 SEALING OF CASING - GENERAL

COMMENT: Commentor suggested that Rule 36.21.654(2) should not be amended and the addition of subsection (5) to this rule is unnecessary and should be deleted.
RESPONSE: The amendment to subsection (2) is to clarify the rule to mean the overlapping space between casings can be sealed in any manner that prevents interflow rather than specifically requiring the use of a packer or pressure grouting that is not practical in all cases. New subsection (5) is necessary to point out that Rules 36.21.655 through 36.21.660 provide suggested special sealing techniques as examples of alternative well sealing procedures for different types of formations to protect the aquifer.

ARM 36.21.655 DESIGN AND CONSTRUCTION - SEALING OF CONSOLIDATED FORMATIONS; 36.21.656 SEALING OF UNCONSOLIDATED FORMATIONS WITHOUT SIGNIFICANT CLAY BEDS; 36.21.659 SEALING OF ARTIFICIAL GRAVEL PACKED WELLS, PERMANENT SURFACE CASING NOT INSTALLED; and 36.21.660 SEALING OF ARTIFICIAL GRAVEL PACKED WELLS, PERMANENT SURFACE CASING INSTALLED

COMMENT: Commentors suggested that the new lead-in statements for Rules 36.21.655, 36.21.656, 36.21.657, 36.21.659, and 36.21.660 should not be added.
RESPONSE: New subsection (1) added to Rules 36.21.655, through 36.21.657, 36.21.659 and 36.21.660 is necessary to clarify the most acceptable sealing method for the specific formation and water bearing zones encountered. The specific site and situation may require, however, a different sealing method to best protect the resource and the driller/contractor has the expertise to make that decision at the site as deemed necessary. This simply gives the driller/contractor some options or flexibility in selecting the best method to

properly seal the well.

COMMENT NO. 2: Commentor suggested that Rule 36.21.655(1) should not be amended except the 5 feet embedment requirement should be changed to a 3 foot embedment. Leave the existing language in Rule 36.21.655(1)(b), except in subsection (2)(b), change the 5 foot casing embedment to 3 feet.
RESPONSE: The comment appears to be in error since the correct rule reference should be subsection (2)(a), and not subsection (1). The request to change the 5 foot casing embedment requirement to 3 feet has already been amended by the Board. Subsections (1)(b) and (2)(a) and (b) were deleted to remove redundant wording. In order to be consistent in retaining the figures as reference examples for driller/contractors the Board amends Rule 36.21.655(2)(a)(i) to retain figures 2A and 2B.

ARM 36.21.656 UNCONSOLIDATED FORMATIONS WITHOUT SIGNIFICANT CLAY BEDS

COMMENT: Commentor suggested that Rule 36.21.656 should be amended to change "bentonite slurry" to "sealing material" throughout the rule. Also retain the figures noted in the rule.
RESPONSE: The Board accepts the comment to change "bentonite slurry" to "appropriate sealing material" as defined in Rule 36.21.634 and retain the figures in this rule and will also amend Rule 36.21.657 to retain figure 3C.

ARM 36.21.658 SPECIAL SEALING STANDARDS FOR FLOWING WELLS

COMMENT NO. 1: Commentor suggested that Rule 36.21.658(1) should be amended to change the word "artesian" to "confined".
RESPONSE: The terms "artesian" and "confined" are quite often used synonymously in the water well drilling industry. An aquifer occurring under artesian conditions is called an "artesian aquifer". The term "confined aquifer" and "confined groundwater" are also used to describe the occurrence. It is unnecessary to amend the word "artesian" in this rule.

COMMENT NO. 2: Commentor suggested that the DNRC leave the term "artesian" in Rule 36.21.658(1), change the term "suitable grout" to "appropriate sealing material" in subsection (3), and revise subsection (4).
RESPONSE: The Board prefers to distinguish between "artesian" wells and "flowing" wells in this special sealing standard because nearly all wells have some pressure-induced artesian characteristics, whereas flowing artesian wells create a waste of water that is difficult to control and causes many complaints. Also it is impractical for a contractor to leave his equipment on the site during this period, but it is reasonable for him to prevent leakage and control the flow within a reasonable time frame or until the Board is satisfied. The Board accepts the comment to change the

proposed term "suitable grout" to "appropriate sealing material" and makes that amendment in subsection (3).

ARM 36.21.659 SEALING OF ARTIFICIAL GRAVEL PACKED WELLS, PERMANENT SURFACE CASING NOT INSTALLED; and 36.21.660 SEALING OF ARTIFICIAL GRAVEL PACKED WELLS, PERMANENT SURFACE CASING INSTALLED

COMMENT: Commentor suggested the DNRC does not amend Rules 36.21.659 or 36.21.660.
RESPONSE: In order to be consistent in retaining the figures notation the Board amends Rules 36.21.659(2) and 36.21.660(2).

ARM 36.21.661 TEMPORARY CAPPING

COMMENT: Commentor stated do not delete the reference to "sealing" standards in Rule 36.21.661(3).
RESPONSE: Subsection (3) of this rule as amended makes reference to Rule 36.21.654 which is the general casing sealing rule. Rule 36.21.654(5) as amended makes specific reference to Rules 36.21.655 through 36.21.660, therefore the "sealing" standards are properly and adequately referenced in the rules as amended.

ARM 36.21.664 TESTS FOR YIELD AND DRAWDOWN

COMMENT: Commentor suggested the DNRC amend Rule 36.21.664 to change the yield and drawdown test procedures to provide adequate testing and certification of test results to the well owner, remove reference to DEQ since it has no responsibility to provide documents to DNRC, and keep form of yield and drawdown testing on well log forms.
RESPONSE: The Board believes the proposed amendment to Rule 36.21.664 is reasonable and adequate to obtain the necessary data on well tests for yield and drawdown and no further amendments are necessary, except the Board agrees that DEQ should not be referenced in subsection (1)(e) and rule is amended accordingly.

ARM 36.21.668 WATER SAMPLES

COMMENT: Commentor suggested that Rule 36.21.668(4) be amended to correct the department name to Department of Environmental Quality.
RESPONSE: This rule was not proposed to be amended, however, this oversight to correct the department name is accepted and Subsection (4) will be amended accordingly.

ARM 36.21.669A TYPES OF WELLS REQUIRING ABANDONMENT

COMMENT: Commentor suggested that Rule 36.21.669A(1)(c) should be amended to clarify what this rule is referring to, and subsection (4) should be amended to change "should" to "shall".

RESPONSE: Subsection (1)(c) clearly refers to subsection (1) and wells that "require permanent abandonment." The Board believes the use of the term "should" in subsection (4) is adequate in this situation.

ARM 36.21.670 PERMANENT ABANDONMENT and 36.21.810 ABANDONMENT

COMMENT: Commentor suggested that Rules 36.21.670(3) and 36.21.810(4) be amended to change the wording "channel for movement" to "conduit for vertical movement".
RESPONSE: The suggested word change may slightly clarify the rule, however, the rule is reasonably written and understood as amended.

ARM 36.21.677 METHOD OF PLACEMENT OF CONCRETE OR CEMENT GROUT

COMMENT: Commentor suggested that Rule 36.21.677(1) should not be amended.
RESPONSE: The Board accepts the comment and amends this rule to retain most of the original language.

5. No other written or oral comments or testimony was received.

BOARD OF WATER WELL CONTRACTORS

By: _____
Wesley Lindsay, Chairman

_____
Donald D. MacIntyre
Rule Reviewer

Certified to the Secretary of State on January 3, 1997.

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

In the matter of the amendment of rules 46.12.1222 and 46.12.1241 pertaining to provider changes under the Medicaid nursing facility services program	))))))	NOTICE OF THE AMENDMENT OF RULES

TO: All Interested Persons

1. On November 21, 1996, the Department of Public Health and Human Services published notice of the proposed amendment of rules 46.12.1222 and 46.12.1241 pertaining to provider changes under the Medicaid nursing facility services program at page 3034 of the 1996 Montana Administrative Register, issue number 22.

2. The Department has amended rules 46.12.1222 and 46.12.1241 as proposed.

3. The Department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

COMMENT #1: The proposed changes to ARM 46.12.1241(3)(b)(i) should incorporate additional language as follows:

> ". . .influence or direct the actions or policies of the entity, except that the related party presumption shall not apply in the case of a person or entity owning less than 20% of a large corporation which:
>
> (A) has at least $50 million in undepreciated net tangible assets; and,
>
> (B) has publicly traded equity securities which are registered with the Securities and Exchange Commission.

It is not uncommon for large, publicly traded corporations to have one or more investors or investment groups owning more than 5% of its stock. These investors may have a purely financial interest in the corporation. The involvement of such minor interests in such large corporations does not indicate that there has been no legitimate change in ownership or control of the provider, and should not preclude a change in provider under the rule. Investments in large publicly traded corporations differ from investments in much smaller closely held entities, as Congress has recognized in distinguishing between the different classes of entities in passing the

Medicare-Medicaid Anti-Fraud and Abuse Amendments of October 1977 and the Medicaid Patient and Program Protection Act of 1987. The proposed language would not allow the manipulation the department seeks to prevent, because other logical and/or regulatory restrictions would prevent it.

RESPONSE: The department has considered this recommendation in conjunction with the intent of the proposed change in provider provisions of the rules. The department does not believe that the change proposed in the comment is necessary. We do not believe that these types of business transactions or situations involving such large corporations have occurred previously or are likely to occur with Montana nursing facility providers. The department will evaluate and monitor these types of business transactions, should they occur, and assess their impact on nursing facility operations in the state and the Medicaid program. The department will consider further modifications to the change in provider provisions of the rules if future transactions indicate changes are necessary.

Dawn Sliva
Rule Reviewer

Russell E. Cater, for
Director, Public Health and Human Services

Certified to the Secretary of State January 3, 1997.

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

In the Matter of Adoption of a Rule Pertaining to Recovery of Abandonment Costs in Electric Utility Least-Cost Resource Planning and Acquisition.	)))))	NOTICE OF ADOPTION OF RULE I

TO: All Interested Persons

1. On July 18, 1996 the Department of Public Service Regulation published notice of the proposed adoption of a rule pertaining to recovery of abandonment costs in electric utility least cost planning at pages 1962-1963, issue number 14 of the 1996 Montana Administrative Register.

2. The Commission has adopted the rule with the following change:

RULE I. 38.5.2016 RECOVERY OF ABANDONMENT COSTS

(1) The extent of electric utility recovery of abandonment costs as defined at ~~69-12-1203(1)~~ 69-3-1203(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

3. Montana-Dakota Utilities Co. (MDU), Montana Department of Environmental Quality (DEQ), and Montana Power Co. (MPC) have filed comments in opposition to the proposed rule. MDU argues that the proposed rule conflicts with §§ 69-3-1202 through 1206, MCA, Montana's Integrated Least-Cost Resource Planning and Acquisition Act (Act). DEQ argues that the proposal meets the letter of the Act, but not the intent. MDU argues that realistic evaluation of abandonment requires that cost recovery be known in advance. DEQ comments that the proposal makes abandonment a risky proposition, e.g., the "used and useful" element of ratemaking, may punish utilities for following accepted least-cost planning principles, and may discourage utilities from acting in a cost-effective way. MDU, DEQ, and MPC further argue that the rule does not identify "criteria" that would allow utilities to make prudent decisions. MDU, DEQ, and MPC also jointly submitted an alternative proposal. The Department (PSC) overrules the comments and rejects the alternative rule. The rule as proposed does not conflict with the Act. The Act is clear and unambiguous in regard to this matter and its intent must be determined only from its provisions. Pursuant to the Act an inclusion of abandonment costs in public utility rates is at the discretion of the PSC. §§ 69-12-1206(1) and (1)(c)(iii). The Act does not mandate recovery. The Act's only mandate is that the PSC adopt "rules establishing the criteria governing

the extent of recovery of abandonment costs." § 69-3-1206, MCA. In total accord with the Act rules governing the extent of recovery could be done in several different ways, the extremes being no recovery and guaranteed recovery. The PSC has determined that neither extreme is appropriate. The PSC determines that the best policy in the interests of the public, sound regulation, and least-cost planning, is that recovery of abandonment costs should be governed by the "usual ratemaking consideration of plant and expenses."

Nancy McCaffree, Chair

CERTIFIED TO THE SECRETARY OF STATE JANUARY 3, 1997.

Reviewed By Robin A. McHugh

VOLUME NO. 46 OPINION NO. 26

CONFLICT OF INTEREST - Simultaneous holding of office of county commissioner and position of county coordinator of disaster and emergency services;
COUNTY COMMISSIONERS - Simultaneous holding of office of county commissioner and position of county coordinator of disaster and emergency services;
COUNTY OFFICERS AND EMPLOYEES - Simultaneous holding of office of county commissioner and position of county coordinator of disaster and emergency services;
DISASTER AND EMERGENCY SERVICES - Simultaneous holding of office of county commissioner and position of county coordinator of disaster and emergency services;
MONTANA CODE ANNOTATED - Sections 7-5-2101, -2107, 10-3-201, -401 to -406;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 47 (1989), 42 Op. Att'y Gen. No. 94 (1988).

HELD: The office of county commissioner and the position of county coordinator of disaster and emergency services are incompatible, and one individual may not hold both simultaneously.

December 12, 1996

Mr. Loren Tucker
Madison County Attorney
P.O. Box 36
Virginia City, MT 59755

Dear Mr. Tucker:

You have requested my opinion on the following question:

> May an individual simultaneously hold the office of county commissioner and the position of county coordinator of disaster and emergency services?

The Board of County Commissioners of Madison County has appointed one of the county commissioners to the position of county coordinator of disaster and emergency services (DES). Because the Board has supervisory powers over the DES coordinator, you have asked whether one individual should serve both as county commissioner and as DES coordinator.

Your question requires consideration of the doctrine of incompatible public offices. This doctrine arises from the common law and addresses the public policy concerns inherent in the simultaneous holding of multiple public offices or positions. The doctrine was discussed in 43 Op. Att'y Gen. No. 47 (1989), and the analysis set forth in that opinion is useful in the resolution of your inquiry.

The common-law doctrine of incompatible public offices serves the purposes of (1) preventing multiple position-holding, so that offices and positions of public trust do not accumulate in a single person; (2) preventing individuals from deriving, directly or indirectly, any pecuniary benefit by virtue of their dual position-holding; (3) avoiding the inherent conflict which occurs when an employee's elected position has revisory power over the employee's superior in another position; and (4) ensuring, generally, that public officeholders and public employees discharge their duties with undivided loyalty. 43 Op. Att'y Gen. No. 47 at 165, citing Acevedo v. City of North Pole, 672 P.2d 130, 134 (Alaska 1983).

More than 80 years ago the Montana Supreme Court observed that offices are incompatible when one has power of removal over the other, when one is in any way subordinate to the other, when one has the power of supervision over the other, or when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both. State ex rel. Klick v. Wittmer, 50 Mont. 22, 144 P. 648 (1914). See also 63A Am. Jur. 2d Public Officers and Employees, §§ 65, 78 (1984); 67 C.J.S. Officers and Public Employees § 27(a) (1978).

The common-law doctrine of incompatibility extends to positions of public employment as well as public offices. See, e.g., Otradovec v. City of Green Bay, 347 N.W.2d 614 (Wis. Ct. App. 1984). As the Wyoming Supreme Court has stated, it is "inimical to the public interest for one in public employment to be both the employer and the employee or the supervisor and the supervised." Thomas v. Dremmel, 868 P.2d 263, 264 (Wyo. 1994), quoting Haskins v. State ex rel. Harrington, 516 P.2d 1171 (Wyo. 1973).

In 42 Op. Att'y Gen. No. 94 (1988), it was held that the offices of county commissioner and county high school trustee are incompatible and that one individual may not hold both offices simultaneously. That opinion, which also applied the doctrine of incompatible offices set forth in Klick, noted that crucial to its conclusion was the fact that under state law a county commissioner has certain supervisory powers over a school trustee.

The simultaneous holding of the office of county commissioner and the position of county DES coordinator presents a similar concern. The board of county commissioners has the general power to manage the business and concerns of the county and to employ such persons as it deems necessary to assist in the performance of its duties. Mont. Code Ann. §§ 7-5-2101, -2107. As required by Mont. Code Ann. § 10-3-201, the county commissioners must designate an agency responsible for emergency and disaster prevention and preparedness and coordination of response and recovery. The board, through its chairman, must notify the division of disaster and emergency services of the

state department of military affairs concerning the manner by which the county is providing or securing emergency and disaster planning and services, and it must identify the person responsible for obtaining the planning and services.

To meet its statutory obligation to provide for such planning and services, the Board of County Commissioners in Madison County employs a county DES coordinator, who assists the board in the preparation of a county-wide or interjurisdictional disaster and emergency plan and program and in the fulfillment of its other duties under Mont. Code Ann. § 10-3-401. The DES coordinator would also assist the board and its chairman with their duties in the event of a local emergency proclamation or disaster declaration under Mont. Code Ann. §§ 10-3-402 to -406.

The county DES coordinator in Madison County is a county employee appointed by the Board of County Commissioners and paid by the county. While the county may be reimbursed, in whole or in part, from state and federal sources for the expenses associated with the DES coordinator's position, the fact remains that the county commissioners have the power of supervision, revision, and removal over the position of DES coordinator. A county commissioner who is also employed as a county DES coordinator would be laboring under a conflict of duties between the office and the position. Based upon the rationale in Klick and the authorities discussed above, I conclude that the office of county commissioner and the position of county DES coordinator are incompatible and that one individual may not hold both simultaneously.

Because of this conclusion, I have not addressed the other concerns raised in your letter of inquiry. In addition, this opinion does not address the simultaneous holding of the position of DES coordinator and any office or position other than that of county commissioner; to determine whether other offices and positions may be incompatible, the appropriate analysis would have to be applied on a case-by-case basis.

THEREFORE, IT IS MY OPINION:

> The office of county commissioner and the position of county coordinator of disaster and emergency services are incompatible, and one individual may not hold both simultaneously.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/jp/dm

VOLUME NO. 46 OPINION NO. 27

COUNTIES - Allocation of Taylor Grazing Act funds to elementary school equalization account;
GRAZING DISTRICTS - Allocation of Taylor Grazing Act funds to elementary school equalization account;
SCHOOLS - Allocation of Taylor Grazing Act funds to elementary school equalization account;
STATUTES - Construction without reference to rules of construction when legislative intent clear;
MONTANA CODE ANNOTATED - Sections 17-3-221, -222, 20-9-331;
MONTANA LAWS OF 1971 - Chapter 5, section 262;
MONTANA LAWS OF 1949 - Chapter 96;
MONTANA LAWS OF 1939 - Chapter 102;
MONTANA LAWS OF 1937 - Chapter 55;
MONTANA LAWS OF 1935 - Chapter 146, section 2;
REVISED CODES OF MONTANA, 1947 - Section 79-205;
REVISED CODES OF MONTANA, 1935 - Political Code §§ 1201.1, 1202;
UNITED STATES CODE - 43 U.S.C. § 315i.

HELD: Pursuant to Mont. Code Ann. §§ 17-3-222 and 20-9-331(2)(a), a county must allocate its share of funds provided by the federal government to the State under the Taylor Grazing Act, 43 U.S.C. § 315i, 50 percent to the county general fund and 50 percent to the equalization account of the elementary BASE funding program.

December 31, 1996

Mr. Jon D. Noel, Director
Department of Commerce
P.O. Box 200501
Helena, MT 59620-0501

Dear Mr. Noel:

You have submitted a letter setting forth certain facts pertaining to the allocation of certain funds by Phillips County. I have chosen to consider your letter as a request for an opinion on the following question:

> Pursuant to Mont. Code Ann. §§ 17-3-222 and 20-9-331(2)(a), must a county allocate its share of funds provided by the federal government to the State under the Taylor Grazing Act, 43 U.S.C. § 315i, 50 percent to the county general fund and 50 percent to the equalization account of the elementary BASE funding program?

Your letter informs me that 50 of Montana's 56 counties contain federal lands leased for grazing purposes under the Taylor Grazing Act, 43 U.S.C. §§ 315 to 315o-1. The Taylor Grazing Act authorizes the federal government to lease federal lands for grazing purposes. 43 U.S.C. § 315i makes provision for the distribution of a portion of the fees collected to the States "to be expended as the State legislature of such State may prescribe for the benefit of the county or counties in which [the lands which produced the fees] are located." The percentage of the fees thus allocated varies from 12½ percent for grazing district lands to 50 percent for "vacant, unappropriated, and unreserved lands of the public domain . . . so situated as not to justify their inclusion in any grazing district." See 43 U.S.C. § 315m.

Your letter informs me that a routine audit of the financial records of Phillips County produced a notation by the auditor that the county appeared to be allocating its share of the Taylor Grazing Act funds in a manner inconsistent with state statutes by allocating 50 percent of the county's share to the county school transportation fund instead of to the elementary BASE equalization account, as required by Mont. Code Ann. § 20-9-331. In response, Phillips County indicated its belief that the state statutes which allocate the Taylor Grazing Act funds to the BASE equalization account are inconsistent with the requirements of 43 U.S.C. § 315i, and its intention to continue to allocate the funds in the manner it had previously.

Upon passage of the Taylor Grazing Act in 1934, the Montana legislature enacted the predecessors to Mont. Code Ann. §§ 17-3-221 and -222, which directed the allocation of Taylor Grazing Act funds received from the United States Treasury. Section 17-3-221 establishes the state treasurer as the custodian of Taylor Grazing Act funds, and section 17-3-222, as originally enacted, provided:

> It shall be the duty of the State Treasurer to properly apportion and allocate these moneys to the County Treasurers, who shall allocate and pay all such moneys as follows, Fifty percent (50%) to the county general fund and fifty percent (50%) to the common school fund of the county.

1935 Mont. Laws, ch. 146, § 2. The statute was amended in both the 1937 and 1939 legislative sessions to change the allocation formula by adding provisions allocating some portion of the Taylor Grazing Act funds to a county "special grazing fund." See 1939 Mont. Laws, ch. 102; 1937 Mont. Laws, ch. 55. In 1949, the statute was amended yet again to return to the originally enacted allocation formula which section 17-3-222 provides today: 50 percent to the county general fund and 50 percent to the "common school fund of the county." 1949 Mont. Laws, ch. 96.

It seems likely that the "common school fund" referred to in the statute as enacted in 1935 and as amended in 1949 is that provided in Rev. Codes Mont. 1935, Political Code § 1202, which required each county to levy a tax of between six and eight mills for the support of the "common schools," which fund was to be expended in addition to the state equalization aid then provided by Rev. Codes Mont. Political Code § 1201.1. This "common school fund" ceased to exist as a separate accounting entity in 1971 when the legislature enacted a massive revision of the laws relating to public schools. 1971 Mont. Laws, ch. 5. In this revision, the legislature created the "foundation program," which established the breakdown between state and locally raised funds to support the public schools. See Helena Elem. Sch. Dist. v. State, 236 Mont. 44, 47-48, 769 P.2d 684, 686 (1989) (describing the foundation program). Chapter 5, section 262 of the 1971 Montana Laws required the counties to levy a tax of 25 mills or less to support the counties' share of the foundation program. To the funds raised by this tax levy, the statute required in subsection (2) that the funds transferred to the State under the Taylor Grazing Act and allocated to "the common school fund" under what is now Mont. Code Ann. § 17-3-222 be added. This statute was codified as Mont. Code Ann. § 20-9-331 upon the recodification of the Montana statutes in 1978.

In 1993, the legislature again revised the funding of Montana public schools in response to a lengthy bout of litigation over the constitutionality of the foundation program. The 1993 amendments adopted the "base amount for school equity" or "BASE" system of school funding. Amendments to section 20-9-331 substituted the elementary BASE program for the foundation program but otherwise left the treatment of the Taylor Grazing Act monies unchanged, i.e., they were added to the amounts raised by local property taxes to support the local share of the cost of maintaining the public schools.

The above discussion is painted with a broad brush, and it is not intended to be an exhaustive exploration of the details of the system of public school funding as it has evolved in Montana. It does, however, illustrate the Montana legislature's response to the federal authorization that the State's share of Taylor Grazing Act funds be allocated by the legislature "for the benefit of the county or counties in which [the lands producing the grazing fees] are located." 43 U.S.C. § 315i.

Phillips County argues that the later-enacted provisions of section 20-9-331 conflict with the requirement in section 17-3-222 that 50 percent of the Taylor Grazing Act funds be deposited in the "common school fund" of the county. The County contends that under the Montana Supreme Court's decision in State ex rel. Woodahl v. Straub, 164 Mont. 141, 520 P.2d 776 (1974), the BASE funding program is a state program, and the fund or funds which are thereby established for the support of

the schools are not a "common school fund of the county" as contemplated by section 17-3-222.

This argument is unpersuasive because it ignores both the history of the Montana legislature's treatment of Taylor Grazing Act monies and the language of 43 U.S.C. § 315i. As noted above, the "common school fund" which was in existence when the predecessor to section 17-3-222 was enacted ceased to exist in 1971, when the legislature fundamentally changed the manner in which schools were funded. As part of that change, the legislature specifically altered the allocation of Taylor Grazing Act funds by directing "the portion of the federal Taylor Grazing Act funds distributed to a county and designated for the common school fund under the provisions of Rev. Codes Mont. 1947 § 79-205 (now Mont. Code Ann. § 17-3-222)" into the school foundation equalization account. 1971 Mont. Laws, ch. 5, § 262(2). In reconciling these two statutes, I find the legislature's intention clear. The later-enacted statute changed the allocation previously made, directing into the foundation program equalization account the portion of the Taylor Grazing Act funds which had previously been designated for the "common school fund of the county." In my opinion, the statutes do not conflict, since the clear intention of section 20-9-331 is to override the previously enacted allocation.

Phillips County argues that section 17-3-222 is the more specific statute and it should control under the canon of statutory construction that the specific statute supersedes the more general one. See, e.g., Mosely v. Lake County Justice Court, 256 Mont. 206, 845 P.2d 732 (1993). I find this rule inapplicable here for two reasons. First, it is a rule of statutory construction, and as such it comes into play only when the language used by the legislature is so unclear that the legislature's intention cannot be discerned from the terms of the statute. Montana Dep't of Rev. v. Dray, 266 Mont. 89, 879 P.2d 651 (1993). For the reasons expressed above, I do not find the statutes ambiguous. Rather, the legislature's intention to change the allocation is clear from the face of section 20-9-331. There is therefore no need to resort to rules of construction here. Second, even if the statutes were ambiguous, I find that neither is the more specific. Both refer directly to the allocation of the county's share of funds received by the State under the Taylor Grazing Act, the later act by specific reference to those funds previously allocated under what is now section 17-3-222. Since they are equally specific in this regard, the rule argued for by the county would be of no help even if it were applicable.

The county further points to the existence of at least two funds that are solely for the benefit of the county schools--a retirement fund and the county transportation fund. The apparent point of this observation is that even though the specific "common school fund of the county" referred to in section 17-3-222 as it was enacted in 1935 may have ceased to exist, there

remain County school funds that could be considered to be "common school funds" under the language of section 17-3-222. But this argument overlooks the clear effect of the later enactment of section 20-9-331. As noted above, the later statute clearly states the legislature's intent that the Taylor Grazing Act funds previously designated for the "common school fund" under section 17-3-222 were henceforth to be deposited in the foundation program, and later the elementary BASE program, account. Even if "common school funds" still exist, the legislature has made plain its intention that they no longer receive the allocation of these funds.

The only remaining question is whether, by directing the Taylor Grazing Act funds into what is now the elementary BASE equalization account, the legislature has violated the federal requirement that the funds be allocated by the state legislature "for the benefit of the county or counties in which [the lands producing the fees] are located." I have found no case law interpreting this language. Its intent seems to be to confer broad discretion on the state legislatures in determining how Taylor Grazing Act funds are to be allocated. This is apparent from the language "to be expended *as the State legislature may prescribe* for the benefit of the county." (Emphasis added.) Even assuming, arguendo, as the Montana Supreme Court found in Straub with reference to the foundation program, that the local property tax supporting the BASE equalization program is a "state tax" rather than a "local tax," this fact would beg the question. The issue is not whether the property tax supporting the equalization account is a state tax or a county tax, but rather whether the legislature could have concluded that the deposit of the funds into that account produces the required "benefit" for the county.

Section 20-9-331 provides that the Taylor Grazing Act funds, together with other funds generated under state and federal law, are in effect credited to the support of the elementary schools in the county before the calculation is made as to how much of the 33-mill BASE tax levy is remitted to the State for equalization purposes. Under 43 U.S.C. § 315i, the only limitation on the legislature's expenditure of the Taylor Grazing Act funds is that they be expended "for the benefit of" the county in which the fees were raised. The legislature's judgment in this case that this allocation of funds benefits the county in which the grazing fees were generated is not an unreasonable one. Because I am convinced that the legislature's discretion in assessing the benefits to the county is broad, I conclude that this allocation satisfies the requirements of 43 U.S.C. § 315i.

THEREFORE, IT IS MY OPINION:

> Pursuant to Mont. Code Ann. §§ 17-3-222 and 20-9-331(2)(a), a county must allocate its share of funds provided by the federal government to the State under the Taylor Grazing

Act, 43 U.S.C. § 315i, 50 percent to the county general fund and 50 percent to the equalization account of the elementary BASE funding program.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/cdt/dm

BEFORE THE BOARD OF NURSING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the petition for declaratory ruling on the administration of regional analgesia through epidural catheter by non-anesthetist registered nurses	)))))	DECLARATORY RULING

Introduction

1. On July 27, 1995, the Board of Nursing received a Petition for Declaratory Ruling from various registered nurses at St. Peter's Community Hospital, 2475 Broadway, Helena, Montana.

2. On January 2, 1996, the Board of Nursing published a Notice of Petition for Declaratory Ruling in the 1996 Montana Administrative Register, Issue 1, Page 169.

3. On February 8, 1996, the Board of Nursing presided over a hearing on this matter.

Question Presented

4. Petitioners request a ruling on whether a professional registered nurse may administer regional analgesia through an epidural catheter upon the written order and general supervision of an anesthesiologist.

Findings of Fact

5. All written and oral comments supported the petition.

6. Approximately 25 nursing jurisdictions affirmatively allow registered nurses to perform the procedure with minor variation in training, setting, and methodology.

7. Epidural analgesia is an effective method of pain control that has been used since approximately 1988 for pre- and post-operative acute pain control and chronic pain conditions.

8. Administration of epidural analgesia is performed in the following settings: hospitals and home health care.

9. The Petitioners presented no mortality or morbidity statistics for this practice.

10. Complications and side effects include respiratory depression, infection related to catheter placement, urinary retention, neurological impairment, hypotension, pruritis, spinal headaches, inadvertent subdural penetration of the catheter, nausea, and vomiting. These complications, however, are rare and are similar to the complications experienced with central line access, a procedure that registered nurses regularly perform.

11. Health care agencies directing the practice have developed written protocol to assist the registered nurse performing the procedure.

12. An informal opinion of the Board of Nursing dated May 23, 1990, reflected that the administration of analgesia through an epidural catheter under the order and general supervision of a physician was within the registered nurse's statutory scope of practice.

Conclusions of Law

13. Section 37-8-102(5), MCA, defined "professional nursing," to include "the administration of medications and treatments prescribed by physicians, advanced practice registered nurses, dentists, osteopaths, or podiatrists authorized by state law to prescribe medications and treatments."

14. Administrative Rule of Montana 8.23.1404 provides in part that a registered nurse shall "obtain instruction and supervision as necessary when implementing nursing techniques or practices;" and "collaborate with other members of the health team to provide optimum client care . . .."

Declaratory Ruling

15. Based on the above findings of fact and conclusions of law, the Board of Nursing declares the following:

a. the scope of practice of a registered nurse includes administration of analgesia through an existing epidural catheter as ordered in writing by a physician or qualified anesthetist provider for a specific patient;

b. the procedure may be accomplished through either intermittent bolus or continuous infusion;

c. the procedure may be performed in all settings;

d. the performance of the procedure does include removal of the catheter upon the order of the attending physician or qualified nurse anesthetist provider;

e. the performance of the procedure by the registered nurse be contingent upon documented education, certification, and annual competency evaluations.

16. This declaratory ruling is subject to judicial review in accordance with sections 2-4-501 and 2-4-702, MCA.

Done this 19th day of December, 1996.

BOARD OF NURSING

By: Jean E. Ballantyne, RN, MSN
JEAN BALLANTYNE, RN, MSN
CHAIRMAN

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules, amendment or repeal of existing rules filed with the Secretary of State, except rules proposed by the Department of Revenue. Proposals of the Department of Revenue are reviewed by the Revenue Oversight Committee.

The Administrative Code Committee has the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. In addition, the Committee may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt or amend a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with the existing or proposed rules. The address is Room 138, Montana State Capitol, Helena, Montana 59620.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter	1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.
Statute Number and Department	2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 1996. This table includes those rules adopted during the period October 1, 1996 through December 31, 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 September 30, 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.

GENERAL PROVISIONS, Title 1

1.2.419 Filing, Compiling, Printer Pickup and Publication of the Montana Administrative Register, p. 2574, 3154

ADMINISTRATION, Department of, Title 2

2.4.136 State Accounting - Reimbursement for Receiptable Lodging, p. 3095
2.5.401 and other rules - State Purchasing, p. 3097
2.21.1201 and other rules - Personnel Policy, p. 945, 1635

(State Compensation Insurance Fund)
2.55.321 and other rules - Premium Rates, p. 2627
2.55.408 Retrospective Rating Plans, p. 1770, 2278

AGRICULTURE, Department of, Title 4

4.5.102 and other rules - Projects, Procedures and Updates and Repeal ofRequirements to the Noxious Weed Trust Fund, p. 2473

4.9.101 and other rules - Wheat and Barley Committee Rules, p. 1343, 1826
4.13.1001 and other rule - Grain Fee Schedule of Lab Hours, Travel Time and Fees, p. 2343, 2842

STATE AUDITOR, Title 6

I Securities Regulation on the Internet, p. 1346, 1828
I-XIV Medicare Select Policies and Certificates, p. 9, 907, 1645
6.2.103 and other rules - Procedural Rules of the State Auditor's Office, p. 1227, 1636
6.6.1101 and other rules - Credit Life - Disability Insurance, p. 955, 1646, 2157
6.6.2001 and other rules - Unfair Trade Practices on Cancellations, Non-renewals, or Premium Increases of Casualty or Property Insurance, p. 2720, 414, 2158
6.6.2007 and other rules - Unfair Trade Practices on Cancellations, Non-renewals, or Premium Increases of Casualty or Property Insurance, p. 869, 1370, 2159
6.6.4102 and other rules - Fee Schedules - Continuing Education Program for Insurance Producers and Consultants, p. 963, 1661

(Classification Review Committee)
6.6.8301 Updating References to the NCCI Basic Manual for Workers Compensation and Employers Liability Insurance, 1996 ed., p. 2349, 2843
6.6.8301 Updating References to the NCCI Basic Manual for Workers Compensation and Employers Liability Insurance, 1996 ed., p. 1348, 1827

COMMERCE, Department of, Title 8

(Board of Alternative Health Care)
I Vaginal Birth After Cesarean (VBAC) Delivery, p. 348, 1829
8.4.301 and other rules - Fees - Renewal - Unprofessional Conduct - Licensing of Out-of-State Applicants - Certification for Speciality Practice of Naturopathic Physician Continuing Education - Direct Entry Midwife Apprenticeship Requirements, p. 2230, 2576

(Board of Architects)
8.6.405 and other rules - Practice of Architecture, p. 2060, 2476, 3210

(Board of Athletics)
8.8.2804 and other rules - Athletic Events - Participants, p. 969, 1664

(Board of Barbers)
8.10.403 and other rules - Barbers, Barber Shops and Barber Schools, p. 1432, 3114

(Board of Chiropractors)
8.12.601 and other rules - Chiropractors, p. 974, 2844, 3212

(Board of Dentistry)
8.16.402 and other rules - Dentists - Dental Hygienists - Denturists - Practice of Dentistry and Denturitry, p. 2478, 3118

(State Electrical Board)
8.18.401 and other rules - Electrical Industry, p. 2065, 3039

(Board of Hearing Aid Dispensers)
8.20.401 and other rules - Hearing Aid Dispensers, p. 3009

(Board of Horse Racing)
8.22.703 and other rule - Exercise Persons - Pony Persons, p. 1350, 1964

(Board of Landscape Architects)
8.24.403 and other rules - Landscape Architects - Applications - Seals - Examinations - Renewals - Replacement Licenses - Fee Schedule - Unprofessional Conduct, p. 2944

(Board of Medical Examiners)
I Physicians - Inactive License, p. 2635, 3213
8.28.911 and other rule - Nutritionists, p. 616, 2279

(Board of Funeral Service)
8.30.101 and other rules - Morticians - Mortuaries - Crematories - Crematory Operators - Crematory Technicians, p. 2073, 2425

(Board of Nursing)
8.32.413 and other rules - Conduct of Nurses - Survey and Approval of Schools - Annual Report - Definitions - Registered Nurse's Responsibility to the Nursing Process - Standards for Schools of Nursing - Standards for IV Therapy - Charge Nurse for Licensed Practical Nurses, p. 2638

(Board of Nursing Home Administrators)
8.34.404A and other rules - Nursing Home Administrators, p. 3174

(Board of Occupational Therapists)
8.35.401 and other rules - Practice of Occupational Therapy, p. 1448, 1586, 2379

(Board of Optometry)
8.36.406 and other rules - General Practice Requirements - Unprofessional Conduct - Fees - Disciplinary Actions - Continuing Education Concerning the Practice of Optometry, p. 2238, 2654

(Board of Physical Therapy Examiners)
8.42.402 and other rules - Licensure of Physical Therapists - Physical Therapist Assistants - Foreign-Trained Physical Therapists, p. 2245

(Board of Plumbers)
8.44.402 and other rules - Plumbing Industry, p. 2081, 2426, 2577

(Board of Professional Engineers and Land Surveyors)
8.48.401 and other rules - Practice of Professional Engineers and Land Surveyors, p. 2085

(Board of Private Security Patrol Officers and Investigators)
8.50.423 and other rules - Private Security Patrol Officers and Investigators, p. 2656

(Board of Public Accountants)
8.54.402 and other rules - Practice of Public Accounting, p. 3018
8.54.402 and other rules - Examinations - Out-of-State Candidates for Examination - Education Requirements - Fees, p. 1460, 2280

(Board of Real Estate Appraisers)
8.57.403 and other rules - Real Estate Appraisers, p. 2665

(Board of Realty Regulation)
8.58.419 Grounds for License Discipline - General Provisions - Unprofessional Conduct, p. 3101

(Board of Sanitarians)
8.60.401 and other rules - Sanitarians, p. 626, 985, 1965, 2578

(Board of Speech-Language Pathologists and Audiologists)
8.62.413 and other rules - Practice of Speech-Language Pathology and Audiology, p. 2103, 2976

(Board of Passenger Tramway Safety)
8.63.503 and other rules - Passenger Tramway Safety Industry, p. 2952

(Board of Veterinary Medicine)
8.64.402 and other rule - Fee Schedule - Examination for Licensure, p. 2679, 3214
8.64.402 and other rules - Fees - Application Requirements - Temporary Permits - Examinations - Annual Renewals - Continuing Education - Unprofessional Conduct - Applications for Certification of Embryo Transfer - Unprofessional Conduct for Embryo Transfer - Disciplinary Actions - Advisory Committee, p. 2253, 2579

(Building Codes Bureau)
8.70.101 and other rules - Uniform and Model Codes - Plumbing and Electrical Requirements - Recreational Vehicles - Boiler Safety - Swimming Pools, p. 2682
8.70.108 and other rules - Incorporation by Reference of CABO One and Two Family Dwelling Code - Funding of Code Enforcement Programs - Extension of Municipal Jurisdictional Area - Incorporation by Reference of Safety Code for Elevators and Escalators, p. 1475, 2160

(Weights and Measures Bureau)
8.77.302 NIST Handbook 130 - Uniform Laws and Regulations, p. 2957

(Consumer Affairs Office)
8.78.202 and other rules - Repair and Servicing of Automobiles - Consumer Reporting Agencies - Operation of Proprietary Schools, p. 1352, 2284

(Banking and Financial Institutions Division)
8.80.108 Limitations on Loans, p. 355, 2161
8.80.307 Dollar Amounts to Which Consumer Loan Rates are to be Applied, p. 986, 2165

(Local Government Assistance Division)
8.83.401 and other rules - State Grants to Counties for District Court Assistance, p. 988, 1665

(Economic Development Division)
8.99.401 and other rules - Microbusiness Advisory Council, p. 636, 2166, 2580, 2978

(Board of Science and Technology Development)
8.122.102 and other rules - Award and Administration of Loans by the Montana Board of Science and Technology Development, p. 2351

(Montana Lottery)
8.127.101 and other rules - Organizational Rule - Instant Tickets - Prizes, p. 2110, 2849
8.127.407 and other rule - Retailer Commission - Sales Staff Incentive Plan, p. 1479, 2850

EDUCATION, Title 10

(Office of Public Instruction)
10.7.103 and other rules - School Transportation, p. 2689
10.20.201 and other rules - School Finance - Budgeting and Funding, p. 1230, 2168

(Board of Public Education)
10.57.107 Teacher Certification - Emergency Authorization of Employment, p. 2961

(Board of Crime Control)

23.14.401 and other rules - Peace Officers Standards and Training - DARE Trust Fund, p. 1260, 2984

LABOR AND INDUSTRY, Department of, Title 24

I and other rules - Unemployment Insurance Case Procedures - Employment Status [Independent Contractor] Issues, p. 1051, 1667

I and other rules - Procedure in Workers' Compensation Matters - Employment Status [Independent Contractor], p. 1061, 1673

I-III and other rules - Wage Claim Procedures - Employment Status [Independent Contractor] Issues, p. 1056, 1668

I-V Workers' Compensation Administrative Assessment, p. 1609

I-XI Creating One Process for Determining All Employment Status Issues, Including that of Independent Contractor, p. 1070, 1676

I-XVII and other rules - Workers' Compensation Plan Number One [Plan 1] Requirements and Eligibility, p. 512, 1151, 2427

24.16.1509 and other rule - Minimum Hourly Wage Rate, p. 2363, 2882

24.16.9007 Prevailing Wage Rates - Building Construction, p. 873, 1669

24.29.706A and other rules - Transfer of Independent Contractor Rules to ARM Title 24, Chapter 35, p. 1863

(Human Rights Commission)

24.9.801 and other rules - Proof of Discrimination, p. 1790, 2871

LIVESTOCK, Department of, Title 32

(Board of Livestock)

32.3.121 and other rules - Disease Control - Animal Feeding, Slaughter, and Disposal - Fluid Milk and Grade A Milk Products - General Licensing and Provisions - Marketing of Livestock - Branding and Inspection, p. 376, 1864

32.3.201 and other rules - Importation of Animals and Semen into Montana - Brucellosis - Tuberculosis - Poultry - Animal Identifications - Control of Biologics - Rendering Plants - Vehicles and Equipment - Animal Health Requirements for Livestock Markets - Official Tuberculin Tests, p. 1803, 2300

(Board of Milk Control)

I-IV and other rule - Milk Utilization - Marketing of Class III Milk, p. 2114, 2428

8.86.301 Wholesale Prices for Class I, II and III Milk, p. 641, 2181

32.24.301 and other rule - Producer Class I Pricing, p. 3201

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

PUBLIC HEALTH AND HUMAN SERVICES, Department of, Title 37

PUBLIC SERVICE REGULATION, Department of, Title 38

I Recovery of Abandonment Costs in Electric Utility Least-Cost Resource Planning and Acquisition, p. 1962
I Content of Certain Motor Carrier Receipts, p. 896, 1567
I-LVIII Local Exchange Competition and Dispute Resolution in Negotiations between Telecommunications Providers for Interconnection, Services and Network Elements, p. 2528
38.5.1010 and other rules - Electric Safety Codes - Electric Service Standards - Pipeline Safety (including Drug and Alcohol Testing), p. 2779

REVENUE, Department of, Title 42

I Agricultural Improvements from Property Land Classification, p. 3112
I-XIII and other rules - Oil and Gas Rules for the Natural Resources Tax Bureau, p. 1107, 2001
42.11.243 and other rules - Liquor Regulations for Golf Course and Moveable Devices, p. 2564, 3146
42.15.101 and other rules - Biennial Review of Chapter 15 - Composite Returns, p. 2142, 2605, 2985
42.15.506 and other rule - Computation of Residential Property Tax Credit, p. 2829, 3148
42.17.103 General Withholding Taxes, p. 2276, 2610
42.18.106 and other rules - Reappraisal Plan Property Rules, p. 2783, 3149
42.19.501 Property Tax Exemption for Disabled Veterans, p. 2568, 3150
42.19.1203 and other rules - Class 5 Classification Property Tax Rules, p. 2803, 3220
42.20.166 and other rule - Forest Land Rules, p. 3208
42.21.106 and other rules - Personal Property Rules, p. 2805, 3157
42.22.101 and other rules - Industrial Property Rules, p. 2793, 3153
42.25.1810 Oil and Gas Rules, p. 2151, 2435

SECRETARY OF STATE, Title 44

I-III Electronic Storage of Local Government Records, p. 2840, 3223
1.2.419 Filing, Compiling, Printer Pickup and Publication of the Montana Administrative Register, p. 2574, 3154
44.3.105 and other rules - Surveys of Polling Places - Examination of Voting Devices, p. 2832, 3221
44.6.106 and other rules - Uniform Commercial Code Rules, p. 2838, 3222

(Commissioner of Political Practices)
Notice of Public Hearing to Consider Whether New or Amended Rules that Address Lobbying Activities are

Necessary Pursuant to the Petition Submitted by Montana Common Cause, p. 2570

44.10.411 Incidental Political Committee, Filing Schedule, Reports, p. 1126, 2153

44.12.109 Personal Financial Disclosure by Elected Officials, p. 1128, 2195

CROSS REFERENCE INDEX

Montana Code Annotated to Administrative Rules of Montana

July 1996 - December 1996

MCA	Rule or A.G.'s Opinion No.	Register Page No.
1-1-215	42.15.101	2142
1-1-216	Rule I (Agriculture)	2343
1-1-216	23.16.101	2504
2-3-103	Rules I - XV (Transportation)	3028
2-3-103	8.30.202	2073
2-3-201	11.2.101	2423
2-4-102	Rule I (Transportation Commission & Transportation)	1930
2-4-103	6.6.8301	2349
2-4-201	8.30.101, 201	2073
2-4-201	8.122.102	2351
2-4-201	11.2.101, 102, 16.2.216, 218	2423
2-4-201	18.13.101	1943
2-4-201	36.11.301	1865
2-4-201	46.12.593, 1705, 1919	2724
2-4-202	16.2.216, 218	2423
2-4-305	16.32.103	1975
2-4-306	46.10.409, 46.18.502	2372
2-4-307	23.5.102	2177
2-4-312	1.2.419	2574
2-4-312	1.2.419	3154
2-4-314	42.15.101, 301, 303, 305, 309, 311 - 315, 322, 324	2142
2-4-501	11.2.102	2423
2-4-501	Petition for Declaratory Ruling (Revenue)	2206
2-4-611	Rule III (Justice)	2267
2-4-621	Rules III, IV (Justice)	2267
2-6-403, 404	Rules I - III (Secretary of State)	2840
2-15-133	16.8.101 - 2025, 16.9.101 - 106, 17.8.101 - 1234, 17.80.101 - 106	2285
2-15-1706	24.9.801, 803, 804, 1101 - 1106, 1401 - 1405	1790
2-18-501	2.4.136	3095
Title 2, Ch. 18, Pt. 6	Opinion No. 25	2986
2-18-604	Opinion No. 25	2986
2-18-617	Opinion No. 25	2986

MCA	Rule or A.G.'s Opinion	Register Page No.
7-3-213	Opinion No. 21	2014
7-11-1101 - 1112	Opinion No. 23	2390
7-11-1101 - 1112	Opinion No. 19	2002
7-11-1105	Opinion No. 19	2002
7-32-4103, 4104	Opinion No. 21	2014
7-33-2105	Opinion No. 19	2002
7-33-2109	Opinion No. 19	2002
13-1-202	44.3.105, 106, 1001, 1708	2832
13-10-502	44.3.1708	2832
13-17-101	44.3.1704, 1706, 1730	2832
13-17-102	44.3.1705	2832
13-17-103	44.3.1703	2832
13-17-105	44.3.1709	2832
13-17-107	44.3.1701, 1703 - 1706, 1709, 1730	2832
13-37-114	44.10.327, 411	2153
13-37-226	44.10.327, 411	2153
15-1-101	Opinion No. 19	2002
15-1-201	Rule I (Revenue)	3112
15-1-201	Rule I (Revenue)	3208
15-1-201	Rules I - VI (Revenue)	2783
15-1-201	42.18.105, 106, 108, 109, 111, 112, 114, 115, 117, 118, 123, 124, 126, 201 - 203, 211	2783
15-1-201	42.19.501	2568
15-1-201	42.19.1203, 1222, 1223	2803
15-1-201	42.20.166	3208
15-1-201	42.21.106, 107, 113, 122, 123, 131, 137 - 140, 151, 153, 155, 158, 305	2805
15-1-201	42.22.116, 1304, 1305, 1311	2793
15-6-134	Rule I (Revenue)	3112
15-6-134	42.22.1304	2793
15-6-135	42.19.1203, 1222, 1223	2803
15-6-135	42.21.131	2805
15-6-136	42.21.113, 122	2805
15-6-137	42.21.122	2805
15-6-138	42.21.106, 107, 123, 131, 137 - 140, 151, 153	2805
15-6-138	42.22.1311	2793
15-6-139	42.21.106, 107, 155	2805
15-6-140	42.21.106, 131, 151	2805
15-6-145	42.22.116	2793
15-6-151	42.19.501	2568
15-6-152	42.19.1222, 1223	2803
15-6-201	42.21.107	2805
15-6-207	42.21.122	2805
15-6-211	42.19.501	2568
15-7-111	Rules I - VI (Revenue)	2783

MCA	Rule or A.G.'s Opinion	Register Page No.
15-7-111	42.18.105, 106, 108, 109, 111, 112, 114, 115, 117, 118, 123, 124, 126, 201 - 203, 211	2783
15-7-133	Rule I (Revenue)	2783
15-7-133, 134	42.18.105	2783
15-7-206	Rule I (Revenue)	3112
15-8-111	42.22.1305, 1311	2793
15-8-202	42.21.305	2805
15-8-303	42.21.158	2805
15-10-401 - 412	Opinion No. 23	2390
15-10-401 - 412	Opinion No. 19	2002
Title 15, Ch. 23, Pt. 1	42.22.101	2793
15-23-108	42.22.101	2793
15-23-211	42.22.101	2793
15-24-902, 903	42.12.158	2805
15-24-905	42.21.158	2805
15-24-920	42.21.158	2805
15-24-1401, 1402	42.19.1222	2803
15-30-101	42.15.101	2142
15-30-102, 103	Petition for Declaratory Ruling (Revenue)	2206
15-30-105	Rules I - VI (Revenue)	2142
15-30-105	42.15.101	2142
15-30-105	42.15.605, 606	2605
15-30-111	42.15.309	2142
15-30-135	42.15.305	2142
15-30-142	42.15.301, 303, 322	2142
15-30-143	42.15.301	2142
15-30-144	42.15.312	2142
15-30-149	42.15.315	2142
15-30-174	42.15.324	2142
15-30-201	42.17.103	2276
15-30-241	42.15.605	2605
15-30-301	42.15.311	2142
15-30-304	42.15.313, 314	2142
15-30-304	42.15.314	2605
15-30-305	Rules I - VI (Revenue)	2142
15-30-305	42.15.101, 301, 303, 305, 309, 311 - 315, 322, 324	2142
15-30-305	42.15.314, 605, 606	2605
15-30-305	42.17.103	2276
15-30-321	42.15.315	2142
15-30-321	42.15.314	2605
15-32-102	16.8.1601	1844
15-32-201	16.8.1601, 1603	2260
15-32-203	16.8.1601, 1603	2260
15-36-322	42.25.1810	2151
15-36-324	42.25.1810	2151
15-44-103	Rule I (Revenue)	3208
15-44-101 - 105	42.20.166	3208
15-44-105	Rule I (Revenue)	3208

MCA	Rule or A.G.'s Opinion	Register Page No.
16-1-303	42.11.243, 42.13.105, 221	2564
16-1-303	42.13.221	3146
16-3-103	42.11.243, 42.13.221	2564
16-3-103	42.13.221	3146
16-3-244	42.13.221	2564
16-3-244	42.13.221	3146
16-3-302	42.13.105	2564
16-3-311	42.13.105	2564
16-4-404	42.13.105	2564
16-6-104	42.13.105	2564
17-8-231	Rule IV (Transportation Commission & Transportation)	1930
18-1-102	Rules I, IV (Transportation Commission & Transportation)	1930
18-1-402	2.5.406	3097
18-2-313	Rules I, IV (Transportation Commission & Transportation)	1930
18-4-133	2.5.605	3097
18-4-221	2.5.401, 406, 602, 605	3097
18-4-226	2.5.702	3097
18-4-301	Rule I (Transportation Commission & Transportation)	1930
18-4-304	2.5.602	3097
20-2-121	10.57.107	2961
20-2-121	10.57.211, 212	2416
20-2-121	10.57.301	1835
20-2-121	10.58.505	2962
20-2-121	10.66.101	2959
20-3-106	10.7.101, 103 - 118	2689
20-4-102	10.57.211, 212	2416
20-4-102	10.57.301	1835
20-4-120	10.57.107	2961
20-4-120	10.58.505	2962
20-4-120	10.66.101	2959
20-5-320, 321	Rule I (OPI)	2689
20-5-321	10.7.106	2689
20-5-323	Rule I (OPI)	2689
20-9-161	10.22.107, 201	2168
Title 20, Ch. 10, Pt. 1	10.7.101, 118	2689
20-10-101	Rules II, III (OPI)	2689
20-10-101	10.7.106, 110	2689
20-10-102	10.7.110	2689
20-10-103	10.7.111, 112	2689
20-10-104	10.7.110	2689

MCA	Rule or A.G.'s Opinion	Register Page No.
20-10-111	10.7.106, 110	2689
20-10-112	Rules I - IV (OPI)	2689
20-10-112	10.7.101, 103 - 118, 2503	2689
20-10-121	10.7.103, 105, 106	2689
20-10-124	10.7.105 - 108	2689
20-10-126	Rules II - IV (OPI)	2689
20-10-127	10.7.115	2689
20-10-128	10.7.109, 115	2689
20-10-132	Rules II, III (OPI)	2689
20-10-132	10.7.112	2689
20-10-141	Rule I (OPI)	2689
20-10-141	10.7.112, 115, 2503	2689
20-10-142	Rule I (OPI)	2689
20-10-142	10.7.106, 113 - 116	2689
20-10-143	10.7.105, 107, 108	2689
20-10-145	10.7.103, 104, 107, 112, 117	2689
20-10-146	10.7.103	2689
22-1-301	Opinion No. 19	2002
22-1-303, 304	Opinion No. 19	2002
22-1-304 - 317	Opinion No. 23	2390
22-1-309	Opinion No. 19	2002
22-1-312	Opinion No. 19	2002
22-1-315, 316	Opinion No. 19	2002
22-1-401 - 413	Opinion No. 19	2002
22-3-107	Rules VII - IX, XI - XIV (Historical Society)	1920
22-3-421	Rules II, IX, XII (Historical Society)	1920
22-3-423	Rules I - VII, IX, X (Historical Society)	1920
22-3-424	Rules I - X (Historical Society)	1920
22-3-424	36.2.803	1820
22-3-428	Rules XIV (Historical Society)	1920
22-3-429	Rule XIII (Historical Society)	1920
22-3-430	Rules VIII, IX, XIII (Historical (Society)	1920
22-3-432	Rule XI (Historical Society)	1920
22-3-435	Rule VII (Historical Society)	1920
22-3-441	Rule XII (Historical Society)	1920
22-15-316	Opinion No. 19	2002
23-1-106	12.8.101, 401 - 410, 502	1841
23-2-701	Rule I (Commerce - Passenger Tramway Safety)	2952
23-2-701	8.63.504, 507, 517	2952
23-2-711 - 713	8.63.504, 507, 517	2952
23-2-721	8.63.503 - 505, 507, 509, 517	2952
23-2-721, 722	Rule I (Commerce - Passenger Tramway Safety)	2952
23-2-722	8.63.504, 505, 507, 517	2952
23-2-723	8.63.504, 505	2952

MCA	Rule or A.G.'s Opinion	Register Page No.
23-5-111	23.16.1802, 1906	2504
23-5-112	23.16.101, 202, 1802, 1906, 3501	2504
23-5-115	Rule I (Justice)	2504
23-5-115	23.16.101 - 103, 105, 107, 109, 111, 115 - 117, 119, 120, 202, 203, 407, 501, 502, 1101, 1201, 1716, 1719, 1802, 1822, 1826, 1827, 1901, 1906, 1913 - 1917, 2001, 2004, 2305, 2306, 2803, 3102, 3501	2504
23-5-118	Rule I (Justice)	2504
23-5-118	23.16.101, 115 - 117, 119, 120, 502	2504
23-5-136	23.16.105, 203, 1826, 1827	2504
23-5-151	23.16.1802, 1906	2504
23-5-152	23.16.2001, 2004, 3501	2504
23-5-157	23.16.202	2504
23-5-176	Rule I (Justice)	2504
23-5-176	23.16.101, 105, 107, 115 - 117, 119, 120, 501, 502	2504
23-5-177	23.16.102, 109, 502	2504
23-5-221, 222	23.16.2803	2504
23-5-308	23.16.407	2504
23-5-311	23.16.1101	2504
23-5-317	23.16.1101	2504
23-5-424	23.16.2302	2504
23-5-426	23.16.2305	2504
23-5-502	23.16.1716, 1719	2504
23-5-503	23.16.1716	2504
23-5-602	23.16.1802, 1901, 1906	2504
23-5-603	23.16.1802, 1822, 1906	2504
23-5-610	23.16.1827, 1901	2504
23-5-611	23.16.1822, 1917, 2001	2504
23-5-612	23.16.1822	2504
23-5-614	23.16.1917, 2001	2504
23-5-621	23.16.1901, 1906, 1917, 2001	2504
23-5-625	23.16.1916, 1917, 2001	2504
23-5-628	23.16.1827	2504
23-5-629	23.16.101	2504
23-5-631	23.16.1917, 2001	2504
23-5-702	23.16.3102	2504
23-5-705, 706	23.16.3102	2504
23-5-715	23.16.3102	2504
23-5-1007	8.127.1003	2110
23-7-202	Rule I (Commerce - Lottery Commission)	2110
23-7-202	8.127.101, 1004, 1005, 1201	2110
23-7-212	8.127.1005	2110
23-7-301	8.127.1004	2110
23-7-311	8.127.1201	2110
23-7-411	8.127.1005	2110
25-1-1104	8.50.437	2656

MCA	Rule or A.G.'s Opinion	Register Page No.
27-2-401	Rule II (PSR)	2528
29-71-2341	2.55.408	1770
30-9-403	44.6.104, 105, 107	2838
33-16-1012	6.6.8301	2349
33-18-1003	6.6.2001 - 2006	2158
33-18-1003	6.6.2007 - 2010	2159
33-21-111	6.6.1101	2157
33-21-205	6.6.1101	2157
37-1-101	8.24.406	2944
37-1-101	8.36.410	2238
37-1-101	8.44.405	2081
37-1-101	8.48.901, 903	2085
37-1-101	8.54.402, 403	3018
37-1-131	Rules I - III (Commerce - Real Estate Appraisers)	2665
37-1-131	8.6.405, 407, 412	2060
37-1-131	8.16.402, 404, 602, 605, 607, 608, 8.17.809, 810	2478
37-1-131	8.18.402, 407 - 409	2065
37-1-131	8.30.701	2073
37-1-131	8.32.1401, 1403	2638
37-1-131	8.34.406, 410, 416, 418, 419	3174
37-1-131	8.36.406, 411	2238
37-1-131	8.42.402, 405, 411 - 413, 701	2245
37-1-131	8.48.902	2085
37-1-131	8.50.423, 424, 427, 431, 435, 436, 805, 901, 903	2656
37-1-131	8.54.402, 403, 411, 416, 702	3018
37-1-131	8.57.403 - 409, 411, 412, 417	2665
37-1-131	8.58.419	3101
37-1-131	8.60.401	1965
37-1-131	8.62.418	2103
37-1-131	8.64.505, 508, 509, 701	2253
37-1-134	8.6.413	2060
37-1-134	8.16.405, 606, 8.17.501	2478
37-1-134	8.18.407	2065
37-1-134	8.24.409	2944
37-1-134	8.30.407	2073
37-1-134	8.34.418	3174
37-1-134	8.36.409	2238
37-1-134	8.42.403	2245
37-1-134	8.44.412	2081
37-1-134	8.48.1105	2085
37-1-134	8.50.437	2656
37-1-134	8.54.410	3018
37-1-134	8.62.413	2103
37-1-134	8.64.402	2253

MCA	Rule or A.G.'s Opinion	Register Page No.
37-1-134	8.64.402	2679
37-1-136	8.16.801 - 806, 808, 8.17.801, 807	2478
37-1-136	8.20.409, 411	3009
37-1-136	8.30.701, 705 - 707	2073
37-1-136	8.32.413	2638
37-1-136	8.36.411	2238
37-1-136	8.42.413	2245
37-1-136	8.48.1110	2085
37-1-136	8.54.702 - 705	3018
37-1-136	8.58.419	3101
37-1-136	8.64.405	2253
37-1-137	8.16.806	2478
37-1-141	8.17.702	2478
37-1-203	8.35.408	2379
37-1-304	Rule I (Commerce - State Electrical Board)	2065
37-1-304	Rule I (Commerce - Alternative Health Care)	2230
37-1-304	Rule I (Commerce - Optometry)	2238
37-1-304, 305	Rule I (Commerce - Speech-Language Pathologists and Audiologists)	2103
37-1-304	Rules II, VI (Commerce - Dentistry)	2478
37-1-304	8.4.403	2230
37-1-304	8.6.405	2060
37-1-304	8.30.404	2073
37-1-304	8.36.409	2238
37-1-304	8.42.402, 403, 406	2245
37-1-304	8.44.412, 415	2081
37-1-304	8.48.603, 604	2085
37-1-304	8.60.413	1965
37-1-304	8.64.402, 509	2253
37-1-304	8.64.402	2679
37-1-305	Rule I (Commerce - Plumbers)	2081
37-1-305	Rule III (Commerce - Architects)	2060
37-1-305	8.20.401	3009
37-1-305	8.35.404	2379
37-1-305	8.42.405	2245
37-1-305	8.44.412	2081
37-1-305	8.60.415	1965
37-1-305	8.64.402, 502	2253
37-1-306	Rule I (Commerce - Professional Engineers and Land Surveyors)	2085
37-1-306	Rule III (Commerce - Physical Therapy Examiners)	2245
37-1-306	8.4.405, 508	2230
37-1-306	8.16.1002 - 1005, 8.17.705 - 708	2478
37-1-306	8.30.504	2073
37-1-306	8.36.601, 602	2238
37-1-306	8.54.802, 809	3018
37-1-306	8.57.411	2665

MCA	Rule or A.G.'s Opinion	Register Page No.
37-1-306	8.62.701 - 703	2103
37-1-306	8.64.505	2253
37-1-307	Rule I (Commerce - Architects)	2060
37-1-307	Rule I (Commerce - Funeral Service)	2073
37-1-307	Rule I (Commerce - Physical Therapy Examiners)	2245
37-1-307	Rule I (Commerce - Veterinary Medicine)	2253
37-1-307	Rule I (Commerce - Public Accountants)	3018
37-1-307	Rule II (Commerce - State Electrical Board)	2065
37-1-307	Rule II (Commerce - Plumbers)	2081
37-1-307	Rule II (Commerce - Alternative Health Care)	2230
37-1-307	Rule II (Commerce - Optometry)	2238
37-1-307	Rule III (Commerce - Professional Engineers and Land Surveyors)	2085
37-1-307	Rule III (Commerce - Speech-Language Pathologists and Audiologists)	2103
37-1-307	Rules IV, X (Commerce - Dentistry)	2478
37-1-307	8.60.401	1965
37-1-308	8.44.410	2081
37-1-308	8.60.412	1965
37-1-308, 309	Rule II (Commerce - Architects)	2060
37-1-308, 309	Rule II (Commerce - Physical Therapy Examiners)	2245
37-1-308, 309	Rule II (Commerce - Veterinary Medicine)	2253
37-1-308, 309	Rule II (Commerce - Public Accountants)	3018
37-1-308, 309	Rule III (Commerce - State Electrical Board)	2065
37-1-308, 309	Rule III (Commerce - Funeral Service)	2073
37-1-308, 309	Rule III (Commerce - Plumbers)	2081
37-1-308, 309	Rule III (Alternative Health Care)	2230
37-1-308, 309	Rule III (Optometry)	2238
37-1-308, 309	Rules III, VII, IX (Commerce - Dentistry)	2478
37-1-308, 309	Rule IV (Commerce - Speech-Language Pathologists and Audiologists)	2103
37-1-308, 309	8.48.1106	2085
37-1-312	8.54.906	3018
37-1-316	Rule III (Commerce - Nursing Home Administrators)	3174
37-1-316	8.4.303	2230
37-1-316	8.6.412	2060
37-1-316	8.16.722, 8.17.801	2478
37-1-316	8.30.701	2073
37-1-316	8.36.412	2238

MCA	Rule or A.G.'s Opinion	Register Page No.
37-1-316	8.42.412	2245
37-1-316	8.48.1202, 1203, 1205, 1206	2085
37-1-316	8.54.702, 703	3018
37-1-316	8.60.412	1965
37-1-316	8.62.418	2103
37-1-316	8.64.405, 508, 807	2253
37-1-319	Rule I (Commerce - Plumbers)	2081
37-1-319	Rule I (Commerce - Medical Examiner)	2635
37-1-319	Rule I (Commerce - Landscape Architects)	2944
37-1-319	Rules I, II (Commerce - Professional Engineers and Land Surveyors)	2085
37-1-319	Rule II (Commerce - Funeral Service)	2073
37-1-319	Rules II, V (Commerce - Speech-Language Pathologists and Audiologists)	2103
37-1-319	Rules II, VIII (Commerce - Dentistry)	2478
37-1-319	Rule III (Commerce - Architects)	2060
37-1-319	Rule III (Commerce - Physical Therapy Examiners)	2245
37-1-319	Rule III (Commerce - Public Accountants)	3018
37-1-319	Rule III (Commerce - Nursing Home Administrators)	3174
37-1-319	8.4.303, 405, 508	2230
37-1-319	8.6.412	2060
37-1-319	8.16.408, 607, 722, 1002 - 1005, 8.17.705 - 708, 801	2478
37-1-319	8.18.404, 409	2065
37-1-319	8.20.401, 408	3009
37-1-319	8.30.501, 502, 504, 701	2073
37-1-319	8.32.413	2638
37-1-319	8.34.413	3174
37-1-319	8.36.412, 601, 602	2238
37-1-319	8.42.405, 406, 412	2245
37-1-319	8.48.1105, 1202, 1203, 1205, 1206	2085
37-1-319	8.54.702, 703, 802, 906	3018
37-1-319	8.62.418, 702, 703	2103
37-1-319	8.64.502, 505, 508, 807	2253
37-3-102	Rule I (Commerce - Medical Examiners)	2635
37-3-313	Rule I (Commerce - Medical Examiners)	2635
37-4-205	Rules I - X (Commerce - Dentistry)	2478
37-4-205	8.16.402, 405, 408, 510, 602, 605 - 608, 707, 722, 806, 1002 - 1005	2478
37-4-301	Rule I (Commerce - Dentistry)	2478
37-4-301	8.16.402, 405	2478
37-4-303	8.16.405	2478
37-4-307	8.16.405, 408	2478
37-4-321	8.16.719, 802 - 804	2478

MCA	Rule or A.G.'s Opinion	Register Page No.
37-4-323	8.16.404, 801 - 806	2478
37-4-401	8.16.602, 605	2478
37-4-402	Rule V (Commerce - Dentistry)	2478
37-4-402, 403	8.16.605, 606	2478
37-4-405	8.16.602, 722	2478
37-4-406	8.16.605 - 608	2478
37-4-408	8.16.602, 707, 722	2478
37-4-511	8.16.722	2478
37-8-202	Rules I - XVII (Commerce - Nursing)	2638
37-8-202	8.32.413, 802, 805, 806, 901 - 907, 909 - 911, 913, 1001 - 1010, 1401, 1403	2638
37-8-301	Rules I - XVII (Commerce - Nursing)	2638
37-8-301, 302	8.32.802, 805, 806, 901 - 907, 909 - 911, 913, 1001 - 1010	2638
37-8-415	Rules XVIII - XX (Commerce - Nursing)	2638
37-9-201	8.34.405 - 408, 410, 411, 415, 417, 419, 421	3174
37-9-203	Rules I - III (Commerce - Nursing Home Administrators)	3174
37-9-203	8.34.404A, 406, 416 - 419	3174
37-9-301	Rule II (Commerce - Nursing Home Administrators)	3174
37-9-301	8.34.408, 417	3174
37-9-302	8.34.413	3174
37-9-303	8.34.408, 417	3174
37-9-304	8.34.405, 415, 418	3174
37-9-305	Rule III - (Commerce - Nursing Home Administrators)	3174
37-9-305	8.34.411, 415, 419	3174
37-9-311	8.34.406, 411, 421	3174
37-10-202	Rules I - III (Commerce - Optometry)	2238
37-10-202	8.36.405, 406, 408, 409, 411, 412, 601, 602	2238
37-10-301	8.36.406, 412	2238
37-10-302	8.36.409	2238
37-10-303	8.36.405	2238
37-10-307	8.36.409, 410	2238
37-10-311	8.36.408	2238
37-11-201	Rules I - III (Commerce - Physical Therapy Examiners)	2245
37-11-201	8.42.401 - 406, 410 - 413, 701	2245
37-11-202	8.42.701	2245
37-11-303	8.42.402	2245
37-11-304	8.42.401 - 403	2245
37-11-308	8.42.403, 404	2245
37-11-310	8.42.410	2245
37-11-321	8.42.413	2245
37-15-102	8.62.504	2103

MCA	Rule or A.G.'s Opinion	Register Page No.
37-15-202	Rules I - V (Commerce - Speech-Language Pathologists and Audiologists)	2103
37-15-202	8.62.413, 418, 419, 504, 701 - 703	2103
37-15-307, 308	8.62.413	2103
37-16-202	8.20.401, 403 - 405, 407 - 409, 411, 412, 416 - 418, 420	3009
37-16-301	8.20.401, 405, 407, 417	3009
37-16-303	8.20.407, 417, 418	3009
37-16-304	8.20.407, 417, 420	3009
37-16-403	8.20.403	3009
37-16-404	8.20.409, 411	3009
37-16-405	8.20.401, 403	3009
37-16-406	8.20.403, 420	3009
37-16-407	8.20.404	3009
37-16-411	8.20.407 - 409, 411, 412	3009
37-16-412	8.20.409, 411	3009
37-16-414	8.20.417	3009
37-18-104	8.64.701, 802, 807	2253
37-18-202	Rules I, II (Commerce - Veterinary Medicine)	2253
37-18-202	8.64.402, 405, 501 - 505, 508, 509, 802, 807	2253
37-18-202	8.64.402, 503	2679
37-18-302	8.64.402, 501	2253
37-18-302	8.64.402	2679
37-18-303	8.64.402, 503	2679
37-18-303	8.64.501, 503	2253
37-18-307	8.64.402, 504	2253
37-18-307	8.64.402	2679
37-19-202	Rules I - III (Commerce - Funeral Service)	2073
37-19-202	8.30.101, 201, 202, 404, 405, 407 - 409, 501, 502, 504, 514, 701, 705 - 707, 807	2073
37-19-301	8.30.407	2073
37-19-304	8.30.405, 407	2073
37-19-306	8.30.407	2073
37-19-311	8.30.705 - 707	2073
37-19-312	8.30.707	2073
37-19-316	8.30.514	2073
37-19-402	8.30.407	2073
37-19-403	8.30.407 - 409	2073
37-19-404	8.30.705, 706	2073
37-19-702, 703	8.30.407	2073
37-24-103	Rule I (Commerce - Occupational Therapy)	2379
37-26-201	Rules II, III (Commerce - Alternative Health Care)	2230
37-26-201	8.4.301 - 303, 403, 405	2230
37-27-105	Rules I - III (Commerce - Alternative Health Care)	2230

MCA	Rule or A.G.'s Opinion	Register Page No.
37-27-105	8.4.301 - 303, 503, 507, 508	2230
37-27-201	8.4.503	2230
37-27-205	8.4.301, 503	2230
37-27-210	8.4.301, 503	2230
37-27-320	8.4.507	2230
37-27-321	8.4.503	2230
37-29-201	8.17.403, 404, 501, 702, 705 - 708, 801, 807, 809, 810	2478
37-29-303	8.17.403	2478
37-29-304	8.17.403, 501	2478
37-29-305	8.17.404	2478
37-29-306	8.17.403, 702, 705 - 708	2478
37-29-311	8.17.801, 807	2478
37-29-402	8.17.801, 809	2478
37-29-403	8.17.801, 810	2478
37-40-101	8.60.415	1965
37-40-301	8.60.415	1965
37-42-104	17.40.202	3182
37-42-202	17.40.201 - 203, 206 - 208, 212 - 214	3182
37-42-302	17.40.207, 208	3182
37-42-304	17.40.202, 212	3182
37-42-304 - 308	17.40.203, 213	3182
37-42-305	17.40.206, 208	3182
37-42-306	17.40.202, 206, 207	3182
37-42-308	17.40.212	3182
37-42-321	17.40.214	3182
37-43-202	36.21.401A, 501 - 506	2120
37-43-202	36.21.410, 415, 634, 635, 637, 638, 641A, 645, 647, 650, 653 - 661, 664, 669A, 670, 677, 702, 801, 805, 810	2120
37-43-302	36.21.415	2120
37-43-303	36.21.415, 702	2120
37-43-305	36.21.401A, 410, 415, 501 - 506, 702	2120
37-43-306	36.21.401A, 501 - 506	2120
37-43-307	36.21.415	2120
37-43-308	36.21.410	2120
37-43-310, 311	36.21.401A, 501 - 506	2120
37-43-313	36.21.401A, 501 - 506	2120
37-50-201	8.54.402, 403, 411, 802, 809	3018
37-50-203	Rules I - III (Commerce - Public Accountants)	3018
37-50-203	8.54.408, 410, 411, 415, 416, 615, 617, 702 - 705, 809, 904, 906	3018
37-50-204	8.54.410	3018
37-50-302, 303	8.54.408	3018
37-50-305	8.54.408	3018
37-50-308	8.54.402, 403	3018
37-50-309	8.54.415	3018
37-50-311, 312	8.54.415, 416	3018
37-50-313	8.54.415	3018
37-50-314	8.54.410, 411	3018

MCA	Rule or A.G.'s Opinion	Register Page No.
37-50-317	8.54.410, 411, 415	3018
37-50-321	8.54.615, 704, 705	3018
37-51-102	Declaratory Ruling (Commerce - Realty Regulation)	2436
37-51-102	8.58.419	3101
37-51-201 - 203	8.58.419	3101
37-51-321	8.58.419	3101
37-51-512	8.58.419	3101
37-54-105	Rule I (Commerce - Real Estate Appraisers)	2665
37-54-105	8.57.401 - 409, 411, 412, 414 - 417	2665
37-54-112	8.57.412	2665
37-54-201	8.57.412	2665
37-54-202	Rule I (Commerce - Real Estate Appraisers)	2665
37-54-202	8.57.403, 405 - 407, 416	2665
37-54-203	8.57.406, 407	2665
37-54-210	Rules II, III (Commerce - Real Estate Appraisers)	2665
37-54-210, 211	8.57.412	2665
37-54-302	8.57.403, 412, 416	2665
37-54-303	Rule I (Commerce - Real Estate Appraisers)	2665
37-54-303	8.57.405, 408, 409, 411, 416	2665
37-54-304	8.57.403, 416	2665
37-54-310	Rules II, III (Commerce - Real Estate Appraisers)	2665
37-54-310	8.57.412, 416	2665
37-54-401	8.57.414	2665
37-54-403	8.57.401	2665
37-54-406	8.57.412	2665
37-54-417	8.57.415	2665
37-60-101	8.50.423	2656
37-60-103	8.50.423	2656
37-60-105	8.50.423	2656
37-60-202	8.50.423 - 428, 431, 433, 435 - 438, 801, 805, 901, 903	2656
37-60-302	8.50.424 - 426, 435, 436, 805, 901, 903	2656
37-60-303	8.50.423, 428, 435, 436, 805, 901, 903	2656
37-60-304	8.50.427, 435 - 437, 805, 901, 903	2656
37-60-305	8.50.435 - 437, 805, 901, 903	2656
37-60-307 - 310	8.50.424	2656
37-60-312	8.50.424, 433, 437	2656
37-60-321	8.50.424, 435, 436, 801, 805, 901, 903	2656
37-60-322	8.50.424	2656
37-60-401	8.50.435, 436, 801, 805, 901, 903	2656
37-60-407	8.50.424	2656
37-65-201	8.6.413	2060

MCA	Rule or A.G.'s Opinion	Register Page No.
37-65-204	Rules I - III (Commerce - Architects)	2060
37-65-204	8.6.405, 407, 412, 413	2060
37-65-303	8.6.407	2060
37-65-304	8.6.413	2060
37-65-306, 307	8.6.413	2060
37-66-202	Rule I (Commerce - Landscape Architects)	2944
37-66-202	8.24.402 - 413	2944
37-66-301	8.24.409	2944
37-66-304	8.24.405	2944
37-66-305	8.24.405, 409	2944
37-66-306	8.24.407	2944
37-66-307	8.24.406, 409	2944
37-66-308	8.24.404, 409	2944
37-66-321	8.24.402, 410, 413	2944
37-66-322	8.24.413	2944
37-66-323	8.24.411	2944
37-67-103	8.48.1101	2085
37-67-201	8.48.401 - 404	2085
37-67-202	Rule III (Commerce - Professional Engineers and Land Surveyors)	2085
37-67-202	8.48.401 - 404, 406, 501 - 508, 510, 601 - 604, 801, 802, 902, 903, 1101, 1103 - 1106, 1108, 1110, 1201 - 1206	2085
37-67-204	8.48.406	2085
37-67-301	8.48.1201, 1202, 1204 - 1206	2085
37-67-303	8.48.502 - 505, 1105	2085
37-67-306	8.48.501, 506, 507, 801	2085
37-67-309	8.48.506, 507, 801	2085
37-67-311	8.48.508	2085
37-67-312	8.48.601 - 603, 1105	2085
37-67-313	8.48.604, 1105	2085
37-67-314	8.48.802	2085
37-67-315	8.48.901 - 903, 1105	2085
37-67-316	8.48.1104, 1202, 1203, 1205, 1206	2085
37-67-320	8.48.510, 1105	2085
37-67-321	8.48.1105	2085
37-67-331	8.48.1106, 1108, 1110, 1206	2085
37-68-103	8.18.402	2065
37-68-201	Rules I - III (Commerce - State Electrical Board)	2065
37-68-201	8.18.401 - 404, 406 - 409	2065
37-68-301	8.18.403	2065
37-68-302	8.18.402, 403	2065
37-68-303	8.18.406	2065
37-68-304	8.18.402, 407, 408	2065
37-68-305	8.18.402, 404, 408	2065
37-68-306	8.18.409	2065
37-68-307	8.18.407	2065
37-68-310	8.18.402, 403, 407	2065

MCA	Rule or A.G.'s Opinion	Register Page No.
37-68-311 - 313	8.18.407	2065
37-68-314	8.18.402	2065
37-69-202	Rules II, III (Commerce - Plumbers)	2081
37-69-202	8.44.402 - 405, 410, 412, 415	2081
37-69-303	8.44.403	2081
37-69-304, 305	8.44.404, 410	2081
37-69-306	8.44.404	2081
37-69-307	8.44.404, 405	2081
39-3-403	24.16.1509, 1510	2363
39-3-409	24.16.1509, 1510	2363
Title 39, Ch. 31	Opinion No. 25	2986
39-31-102	Opinion No. 25	2986
39-71-203	24.29.601	2427
39-71-403	24.29.601	2427
39-71-2101 - 2108	24.29.601	2427
39-71-2211	2.55.324, 327	2627
39-71-2311	2.55.321, 322, 324, 325, 327	2627
39-71-2315, 2316	2.55.408	1770
39-71-2315, 2316	2.55.321, 322, 324, 325, 327	2627
39-71-2315, 2316	2.55.408	2278
39-71-2330	2.55.321, 322, 324, 325, 327	2627
39-71-2330	2.55.408	1770
39-71-2330	2.55.408	2278
39-71-2341	2.55.324	2627
39-71-2341	2.55.408	2278
41-3-1101	11.7.901	3205
41-3-1103	11.7.901	3205
41-4-101	11.7.901	3205
44-1-1005	23.5.102	2177
44-6-101 - 110	23.4.501	2172
44-6-103	23.4.502, 503	2172
44-6-110	23.4.502, 503	2172
49-2-101	Rules II, V, VI, IX - XII (Labor & Industry - Human Rights Commission)	1790
49-2-101	24.9.602, 605, 606, 609 - 612	2871
49-2-101	24.9.801, 1101	1790
49-2-102	24.9.803, 804, 1103, 1106, 1401 - 1405	1790
49-2-202	Rule IV (Labor & Industry - Human Rights Commission)	1790
49-2-203	24.9.804	1790
49-2-204	Rules I - XII (Labor & Industry - Human Rights Commission)	1790
49-2-204	24.9.601 - 612	2871
49-2-204	24.9.801, 804, 1101 - 1106, 1401 - 1405	1790

MCA	Rule or A.G.'s Opinion	Register Page No.
49-2-301	Rules III, XI (Labor & Industry - Human Rights Commission)	1790
49-2-301	24.9.603	2871
49-2-301	24.9.1106	1790
49-2-301 - 404	Rule I (Labor & Industry - Human Rights Commission)	1790
49-2-301 - 404	24.9.601	2871
49-2-303	Rules II, IV, VII, VIII, X - XII (Labor & Industry - Human Rights Commission)	1790
49-2-303	24.9.602, 604, 605, 607, 608, 610 - 612	2871
49-2-303	24.9.803, 1103, 1106, 1401 - 1405	1790
49-2-304	Rules II, IX - XII (Labor & Industry - Human Rights Commission)	1790
49-2-304	24.9.602, 609 - 612	2871
49-2-304, 305	24.9.1103, 1104, 1106	1790
49-2-305 - 307	Rules II, X - XII (Labor & Industry - Human Rights Commission)	1790
49-2-305 - 307	24.9.602, 610 - 612	2871
49-2-306	24.9.1102, 1106	1790
49-2-307, 308	24.9.1105, 1106	1790
49-2-308	Rules II, IV, V, X - XII (Labor & Industry - Human Rights Commission)	1790
49-2-308	24.9.602, 604, 610 - 612	2871
49-2-401	24.9.803, 1106, 1401 - 1405	1790
49-2-402	24.9.1106	1790
49-2-403	Rules II, X - XII (Labor & Industry - Human Rights Commission)	1790
49-2-403	24.9.602, 610 - 612	2871
49-2-504	24.9.803	1790
49-3-101	Rules II, V, X - XII (Labor & Industry - Human Rights Commission)	1790
49-3-101	24.9.602, 605, 606, 610 - 612	2871
49-3-101	24.9.801	1790
49-3-103, 104	Rules I, II, X - XII (Labor & Industry - Human Rights Commission)	1790
49-3-103, 104	24.9.601, 602, 610 - 612	2871
49-3-106	Rules I - XII (Labor & Industry - Human Rights Commission)	1790
49-3-106	24.9.601 - 612	2871
49-3-201	Rules II, IV - VIII, X - XII (Labor & Industry - Human Rights Commission)	1790
49-3-201	24.9.601, 602, 604, 605, 607, 608, 610 - 612	2871
49-3-201 - 209	Rule I (Labor & Industry - Human Rights Commission)	1790
49-3-202	Rules II, V - VIII, X - XII (Labor & Industry - Human Rights Commission)	1790
49-3-202	24.9.602, 605 - 608, 610 - 612	2871
49-3-203 - 207	Rules II, X - XII (Labor & Industry - Human Rights Commission)	1790

MCA	Rule or A.G.'s Opinion	Register Page No.
49-3-203 - 207	24.9.602, 610 - 612	2871
49-3-208	Rules II, IX - XII (Labor & Industry - Human Rights Commission)	1790
49-3-208	24.9.602, 609 - 612	2871
49-3-209	Rules III, X, XI (Labor & Industry - Human Rights Commission)	1790
49-3-209	24.9.601, 603	2871
49-3-210	24.9.606	2871
50-1-202	16.24.1001	2184
50-5-101	16.32.112	1975
50-5-103	16.32.320	2722
50-5-103	16.32.320	3216
50-5-103	16.32.701, 705 - 707, 711	2587
50-5-103	16.32.807, 809, 810, 814, 815, 817	1867
50-5-204	16.32.320	2722
50-5-204	16.32.320	3216
50-5-213	16.32.701, 705 - 707, 711	2587
50-5-214	16.32.807, 809, 810, 814, 815, 817	1867
50-5-301	16.32.101 - 103, 119, 301	1975
50-5-302	16.32.103, 106, 107, 109, 119	1975
50-5-304	16.32.110, 128	1975
50-5-305	16.32.101	1975
50-5-306	16.32.111, 112	1975
50-5-310	16.32.112	1975
50-5-404	16.32.320	2722
50-5-404	16.32.320	3216
50-6-303	16.2.216	2423
50-34-103	16.2.218	2423
50-53-103	Rule I (Commerce - Building Codes)	2682
50-60-103	8.70.101, 105, 907	2682
50-60-104	8.70.101, 105	2682
50-60-108, 109	8.70.101	2682
50-60-201	8.70.101, 105, 302, 401, 501	2682
50-60-203	8.70.101, 105, 302, 303, 401, 402, 501, 907	2682
50-60-401	8.70.501	2682
50-60-504	8.70.302, 303	2682
50-60-508	8.70.105, 302	2682
50-60-601	8.70.401	2682
50-60-603	8.70.401, 402	2682
50-74-101	8.70.907	2682
50-74-103	8.70.907	2682
52-2-111	11.7.901	3205
52-2-704	11.14.605	1824
52-2-713	11.14.605	1824
53-2-108	46.10.410	2372
53-2-201	Rules I - IV (DPHHS)	2131

MCA	Rule or A.G.'s Opinion	Register Page No.
53-2-201	46.12.101, 102, 301 - 304, 306 - 308, 407, 501, 502, 593, 1235, 1260, 1750, 1919	2724
53-2-201	46.2.301	2423
53-2-201	46.10.410	2372
53-2-201	46.12.503, 508	2752
53-2-201	46.12.706, 709, 710	2599
53-2-201	46.12.1222, 1241	3034
53-2-201	46.12.4804 - 4806, 4813, 4816, 4817, 4827	2418
53-2-201	46.13.302 - 304, 401, 502	2136
53-2-301	46.2.320	2423
53-2-606	46.10.410	2372
53-2-606	46.12.1705, 1919	2724
53-2-803	46.2.320	2423
53-4-111	11.7.901	3205
53-4-114	11.7.901	3205
53-4-211	46.18.502, 505, 507	2372
53-4-212	46.10.409, 410, 502, 505, 507	2372
53-4-231	46.10.410	2372
53-4-601	46.18.502, 507	2372
53-4-603	46.18.505, 507	2372
53-4-612	46.18.502	2372
53-4-701	46.10.409	2372
53-4-716	46.10.409	2372
53-4-719	46.10.409	2372
53-6-101	Rules I - IV (DPHHS)	2131
53-6-101	Rules I - X (DPHHS)	2755
53-6-101	46.12.101, 102, 301 - 304, 306 - 308, 407, 501, 502, 593, 1235, 1260, 1750, 1919	2724
53-6-101	46.12.503, 508	2752
53-6-101	46.12.706, 709, 710	2599
53-6-101	46.12.1222, 1241	3034
53-6-101	46.12.1901 - 1903, 1915, 1916, 1918, 1925 - 1927, 1929, 1935 - 1937, 1939, 1940, 1945 - 1947, 1949	2755
53-6-101	46.12.1920	1997
53-6-101	46.12.1928, 1938, 1950	2755
53-6-101	46.12.1930, 1951	1998
53-6-101	46.12.3803	2750
53-6-101	46.12.4804 - 4806, 4813, 4816, 4817, 4827	2418
53-6-103	46.12.501, 502	2724
53-6-106, 107	46.12.102	2724
53-6-111	Rules II, III (DPHHS)	2131
53-6-111	46.12.102, 301 - 304, 306 - 308, 407, 501, 593, 1235, 1260, 1750, 1919	2724
53-6-111	46.12.503, 508	2752
53-6-111	46.12.709	2599
53-6-111	46.12.1222, 1241	3034

MCA	Rule or A.G.'s Opinion	Register Page No.
53-6-113	Rules I - IV (DPHHS)	2131
53-6-113	Rules I - X (DPHHS)	2755
53-6-113	46.12.101, 102, 301 - 304, 306 - 308, 407, 501, 502, 593, 1235, 1260, 1750, 1919	2724
53-6-113	46.12.503, 508	2752
53-6-113	46.12.706, 709, 710	2599
53-6-113	46.12.1222, 1241	3034
53-6-113	46.12.1901 - 1903, 1915, 1916, 1918, 1925 - 1927, 1929, 1935 - 1937, 1939, 1940, 1945 - 1947, 1949	2755
53-6-113	46.12.1920	1997
53-6-113	46.12.1928, 1938, 1950	2755
53-6-113	46.12.1930, 1951	1998
53-6-113	46.12.3803	2750
53-6-113	46.12.4804 - 4806, 4813, 4816, 4817, 4827	2418
53-6-116	46.12.4804 - 4806, 4813, 4816, 4817, 4827	2418
53-6-117	46.12.4804 - 4806	2418
53-6-131	46.12.101, 102, 302, 303, 501, 502	2724
53-6-131	46.12.3803	2750
53-6-141	46.12.101, 102, 301 - 304, 306 - 308, 501, 502, 593	2724
53-6-141	46.12.503, 508	2752
53-6-141	46.12.3803	2750
53-6-155	46.12.102	2724
53-6-402	46.12.502	2724
53-19-305	Rules I, III, IV, IX, X, XII - XVIII (DPHHS)	2967
53-19-307	Rules I - XVIII (DPHHS)	2967
53-19-311	Rules II, IV (DPHHS)	2967
53-19-312	Rule V (DPHHS)	2967
53-20-204	46.8.109	2188
53-21-166	20.14.309	2187
53-24-209	Rules I - VI (DPHHS)	1958
53-24-209	20.3.602, 605	2596
53-24-301	Rules I - VI (DPHHS)	1958
53-24-301	20.3.602, 605	2596
60-2-111, 112	Rules I - VII (Transportation Commission & Transportation)	1930
60-2-121	Rules I - XV (Transportation)	3028
60-2-201	Rules I - VII (Transportation Commission & Transportation)	1930
60-2-201	Rules I - XV (Transportation)	3028
60-3-101	Rules I - VII (Transportation Commission & Transportation)	1930
61-1-104	18.8.428, 514	2980
61-3-321	42.21.106	2805
61-3-431	18.8.428	2980

MCA	Rule or A.G.'s Opinion	Register Page No.
61-3-506	42.21.305	2805
61-3-711 - 733	18.8.101	2980
61-8-903	Rule I (Justice)	2267
61-8-903	23.6.101	3134
61-8-905	Rules II - IV (Justice)	2267
61-8-905	23.6.103, 106	3134
61-8-906	Rule V (Justice)	2267
61-8-906	23.6.108	3134
61-8-907	Rule VI (Justice)	2267
61-8-907	23.6.109, 110	3134
61-8-908	Rules I, VII - IX (Justice)	2267
61-8-908	23.6.113	3134
61-8-911	Rules I - IX (Justice)	2267
61-8-911	23.6.101, 103, 106, 108 - 110, 113	3134
61-9-411	Rule VI (Justice)	2267
61-9-416	Rules I, VI (Justice)	2267
61-9-502	10.7.110	2689
61-10-101 - 148	18.8.504, 509, 511A, 1002, 1101	2980
61-10-101 - 148	18.8.509, 1101	2964
61-10-101 - 148	18.8.511A	1971
61-10-107	18.8.101	2980
61-10-121	18.8.101, 501, 502, 519, 602, 801	2980
61-10-121 - 148	18.8.513, 514, 601	2980
61-10-122	18.8.501, 602, 801	2980
61-10-124	18.8.501, 502, 801	2980
61-10-125	18.8.101, 501	2980
61-10-127	18.8.501	2980
61-10-141	18.8.519	2980
61-10-155	18.8.509, 1101	2964
61-10-155	18.8.511A	1971
61-10-155	18.8.101, 415, 428, 501, 502, 504, 509, 511A, 513, 514, 519, 601, 602, 801, 1002, 1101	2980
61-10-201	18.8.428	2980
61-10-206	18.8.428	2980
61-10-209	18.8.415	2980
67-1-105	18.12.501	1943
67-2-102	18.12.101 - 103, 201 - 203, 301 - 304, 501, 601 - 612, 701, 801 - 808, 18.13.201 - 224, 301 - 319	1943
67-2-301	18.12.501	1943
67-3-101	18.12.801 - 808	1943
67-3-104, 105	18.12.801 - 808	1943
67-3-211	18.12.101 - 103, 201 - 203, 301 - 304	1943
67-3-301	18.12.801 - 808	1943
67-3-303	18.12.801 - 808	1943
67-3-401	18.12.601 - 612	1943
69-3-102, 103	Rules I - LVIII (PSR)	2528
69-3-103	38.5.2102	2777
69-3-108	38.5.2102	2777

MCA	Rule or A.G.'s Opinion	Register Page No.
69-3-201	Rules I - LVIII (PSR)	2528
69-3-207	Rule I (PSR)	2777
69-3-207	38.5.2201, 2202, 2204, 2220, 2301, 2303, 2305, 2307, 2309, 2311, 2313, 2315, 2317, 2319, 2321, 2323, 2325, 2327	2777
69-3-1206	Rule I (PSR)	1962
69-4-201	38.5.1010	2777
69-12-102	Rule V (Justice)	2267
71-3-125	44.6.105, 107, 110	2838
71-3-206	44.6.104	2838
75-2-111	Rule I (DEQ - Board of Environmental Review)	1772
75-2-111	Rules I - IX (DEQ - Board of Environmental Review)	1775
75-2-111	16.8.805, 1104, 1507, 1904, 1906	2260
75-2-111	16.8.1102, 1113	1772
75-2-111	16.8.1903, 1905	1928
75-2-202	Rules I - IX (DEQ - Board of Environmental Review)	1775
75-2-202	16.8.805	2260
75-2-203	16.8.1507	2260
75-2-204	Rule I (DEQ - Board of Environmental Review)	1772
75-2-204	16.8.1102, 1113	1772
75-2-204	16.8.1104	2260
75-2-211	16.8.301, 401, 805, 1104, 1507, 1904, 1906	2260
75-2-215	16.8.1120	2291
75-2-220	16.8.1903, 1905	1928
75-2-402	16.8.401 - 404	2260
75-2-411	16.8.301	2260
75-5-103	17.30.1001	2263
75-5-201	17.30.1001	2263
75-5-201	17.30.1001	3199
75-5-301	17.30.716	3103
75-5-301	17.30.1001	2263
75-5-301	17.30.1001	3199
75-5-303	17.30.716	3103
75-5-317	17.30.716	3103
75-5-401	17.30.1001, 1022, 1501 - 1504, 1511 - 1517, 1520, 1521, 1525 - 1527	2263
75-5-401	17.30.1001, 1022, 1501 - 1504, 1511 - 1517, 1520, 1521, 1525 - 1527	3199
75-5-602	17.30.1022	2263
75-5-602	17.30.1022	3199
75-7-102	Rule I (DNRC)	1946
75-7-103	Rule III (DNRC)	1946
75-7-111, 112	Rule II (DNRC)	1946
75-7-117	Rules I - IV (DNRC)	1946

MCA	Rule or A.G.'s Opinion	Register Page No.
75-7-117	36.2.401 - 406	1946
75-10-404	17.54.404	2711
75-10-404, 405	Rule I (DEQ)	2711
75-10-405	17.54.102, 106, 107, 309, 333	2357
75-10-405	17.54.102, 201, 351, 404	2711
75-10-406	17.54.106, 107	2357
75-10-406	17.54.201	2711
75-10-1001 - 1006	8.30.408	2073
75-11-307	17.58.333	3197
75-11-318	17.58.333	3197
75-15-111	18.6.202, 203, 242, 251, 262	1855
75-15-112	18.6.202	1855
75-15-113	18.6.202, 203, 251, 262	1855
75-15-121	18.6.202, 203, 214, 242, 251, 262	1855
75-15-122	18.6.211 - 214	1855
76-2-205	Opinion No. 22	2196
76-2-305	Opinion No. 22	2196
76-13-109	36.10.126	2183
76-13-125	36.10.126	2183
77-1-106	36.25.146	3110
77-1-209	36.25.115	2368
77-1-209	36.25.146	3110
77-1-802	36.25.146	3110
77-1-804	36.25.146, 167	3110
77-3-102	36.25.602	2368
77-3-301	36.25.301	2368
77-3-303	36.25.301, 302, 304, 310	2368
77-3-316	36.25.310	2368
77-3-401	36.25.203	2368
77-3-402	36.25.201, 203, 206	2368
77-3-404, 405	36.25.203	2368
77-3-407	36.25.203	2368
77-3-421, 422	36.25.206	2368
77-6-104	36.25.602	2368
77-6-202	36.25.115	2368
77-6-210	36.25.146	3110
80-4-403	Rule I (Agriculture)	2343
80-4-721	Rule I (Agriculture)	2343
80-7-802	4.5.102, 108, 109, 113	2473
80-7-812	4.5.113	2473
80-7-814	4.5.102, 108, 109	2473
80-8-105	4.5.113	2473
81-2-101 - 103	32.3.121, 208, 222, 407C - 407E, 410, 417, 425, 426A, 431, 432, 441, 442, 445 - 447, 450, 603 - 605, 612 - 618, 801 - 804, 1508, 2302, 2304,	

MCA	Rule or A.G.'s Opinion	Register Page No.
	32.6.601, 32.8.104, 32.9.102, 202, 203, 205, 207, 32.15.801 - 804, 32.18.301 - 304	1864
81-2-102	Rule I - III (Livestock)	1803
81-2-102	32.3.201, 210, 212, 214 - 216, 218 - 221, 225, 401, 403, 407B, 418, 601, 602, 607, 2001, 2301	1803
81-2-102	32.15.204	1803
81-2-103	Rule III (Livestock)	1803
81-2-103	32.3.201, 214, 218, 221, 225, 401, 403, 407, 418, 601, 602, 607	1803
81-2-701	32.3.214	1803
81-2-707	32.3.212, 214	1803
81-8-215	32.15.204	1803
81-8-231	32.15.204	1803
81-9-302	32.6.1103	1803
81-20-101	32.3.201, 210, 212, 214 - 216, 218 - 220, 2301	1803
81-22-102	32.3.201, 210, 212, 214 - 216, 218 - 221, 225, 226, 401, 403, 407A, 407B, 418, 601, 602, 607, 2001, 2301, 32.6.1103, 32.15.204	2300
81-23-103	32.24.522	2428
81-23-103, 104	Rules I - IV (Livestock - Milk Control)	2114
81-23-103, 104	32.24.501, 504 - 506	2718
81-23-103, 104	32.24.501, 504 - 506	3215
81-23-104	32.24.522	2428
81-23-302	32.24.301	2114
81-23-302	32.24.301	2181
81-23-302	32.24.301	2428
81-23-302	32.24.301	3201
81-23-302	32.24.303	2883
82-4-203	26.4.301	2265
82-4-204, 205	26.4.301, 1231 - 1242, 1303	2265
82-4-227, 228	26.4.1303	2265
82-4-231 - 233	26.4.1303	2265
82-4-235	26.4.1303	2265
82-4-239	26.4.1231 - 1242	2265
82-4-311	26.4.121 - 132	2265
82-4-321	26.4.107M - 107O	1786
82-4-337	26.4.107M	1786
82-4-339	26.4.107M	1786
82-4-357	26.4.107N, 107P	1786
82-4-361	26.4.107M - 107P	1786
82-4-362	26.4.107N, 107P	1786
82-4-422	26.4.121 - 132, 221 - 232	2265

MCA	Rule or A.G.'s Opinion	Register Page No.
82-4-424	26.4.221 - 232	2265
82-11-111	36.22.1408	3107
82-11-121	36.22.1408	3107
82-11-123, 124	36.22.1408	3107
82-11-127	36.22.1408	3107
82-11-137	36.22.1408	3107
82-15-102, 103	8.77.302	2957
82-20-101	32.3.212, 216	1803
85-2-113	36.12.102, 103	1954
85-2-302	Rule I (DNRC)	1952
85-2-302	36.12.103	2430
85-2-319	Rule I (DNRC)	1952
87-2-706	12.3.107	1837
87-5-704	12.9.105, 106, 403	1842
87-5-711	12.9.105, 106, 403	1842
90-3-102	8.122.206	2351
90-3-204	8.122.206, 607, 614 - 616, 701 - 704	2351
90-3-901	8.122.606 - 611, 613, 615, 616	2351
Ch. 591, L. 1995	Opinion No. 22	2196
Opinion 46-19	Opinion No. 23	2390
Opinion 46-17	Opinion No. 23	2390
Opinion 46-2	Opinion No. 25	2986
Opinion 45-21	Opinion No. 25	2986
Opinion 44-11	Opinion No. 23	2390
Opinion 43-77	Opinion No. 20	2010
Opinion 43-74	Opinion No. 19	2002
Opinion 42-113	Opinion No. 19	2002
Opinion 42-98	Opinion No. 19	2002
Opinion 42-80	Opinion No. 19	2002
Opinion 42-23	Opinion No. 20	2010
Opinion 41-91	Opinion No. 19	2002
Opinion 41-45	Opinion No. 21	2014
Opinion 37-47	Opinion No. 22	2196
Opinion 10-167	Opinion No. 20	2010
ARM Title 2, Ch. 21, Sub. 2	Opinion No. 25	2986
ARM 2.21.232	Opinion No. 25	2986
ARM 2.21.234	Opinion No. 25	2986
50-1704, RCM, 1947	17.30.1501 - 1504, 1511 - 1517, 1520, 1521, 1525 - 1527	3199