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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 found at the back of each register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Administrative Rules Bureau at (406) 444-2055.

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

In the matter of the proposed adoption of New Rule I pertaining to the calculation of manual rates, New Rule II pertaining to variable pricing, amendment of ARM 2.55.320, 2.55.323, 2.55.324, 2.55.327A, 2.55.401, 2.55.407 pertaining to premium rates and premium modifiers, and repeal of 2.55.321 and 2.55.322 pertaining to ratemaking	)))))))))))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION, AMENDMENT AND REPEAL OF RULES

TO: All Concerned Persons

1. On January 31, 2001 the Montana State Fund will hold a public hearing at 2:00 p.m. in Room 301 of the State Compensation Insurance Fund Building, 5 South Last Chance Gulch, Helena, Montana, to consider adopting new rule I pertaining to the calculation of manual rates, new rule II pertaining to variable pricing, the amendments to ARM 2.55.320, 2.55.323, 2.55.324, 2.55.327A, 2.55.401, 2.55.407 pertaining to the State Fund's premium ratemaking and premium modifiers and the repeal of 2.55.321 and 2.55.322 pertaining to ratemaking.

2. The Montana State Fund will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Montana State Fund no later than 5:00 p.m., January 25, 2001, to advise us of the nature of the accommodation that you need. Please contact the Montana State Fund, attn: Nancy Butler, PO Box 4759, Helena, Montana 59604-4759; telephone (406) 444-7725, TDD (406) 444-5971; fax (406) 444-7796.

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

<u>RULE I CALCULATION OF MANUAL RATES-FY02</u> (1) The board of directors shall approve a loss-cost multiplier that, when applied to loss-costs as filed by the advisory or rating organization as provided for in (2) or loss-costs as provided for in (3) and (4), results in the state fund's manual rates effective for new and renewal policies as of July 1 of each year or other effective date as determined by the board. In determining the loss-cost multiplier, the board shall take into consideration the following factors such as, but not limited to:

(a) the aggregate adequacy of advisory organization loss-costs;
(b) state fund loss adjustment expense;
(c) production and acquisition expense;
(d) investment yield on underwriting cash flow;
(e) net credits or debits attributable to underwriting programs; and
(f) the desired target level of contribution to surplus.

(2) The advisory or rating organization loss-costs used by the board shall be the latest filed or prior filed loss-costs, as determined by the board, at the time the board determines the loss-cost multiplier.

(3) Using processes, procedures, formulas, and factors certified by the consulting actuary as being consistent with generally accepted actuarial principles, state fund staff shall conduct an analysis of the adequacy of the advisory or rating organization's filed loss-costs, by classification. State fund staff shall present the conclusions of this analysis to the board along with recommendations, if any, to establish loss-costs for classifications which differ from the advisory or rating organization loss-costs as provided for in (2). The determination whether to establish loss-costs for a classification which differ from the advisory or rating organization loss-costs shall consider factors such as, but not limited to:
(a) indications based on state fund loss experience;
(b) indications based on other rating sources;
(c) the ability of the state fund to appropriately underwrite affected policies;
(d) the amount of payroll written or potentially written by the state fund in the affected classification;
(e) administrative convenience;
(f) volatility of rates;
(g) differences in state fund classifications or their usage; and
(h) other relevant underwriting and actuarial judgments.

(4) For classifications in use by the state fund which are not part of the advisory or rating organization loss-cost filing and for classifications identified in (3), state fund staff shall develop a loss-cost using the processes, procedures, formulas, and factors provided for in (3) and other factors consistent with generally accepted actuarial principles. Upon certification of the consulting actuary, state fund staff shall present the results of this analysis to the board along with recommendations if any, for approval of the board. The consulting actuary shall certify that such loss-cost rates are neither excessive, inadequate, nor unfairly discriminatory. The board shall act to accept or not accept the consulting actuary's certification.

(5) NCCI classifications not in the state fund’s inventory at the time rates are adopted under this rule for the following fiscal year, may be adopted during a fiscal year in accordance with ARM 2.55.320 and attendant NCCI loss-costs

and the previously approved loss-cost multiplier shall be applied for new and renewal policies during the fiscal year.

AUTH: Sec. 39-71-2315 and 39-71-2316, MCA;
IMP: Sec. 39-71-2311, 39-71-2316, and 39-71-2330, MCA.

RATIONALE: The State Fund, in November 2000, reorganized its operations and adopted several initiatives to make the State Fund more efficient, competitive and function more like a private workers' compensation carrier. One of these initiatives is the adoption of NCCI programs. NCCI is the licensed workers' compensation advisory and rating organization to which private carriers and the State Fund belong. Private carriers presently use a table of loss-costs for NCCI class codes filed each year by NCCI with the Insurance Commissioner. These loss-costs are used by private carriers in setting their rates for workers' compensation insurance. The State Fund has used NCCI class codes and loss-costs as a basis for its own rates, but has also used its own class codes and loss-cost data in setting its annual rates. The State Fund's adoption of NCCI programs for new and renewal policies beginning in FY02, including the annual loss-cost filing, will bring the State Fund's ratemaking process closer to the process used by private carriers. This will allow insurance agents, policyholders, and prospective customers of the State Fund to compare rates with other carriers on a basis that is the same as or similar to the basis used by these other carriers in setting their rates. Use of the actuary is authorized in 39-71-2330, MCA to assist the board in developing and recommending actuarially sound rates. The role of the board's independent actuary, through certification of the process, procedures, formulas, and factors also allows for streamlining the rate making process. The State Fund will adopt the NCCI loss-cost filing as the basis for its annual ratemaking process, in accordance with (2). The proposed rule, in (1) adopts a process for the board of directors to approve a loss-cost multiplier each year to be applied to the loss-costs filed for NCCI class codes used by the State Fund and as provided for in (3) and (4). This multiplier will be used to assure that rates are set at an adequate, but not excessive or unfairly discriminatory level to cover claims costs and operating expenses.

The proposed rule, in (3) also provides that the State Fund staff must perform an analysis of the adequacy of the filed loss-costs, and present recommendations for variances to the board for its consideration. This will assure that the rates set by the State Fund are adequate, but not excessive, nor unfairly discriminatory for each classification.

The State Fund presently uses many of the NCCI class codes in its own inventory, but there are several differences. The proposed rule, in (4) includes a process for setting rates for State Fund class codes that are not part of the NCCI loss-cost filing and for the classification codes with NCCI loss-costs that are identified in the analysis in (3).

The proposed rule, in (5) provides a process for setting rates for new class codes, not in the State Fund inventory that are erected during the fiscal year.

RULE II VARIABLE PRICING (1) Variable pricing will be applied to new and renewal policies with effective dates between each July 1 and June 30, beginning on July 1, 2001, in lieu of ARM 2.55.325. An analysis shall be conducted annually, and will result in placement of insureds into a pricing level applicable to policies with new or renewal effective dates in the next fiscal year.

(2) The state fund upon approval of the board may establish variable pricing levels to be applied to all classification rates with assignment of individual policies to a pricing level based on annual premium size. Placement in a pricing level will be based on the estimated annual premium amounts of each individual policy for the following policy year, as established in [New Rule I]. Each pricing level will have a separate variable pricing multiplier applied to the rates as determined in [New Rule I].

(3) Notwithstanding placement in a pricing level under (2), a policyholder may be placed in a higher-rated tier based on underwriting criteria including, but not limited to:

(a) industry type;

(b) the prior insolvency of the insured or any of the insured's principals;

(c) determination that the insured is an increased risk pursuant to a state fund evaluation;

(d) the work is primarily performed at locations other than the insured's principal job site or place of business and the insured does not have control over the job site or place of business;

(e) the insured has a history of preventable losses;

(f) an employer's history and experience with any other insurer;

(g) new business without workers' compensation experience history.

(4) Further placement of a policyholder in variable pricing levels shall be based on the incidence of non zero loss claims and length of continuous coverage with the state fund, including any prior associated policies. The board shall establish the percentage of credits and debits for the variable pricing levels. In addition, the board shall establish requirements for the number of years of continuous coverage and the number of years of non zero loss claims for each variable pricing level of debits or credits.

(5) Only policyholders not qualified for experience modification in the next fiscal year will be placed in variable pricing levels in accordance with (4).

AUTH: Sec. 39-71-2315 and 39-71-2316, MCA;
IMP: Sec. 39-71-2311, 39-71-2316, 39-71-2330, and 39-71-2341, MCA.

RATIONALE: The State Fund is proposing a new variable pricing rule for fiscal year 2002 and subsequent fiscal years. This proposed new rule is to operate in conjunction with new Rule I concerning calculation of manual rates. The purpose of the variable pricing rule is to address the inherent price differentials that exist between residual or involuntary, and voluntary markets along an account size dimension and based on loss history. A single manual rate structure does not provide the flexibility to appropriately price different premium segments and recognize individual loss histories. The current program focuses solely on loss ratios which do not fully allow for predictability of future losses. The first part of the State Fund's proposed variable pricing program, under (2) further enhances the objective of appropriately pricing employers, and in particular smaller employers through multiple pricing levels. This will provide balance in pricing by applying different pricing levels to individual policies based on estimated annual premium. These pricing levels will be applied to the manual rates established under proposed new Rule I. Further, a policyholder, under (3) may be placed in a higher pricing level based on the underwriting criteria set forth in the proposed rule and as authorized by 39-71-2341, MCA. The second primary portion of variable pricing level placement is proposed under (4), and will provide for further adjustments to non-experience rated accounts based on frequency of losses and length of continuous coverage, which address the statutory requirement of rewarding and penalizing safety records as authorized in 39-71-2341, MCA.

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

2.55.320 METHOD FOR ASSIGNMENT OF CLASSIFICATIONS OF EMPLOYMENTS (1) and (2) remain the same.

(3) The state fund staff shall assign its insureds to classifications contained in the classifications segment of the State Compensation Insurance Fund Policy Services Underwriting Manual issued July 1, 1997~~7~~9, and assign new or changed classifications as approved by the board. That section of the manual is hereby incorporated by reference. Copies of the classification section of the manual may be obtained from the ~~Underwriting~~ Insurance Operations Support Department of the State Fund, 5 South Last Chance Gulch, Helena, Montana 59601.

AUTH: Sec. 39-71-2315 and 39-71-2316, MCA;
IMP: Sec. 39-71-2311 and 39-71-2316, MCA.

RATIONALE: This rule is amended at this time for the purpose of updating the name of the new department from which the state fund's underwriting manual may be obtained and to reflect the date of the most recently issued version of the Underwriting Manual.

2.55.323 OVERALL RATE LEVEL ~~ADJUSTMENT~~ (1) In order to determine the aggregate premium ~~rate~~ to be charged to new and renewal policies for the fiscal year ~~each insured's policy year~~ that begins on ~~or after~~ the next July 1, the state fund actuary shall ~~recommend~~ evaluate the adequacy of the projected overall rate level ~~adjustment~~ for the fiscal year of the state fund. The projected overall rate level ~~adjustment~~ must be sufficient to cover:

(a) the value of claims, as determined by actuarial analysis, expected to be incurred as a direct result of covered accidents during the following fiscal year of the state fund;

(b) operational and administrative expenses, claims adjustment expense related to covered claims, and other expenses required to operate the state fund for the fiscal year; and

(c) an amount sufficient to maintain appropriate contingency reserves and policyholder surplus.

(2) remains the same.

AUTH: Sec. 39-71-2315 and 39-71-2316, MCA;
IMP: Sec. 39-71-2311, 39-71-2316 and 39-71-2330, MCA.

RATIONALE: The state fund proposes to amend ARM 2.55.323 to make the rule consistent with the rate-setting processes proposed for adoption in new Rule I. The state fund actuary will analyze the overall rate adequacy, but not calculate an overall rate level adjustment. Instead, a loss cost multiplier will be applied to all loss costs in accordance with Rule I.

2.55.324 PREMIUM RATESETTING-HORSE RACING AND BOARD INTERIM MODIFICATION OF RATES ~~(1) The board shall approve an overall rate level adjustment. Except as provided in (2) through (7), to establish a premium rate for a classification for the following fiscal year, state fund staff shall apply the overall rate level adjustment factor to each stabilized credibility weighted rate. State fund staff may apply an adjustment factor to the resulting rates to achieve the board-approved level. The adjustment factor shall be a multiplier which is equally applied to all stabilized credibility weighted rates, prior to application of the limits in (4) (a).~~

~~(2) (a) The state fund staff with approval of the board shall evaluate an individual classification to determine whether the process for setting the premium rate results in an equitable rate based on an analysis of the losses and the premium amount and, if the rate is not equitable, may adjust it so that it is equitable.~~

~~(b)~~(1) Payrolls for horse racing activities conducted at licensed Montana race tracks and hauling of horses between those race tracks from March l through September 30 of each year have been determined not to be sufficiently verifiable and a fee basis shall be used, except as provided in (2) below. The fee for each March 1 through September 30 period

shall be based on the aggregate revenue requirement of this classification and allocated among the projected number of industry participants. ~~The percentage increase or decrease limits in (4) apply to payroll-based rates and do not apply to fee-based coverage. However, the board may approve limits on the revenue requirement for fee-based coverage.~~ This subsection will become effective October 1, 1994.

(2) The board, in lieu of a fee based policy for horse racing activities, may utilize classifications and establish loss-costs under [New Rule I] for horse racing activities if a fee based policy is determined to be inappropriate.

~~(3) The state fund staff with approval of the board may set a classification's rate for all or a portion of the fiscal year at a percentage of the advisory or rating organization rate adjusted for state fund expenses. The percentage of the advisory or rating organization rate shall not be more than 150% of the advisory or rating organization rate adjusted for state fund expenses and the current state fund rate level for the fiscal year in which the rate shall be effective for such classification, or not less than 75% of the advisory or rating organization rate adjusted for state fund expenses and the current state fund rate level for the fiscal year in which the rate shall be effective for such classification or substitute rate or at the rate of an equivalent class code recommended by the advisory or rating organization or the state fund actuary. These situations include, but are not limited to:~~

~~(a) an industry or occupation new to Montana or the state fund;~~

~~(b) an industry or occupation without state fund experience;~~

~~(c) an industry or occupation which has changed to the extent that a new classification code is applicable;~~

~~(d) an industry or occupation with significant changes in class code definition or application such that a portion of the experience of that classification code would be moved into two or more classification codes. A significant change may be determined by the impact on the experience of the class codes by review of the percent of payroll and liabilities affected, numbers of policyholders, the similarities or differences in experience and premium of those moving into or out of a class code and the feasibility of developing experience-based rates.~~

~~(4)(a) The state fund, subject to the approval of the state fund board of directors, may limit the percentage amount of premium rate increases or decreases from the overall rate level adjustment if the limitation is applied to all classifications and the state fund is maintained on an actuarially sound basis. In applying the limits established by this section to construction classifications, the limits shall exclude current construction credit offsets. In establishing a limitation, the state fund may consider such factors as market share, catastrophic or unusual losses, rate stabilization, and economic impact on the state fund.~~

~~(b) The state fund board of directors will approve the limit any one large loss will impact the experience of a classification. The board may apply the same limit to all classifications, or different limits based upon the credibility factor of each classification or based upon industry hazard group with all classifications which have the same credibility factor or hazard group treated alike. The board shall approve industry hazard group designations for each classification.~~

~~(5)~~(3) The state fund may, with concurrence of the state fund board of directors, adopt and implement changes to previously adopted rates. These changes may be based on, but are not limited to, statutory or other legal changes in benefits or costs, or revisions in actuarial indications. These rate changes shall be effective on a date and in such manner as determined by the board of directors, and shall apply to each policy for the remainder of the policy year to which the previously adopted rates apply, and for new and renewal policies.

~~(6) For each construction class code defined in ARM 2.55.327, the state fund staff and with approval of the board will calculate and apply an additional factor to offset the anticipated credits in ARM 2.55.327. These factors will be applied to each construction class code after the stabilized credibility weighted rate, however, the premium rate limits in (4)(a) do not apply.~~

~~(7) The board may approve for each class code a minimum premium rate which is a percentage of the advisory or rating organization rate adjusted for state fund expenses and current state fund rate level or substitute rate similarly adjusted. The board may use these percentages based upon the credibility factor of each code, with all codes which have the same credibility factor treated alike. However, the minimum rate generated by application of this section shall also be subject to the limitations in (4).~~

AUTH: Sec. 39-71-2315 and 39-71-2316, MCA;
IMP: Sec. ~~39-71-2211~~, 39-71-2311, 39-71-2316, and 39-71-2330, MCA.

RATIONALE: The State Fund proposes to amend ARM 2.55.324 as proposed as the deleted procedures are replaced by new Rule I, if the rule is adopted as proposed. In (2) the board needs the flexibility to be able to offer a payroll based policy versus a fee based policy if indicated for administrative ease or to establish actuarially sound rates. The portion of the rule referencing swing limits has been deleted, as that portion of the rule is being addressed through new Rule I and any limits consideration is part of the NCCI filing or the actuarial analysis in setting the revenue requirement for the fee based policy.

2.55.327A CONSTRUCTION INDUSTRY PREMIUM CREDIT PROGRAM - ~~FY01~~ (1) remains the same.

(2) To become eligible for the program, the insured must meet all of the following criteria:

(a) maintain accurate individual employee records of the total hours worked and payroll by class code and make those records available for verification and audit;

(i) If a payroll audit period includes all or a portion of a policy year to which a construction credit applies, the survey period will also be audited to determine the proper credit for the payroll audit period even though the survey period may be more than 3 years prior.

(ii) If the verification or audit reveals hourly records are not available, the insured is disqualified from the program.

(iii) If the insured fails to make the records available within a reasonable period of time after contact, the insured is disqualified from the program.

(iv) If the application of the insured was originally disapproved based on criteria (2)(c) or (2)(d) but otherwise qualified and a subsequent verification or audit results in adjustments which determine the insured actually met those criteria, a credit will be applied retroactively.

(b) apply for the premium credit program and submit the completed and signed application form by the stated due date on the application form;

(c) have paid an average hourly wage equal to or in excess of 1.168 times the state's average weekly wage as published by the department of labor and industry for ~~FY2000~~ each fiscal year; and

(d) have at least 50% of the manual premium during the survey period attributable to one or more of the eligible construction class codes.

(3) The following class codes are the construction codes eligible for the construction industry premium credit program:

3365	5057	5190	5437	5479	5537	6003	6233	7538
3719	5059	5213	5443	5480	5538	6005	6251	7601
3724	5069	5215	5445	5491	5551	6017	6252	7605
3726	5102	5221	5462	5506	5610	6018	6306	7855
5020	5146	5222	5472	5507	5645	6045	6319	8227
5022	5160	5223	5473	5508	5651	6204	6325	9521
5037	5183	5348	5474	5511	5703	6217	6365	9534
5040	5188	5403	5478	~~5536~~	5705	6229	6400	9552

(4) The following credit percentages, are to be applied to the manual premium of the insured's construction class codes during the survey period to determine the premium credit factor for policies with effective dates between:

(a) July 1, 2000 and June 30, 2001 inclusive:

Average Hourly Wage	Credit Percentage
$12.40 or less	0%
12.41 – 13.43	2%
13.44 – 14.46	3%
14.47 – 15.49	4%
15.50 - 16.52	5%

16.53 – 17.55	6%
17.56 - 18.58	8%
18.59 – 19.61	10%
19.62 – 20.64	12%
20.65 – 21.67	14%
21.68 - 22.70	16%
22.71 – 23.73	18%
23.74 - 24.76	20%
24.77 and above	22%

(b) July 1, 2001 and June 30, 2002 inclusive:

Average Hourly Wage	Credit Percentage
$ 12.80 or less	0%
12.81 – 13.86	2%
13.87 – 14.93	3%
14.94 – 15.99	4%
16.00 - 17.05	5%
17.06 – 18.12	6%
18.13 - 19.18	8%
19.19 – 20.24	10%
20.25 – 21.31	12%
21.32 – 22.37	14%
22.38 - 23.43	16%
23.44 – 24.50	18%
24.51 - 25.56	20%
25.57 and above	22%

(5) remains the same.

(6) The following definitions apply to the construction industry premium credit program:

(a) "Policy year" means the period beginning on the effective date of the policy and ending on the expiration date of the policy.

(b) "Premium credit factor" means the factor as calculated in (5)(e). This factor will be applied to the insured's total standard premium for that policy year.

(c) "Survey period" means the third calendar quarter, July 1 through September 30, preceding the ~~policy~~ program year to which the premium credit factor will apply. Program year as used in this rule means July 1 through June 30. If the insured did not engage in operations for the complete usual survey period (July 1 through September 30), then the last complete quarter prior to the policy effective date shall be used or if there was no complete quarter of operations prior to the policy effective date, the first complete quarter after the policy effective date shall be used.

AUTH: Sec. 39-71-2315 and 39-71-2316, MCA;
IMP: Sec. 39-71-2211, 39-71-2311, 39-71-2316, and 39-71-2330, MCA.

RATIONALE: The proposed amendment to subsection (4) is needed to update the construction credit table to reflect changes in

the state's average weekly wage as determined by the Montana Department of Labor and Industry, effective July 1, 2000. In addition, the applicability of the rule to fiscal years beyond FY01 is clarified. In addition, code 5536 has been deleted from the state fund inventory by the board, and policy year was modified to program year in order to be consistent with NCCI's construction credit program.

2.55.401 EXPERIENCE MODIFICATION FACTOR

(1) and (2) remain the same.

~~(3) The state fund may use only experience incurred within the state in determining an experience modification factor.~~

AUTH: Sec. 39-71-2315 and 39-71-2316, MCA;
IMP: Sec. 39-71-2311, 39-71-2316, and 39-71-2330, MCA.

RATIONALE: The State Fund is proposing to delete 2.55.401(3). As stated above in the rationale for adoption of new Rules I and II, the State Fund is conforming its programs and practices to NCCI. NCCI provides an interstate experience rating program that is applied to employers with interstate operations. The interstate rating program is presently being used by private carriers. The State Fund's current practice of not using interstate rating puts the State Fund at a competitive disadvantage to private carriers. The State Fund proposes to adopt the NCCI interstate experience rating program, which would make ARM 2.55.401(3) inconsistent with this objective.

2.55.407 OPTIONAL DEDUCTIBLE PLANS

(1) remains the same.

(2) The board shall establish deductible plans for each fiscal year. ~~The board shall establish premium reduction percentages by hazard group for each level of deductible offered by the state fund. The hazard group is determined by the governing code of the employer. Each classification in use by the state fund shall be assigned a hazard group as published by the advisory or rating organization, or as determined by the board.~~ The board shall determine the factors, multipliers, ratios or other formula components for the plan.

(3) Except as provided in (4), to qualify for a plan an employer must meet the following conditions:

(a) be selected by the state fund pursuant to criteria established by the board, and be provided a written proposal for a state fund optional deductible plan;

~~(a)~~(b) the employer shall have an annual estimated earned premium that equals or exceeds the deductible level chosen or such annual estimated earned premium as established by the board;

~~(b)~~(c) file an endorsement form provided by the state fund; and

~~(c)~~(d) the endorsement is approved by the state fund for the plan chosen by the employer.

(4) The employer may be disqualified or terminated at any time from participation in a plan because of a poor payment history with the state fund; as a result of a credit investigation, or review of relevant financial information which demonstrates the employer is not sufficiently financially stable to be responsible for the payment of the reasonably anticipated deductible amounts. As a condition of approval or continuation in a plan, the state fund may require security including, but not limited to, surety bond, cash deposit or guarantee sufficient to meet the reasonably anticipated obligations of the employer for the policy year.

(5) The plan shall provide for penalty for early termination of the plan by an employer.

AUTH: Sec. 39-71-2315 and 39-71-2316, MCA;
IMP: Sec. 39-71-2316, 39-71-435, and 39-71-2330, MCA.

RATIONALE: The State Fund proposes to amend ARM 2.55.407 to add provisions authorizing the board to adopt factors, multipliers, ratios and other formula components of a large deductible plan, for the State Fund to follow in the provision of large deductible plans. In the past, the State Fund has constructed large deductible plans on an as-needed basis, and each individual plan required board approval. The proposed amendment will allow the board to set criteria so that the State Fund may offer a large deductible policy to a customer on a timely basis without waiting for a meeting of the board.

5. The Montana state fund proposes to repeal, effective June 30, 2001, ARM 2.55.321 (authority sections 39-71-2315 and 39-71-2316, MCA, implementing sections 39-71-2311, 39-71-2316, and 39-71-2330, MCA) and 2.55.322 (authority sections 39-71-2315 and 39-71-2316, implementing sections 39-71-2311, 39-71-2316, and 39-71-2330) located at pages 2-3734 to 2-3736, Administrative Rules of Montana. The reason for the proposed repeal is that the rules will be inconsistent with and replaced by new Rule I, if the rule is adopted as proposed.

6. Interested persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Montana State Fund attorney, Nancy Butler, General Counsel, Montana State Fund, 5 South Last Chance Gulch, PO Box 4759, Helena, Montana 59604-4759, or by electronic mail address nbutler@montanastatefund.com, and must be received no later than 5:00 p.m., February 8, 2001.

7. The State Fund maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and mailing address of the person to receive notices

and specifies that the person wishes to receive notices regarding State Fund administrative rules. Such written request may be mailed or delivered to Nancy Butler, Montana State Fund, PO Box 4759, Helena, MT 59601-4759, telephone (406) 444-7725, faxed to the office at (406) 444-7796, or may be made by completing a request form at any rules hearing held by the State Fund.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

9. Curtis Larsen, Legal Counsel, has been designated to preside over and conduct the hearing.

/s/ Nancy Butler
Nancy Butler, General Counsel
Rule Reviewer

/s/ Jim Broulette
Jim Broulette
Chairman of the Board

/s/ Dal Smilie
Dal Smilie, Chief Legal Counsel
Rule Reviewer

Certified to the Secretary of State January 2, 2001.

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

In the matter of the proposed repeal of ARM 6.6.1901, 6.6.1902, 6.6.1903, 6.6.1904, and 6.6 1905 and adoption of Rule I pertaining to comprehensive health care	))))))	NOTICE OF PROPOSED REPEAL AND ADOPTION NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On February 23, 2001, the state auditor and commissioner of insurance proposes to repeal ARM 6.6.1901, 6.6.1902, 6.6.1903, 6.6.1904, and 6.6.1905 and adopt Rule I pertaining to comprehensive health care.

2. The State Auditor will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the State Auditor's Office no later than 5:00 p.m., January 21, 2001, to advise us of the nature of the accommodation that you need. Please contact Christina L. Goe, State Auditor's Office, 840 Helena Ave., Helena, Montana 59620; telephone 406-444-1942; fax 406-444-3497; e-mail address cgoe@state.mt.us.

3. The rules proposed to be repealed are:

6.6.1901 INSURANCE ARRANGEMENT REPORTING REQUIREMENTS on page 6-207 of the Administrative Rules of Montana.

AUTH: 33-22-1502, MCA
IMP: 33-22-1503, MCA

6.6.1902 APPLICABILITY OF INSURANCE CODE on page 6-207 of the Administrative Rules of Montana.

AUTH: 33-22-1502, MCA
IMP: 33-22-1502, MCA

6.6.1903 GENERAL REQUIREMENTS OF THE MONTANA COMPREHENSIVE HEALTH CARE ASSOCIATION on pages 6-207 and 6-208 of the Administrative Rules of Montana.

AUTH: 33-22-1502, MCA
IMP: 33-22-1503 and 33-22-1521, MCA

6.6.1904 GENERAL REGULATIONS FOR THE BOARD OF DIRECTORS on pages 6-208 and 6-209 of the Administrative Rules of Montana.

AUTH: 33-22-1502, MCA
IMP: 33-22-1504, MCA

6.6.1905 ASSESSMENTS - ASSOCIATION AND BOARD EXPENSES on pages 6-209 and 6-210 of the Administrative Rules of Montana.

AUTH: 33-22-1502, MCA
IMP: 33-22-1504 and 33-22-1513, MCA

4. The proposed new rule will provide as follows:

RULE I OPERATING RULES FOR THE ASSOCIATION (1) For the purpose of carrying out the provisions and purposes of Title 33, chapter 22, part 15, MCA, comprehensive health association and plan, the commissioner hereby adopts and incorporates by reference the bylaws of the Montana comprehensive health association, adopted on July 22, 1987, amended on August 1, 2000, and approved by the commissioner on December 27, 2000, and the operating rules of Montana adopted on June 16, 2000, and approved by the commissioner on December 27, 2000. A copy of the bylaws and operating rules is available for inspection at the office of the Commissioner of Insurance, 840 Helena Avenue, Helena, Montana.

AUTH: 33-22-1502, MCA
IMP: 33-22-1502, MCA

Reason: ARM 6.6.1901 through 6.6.1905 are being proposed for repeal because most of the content of these rules is now outdated. Rule I is necessary in order to comply with the statutory mandate in section 33-22-1502, MCA, and to implement the new statutory provisions governing the Comprehensive Health Association and Plan in Title 13, chapter 22, part 15, MCA. The Commissioner believes that the Bylaws of the Montana Comprehensive Health Association and the Operating Rules properly carry out these new provisions.

5. Concerned persons may present their data, views, or arguments concerning the proposed actions in writing to Christina L. Goe, Montana Insurance Department, P.O. Box 4009, Helena, Montana 59604, or by e-mail to cgoe@state.mt.us, and must be received no later than February 8, 2001.

6. If persons who are directly affected by the proposed actions wish to express their data, views and arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written comments they have to Christina L. Goe, Montana Insurance Department, P.O. Box 4009, Helena, Montana 59604, or by e-mail to cgoe@state.mt.us. A written request for hearing must be received no later than February 8, 2001.

7. If the agency receives requests for a public hearing on the proposed actions from either 10% or 25, whichever is

less of the persons who are directly affected by the proposed actions; from the administrative rule review 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 22 persons based on the 220 persons who have indicated interest in the rules of this agency and who the agency has determined could be directly affected by these rules.

8. The State Auditor's Office maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies whether the person wishes to receive notices regarding insurance rules, securities rules, or both. Such written request may be mailed or delivered to the State Auditor's Office, P.O. Box 4009, Helena, MT 59604, faxed to the office at 406-444-3497, e-mailed to dsautter@state.mt.us, or may be made by completing a request form at any rules hearing held by the State Auditor's office.

9. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

By: /s/ John Morrison
John Morrison
State Auditor and
Commissioner of Insurance

By: /s/ Janice S. VanRiper
Janice S. VanRiper
Rules Reviewer

Certified to the Secretary of State January 2, 2001.

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

In the matter of the proposed repeal of ARM 12.3.203, 12.3.204, and 12.3.206; the proposed adoption of new rules pertaining to license agents; and the proposed amendment of ARM 12.3.106, 12.3.202, 12.3.205, 12.3.209, and 12.3.403	)	CORRECTED NOTICE OF REPEAL, ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On October 5, 2000, the Department of Fish, Wildlife and Parks (department) published a notice at page 3200 of the 2000 Montana Administrative Register, Issue Number 22, of the repeal, adoption and amendment of the above-captioned rules pertaining to license agents.

2. The reason for the correction is that for new rule III (ARM 12.3.220) and ARM 12.3.202 the incorrect statutes were cited under AUTH and IMP. The corrected AUTH and IMP citations read as follows:

NEW RULE III (ARM 12.3.220) LICENSE AGENT APPLICATIONS

AUTH: 87-1-201, 87-2-901, 87-2-902, MCA
IMP: ~~87-1-901~~, 87-2-901 MCA

12.3.202 CLASSES OF LICENSE AGENTS

AUTH: 87-1-201, 87-2-901, MCA
IMP: 87-2-901, ~~87-2-901~~, 87-2-904 MCA

3. Replacement pages for the corrected notice of adoption, repeal and amendment have already been submitted to the Secretary of State on December 29, 2000.

By: /s/ Christian A. Smith
Christian A. Smith
Acting Director, Department of Fish, Wildlife and Parks

By: /s/ John F. Lynch
John F. Lynch
Rule Reviewer

Certified to the Secretary of State January 2, 2001

**BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA**

In the matter of the repeal of 12.6.801 and 12.6.901, the adoption of rules I-XCVIII (new rules 12.11.501 through 12.11.6201) relating to water safety, and the transfer of rules 12.6.701, 12.6.702, 12.6.703, 12.6.704, 12.6.705, 12.6.706, 12.6.707, 12.6.802, 12.6.902, 12.6.903, and 12.6.904	)	NOTICE OF REPEAL, ADOPTION AND TRANSFER

TO: All Concerned Persons

1. On November 9, 2000, the Fish, Wildlife and Parks Commission (commission) published notice of the proposed repeal of 12.6.801, and 12.6.901, the adoption of rules I-XCVIII, and the transfer of rules 12.6.701, 12.6.702, 12.6.703, 12.6.704, 12.6.705, 12.6.706, 12.6.707, 12.6.802, 12.6.902, 12.6.903, and 12.6.904 at page 3068 of the 2000 Montana Administrative Register, Issue Number 21.

2. The commission has repealed ARM 12.6.801 and 12.6.901 as proposed.

3. The commission has adopted the following rules as proposed:

Rule I	(ARM 12.11.501)
Rule II	(ARM 12.11.650)
Rule IV	(ARM 12.11.3901)
Rule V	(ARM 12.11.801)
Rule VI	(ARM 12.11.3401)
Rule VII	(ARM 12.11.2701)
Rule VIII	(ARM 12.11.2801)
Rule IX	(ARM 12.11.2805)
Rule X	(ARM 12.11.2201)
Rule XI	(ARM 12.11.3905)
Rule XII	(ARM 12.11.601)
Rule XIII	(ARM 12.11.605)
Rule XIV	(ARM 12.11.610)
Rule XV	(ARM 12.11.615)
Rule XVI	(ARM 12.11.3910)
Rule XVII	(ARM 12.11.3405)
Rule XVIII	(ARM 12.11.2301)
Rule XIX	(ARM 12.11.1601)
Rule XX	(ARM 12.11.4601)
Rule XXI	(ARM 12.11.3410)

Rule XXII	(ARM 12.11.1001)
Rule XXIII	(ARM 12.11.3415)
Rule XXIV	(ARM 12.11.3420)
Rule XXV	(ARM 12.11.620)
Rule XXVI	(ARM 12.11.3915)
Rule XXVII	(ARM 12.11.625)
Rule XXVIII	(ARM 12.11.3920)
Rule XXIX	(ARM 12.11.1201)
Rule XXX	(ARM 12.11.3925)
Rule XXXI	(ARM 12.11.2101)
Rule XXXII	(ARM 12.11.2305)
Rule XXXIII	(ARM 12.11.3930)
Rule XXXIV	(ARM 12.11.5701)
Rule XXXV	(ARM 12.11.2205)
Rule XXXVI	(ARM 12.11.3701)
Rule XXXVII	(ARM 12.11.5901)
Rule XXXVIII	(ARM 12.11.3601)
Rule XXXIX	(ARM 12.11.3935)
Rule XL	(ARM 12.11.2810)
Rule XLI	(ARM 12.11.4901)
Rule XLII	(ARM 12.11.3940)
Rule XLIII	(ARM 12.11.3501)
Rule XLIV	(ARM 12.11.3205)
Rule XLV	(ARM 12.11.5705)
Rule XLVI	(ARM 12.11.3945)
Rule XLVII	(ARM 12.11.3950)
Rule XLVIII	(ARM 12.11.3215)
Rule XLIX	(ARM 12.11.2310)
Rule L	(ARM 12.11.3955)
Rule LI	(ARM 12.11.1801)
Rule LII	(ARM 12.11.3101)
Rule LIII	(ARM 12.11.3960)
Rule LIV	(ARM 12.11.6201)
Rule LV	(ARM 12.11.3220)
Rule LVI	(ARM 12.11.3425)
Rule LVII	(ARM 12.11.3430)
Rule LVIII	(ARM 12.11.3435)
Rule LIX	(ARM 12.11.3440)
Rule LX	(ARM 12.11.3445)
Rule LXI	(ARM 12.11.2210)
Rule LXII	(ARM 12.11.3450)
Rule LXIII	(ARM 12.11.3455)
Rule LXIV	(ARM 12.11.2105)
Rule LXV	(ARM 12.11.3460)
Rule LXVI	(ARM 12.11.630)
Rule LXVII	(ARM 12.11.3965)
Rule LXVIII	(ARM 12.11.3465)
Rule LXIX	(ARM 12.11.2901)
Rule LXX	(ARM 12.11.1401)
Rule LXXI	(ARM 12.11.3970)
Rule LXXII	(ARM 12.11.3470)
Rule LXXIII	(ARM 12.11.3975)
Rule LXXIV	(ARM 12.11.3980)
Rule LXXV	(ARM 12.11.3475)

Rule LXXVI	(ARM 12.11.3985)
Rule LXXVII	(ARM 12.11.635)
Rule LXXVIII	(ARM 12.11.2001)
Rule LXXIX	(ARM 12.11.3990)
Rule LXXX	(ARM 12.11.3225)
Rule LXXXI	(ARM 12.11.3995)
Rule LXXXII	(ARM 12.11.640)
Rule LXXXIII	(ARM 12.11.805)
Rule LXXXIV	(ARM 12.11.3480)
Rule LXXXV	(ARM 12.11.2110)
Rule LXXXVI	(ARM 12.11.3485)
Rule LXXXVII	(ARM 12.11.3999)
Rule LXXXVIII	(ARM 12.11.645)
Rule LXXXIX	(ARM 12.11.1701)
Rule XC	(ARM 12.11.3230)
Rule XCI	(ARM 12.11.701)
Rule XCII	(ARM 12.11.1005)
Rule XCIII	(ARM 12.11.1101)
Rule XCIV	(ARM 12.11.2315)
Rule XCV	(ARM 12.11.2905)
Rule XCVI	(ARM 12.11.3505)
Rule XCVII	(ARM 12.11.4101)
Rule XCVIII	(ARM 12.11.3201)

4. The commission has adopted Rule III with the following changes, stricken matter interlined, new matter underlined:

RULE III (ARM 12.11.505) ~~EXCEPTIONS TO RESTRICTIONS~~ GENERAL EXCEPTIONS AND APPLICATIONS (1) The following exceptions apply to the restrictions placed on waters in subchapters 5 through 62:

(a) official patrol;

(b) search and rescue operations;

(c) maintenance of hydroelectric projects with prior notification by the utility;

(d) scientific studies, including sampling fish populations, by department personnel;

(e) for other than department personnel, scientific purposes with the director's prior written approval and any required permits; and

(f) special events such as testing of motorized water craft with the director's prior written approval.

(2) The rules within this chapter generally do not require approval by the department of public health and human services (DPHHS) under 87-1-303, MCA, as they do not apply to issues of public health and sanitation. If a rule is adopted which does require DPHHS approval in regard to health and sanitation, the rule will indicate approval.

5. The commission has transferred the following rules as proposed:

OLD	NEW	
12.6.701	12.11.301	Personal Floatation Devices and Life Preservers
12.6.702	12.11.305	Ventilation Systems
12.6.703	12.11.310	Fire Extinguishers
12.6.704	12.11.315	Lights
12.6.705	12.11.320	Sound Producing Device on Motorboats
12.6.706	12.11.325	Measuring Length of Boat
12.6.707	12.11.330	Definition of "Vessel"
12.6.802	12.11.340	Enforcement Authority
12.6.904	12.11.345	Use Restrictions at Montana Power Company Dams
12.6.902	12.11.5101	Castle Rock Reservoir Regulations
12.6.903	12.11.3210	Helena Valley Equalizing Reservoir Regulations

6. No comments or testimony were received.

BY:

/s/ S.F. Meyer
S.F. MEYER
Commission Chairman

/s/ Robert N. Lane
ROBERT N. LANE
Rule Reviewer

Certified to the Secretary of State January 2, 2001

**BEFORE THE BOARD OF LAND COMMISSIONERS
AND THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
OF THE STATE OF MONTANA**

In the matter of the amendment of ARM 36.25.102 and 36.25.110 to set rental rates for cabin site leases on state trust lands and associated improvements	))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On November 9, 2000, the Board of Land Commissioners and Department of Natural Resources and Conservation published notice of the proposed amendment of ARM 36.25.102 and 36.25.110 to set rental rates for cabin site leases on state trust lands and associated improvements at page 3104 of the 2000 Montana Administrative Register, Issue Number 21.

2. The agency has amended ARM 36.25.102 and 36.25.110 as proposed.

**AUTH: 77-1-202, MCA
IMP: 77-1-209, MCA**

3. The following comments were received and appear with the agency's responses:

COMMENT 1: The lessees contend that the 3.5% lease rate reflects market value. If the lease rate increases to 5%, many lessees will not be able to afford their lease. The state would have an excess number of leases to market, loosing revenue to the trust funds.

RESPONSE 1: This issue was raised with the negotiated rule making committee of the possible diminishing returns to the school fund if lessees are driven off of their leases due to higher lease fees. The long term effect of the increased lease rate will not be known until implementation. The department has been successful in marketing vacant lease sites with a minimum bid equal to 7% of the appraised value of the land. Predicting the effects of the proposed 5% lease rate and its long-term impact cannot be determined at this time. The committee concluded that phasing in the lease fee would help mitigate this issue.

COMMENT 2: The membership of the Negotiated Rule Making Committee was not fairly represented by the lessees. Eight state representatives versus three lessees. It seemed like a staked deck. It's pretty easy for eight to out vote three.

RESPONSE 2: The membership of the Negotiated Rule Making Committee are provided for in statute and administrative rule. At the first meeting in April, the committee approved ground rules. Some of the ground rules address the comment above. A quorum consisted of at least two of the three members representing each interest on the committee, and at least one of the two members from the Department of Natural Resources and Conservation. Consensus means an assenting vote by 9 of the 11 committee members. The committee would allow proxy votes, authorized in writing, only on specified issues.

COMMENT 3: Lessees provide valuable strength to the community through community service, volunteering to mentor youth in the community and contributing to the local economy. The increased lease rate will drive many people out of the state. What about the people on social security?

RESPONSE 3: The draft rule provides for phasing in not only the increase in lease fee but also the increase in the appraised value over the first five-year period the rate is implemented. The committee recognized that relief for hardship cases must come from the General Fund and is the province of the legislature. This relief would take the form of income tax credits. During the informal question and answer portion of the hearing the hearings officer recommend the lessees meet with their local legislators regarding this matter.

COMMENT 4: Cabin/homesite lessees believe that they were unfairly singled out as one of many types of surface leases by MonTrust in the lawsuit. How about the grazing and agricultural lessees. Why should the cabin/homesite lessees be burdened with the question of fair market value and not other users?

RESPONSE 4: This comment is outside the scope of this rule making process. The hearings officer offered that the representative from MonTrust could be contacted regarding their lawsuit and future intentions regarding securing fair market value for other uses of school trust lands.

COMMENT 5: The lessees would like the Land Board to support selling the leases.

RESPONSE 5: The committee posed this question to the Land Board members. They unanimously responded that, in general, the Land Commissioners believe that the long-term return on school trust lands will exceed the return gained by selling the land and investing the proceeds in the Permanent School Fund. In addition, they want to maintain the land base, rather than sell it off.

COMMENT 6: Lessees pay more for a lease fee than they would in property tax on the land.

RESPONSE 6: Comparing the annual lease fee to what would be

paid in property tax is comparing apples to oranges. A return on your property referred to as "Fair Market Value" is not synonymous with the assessment of property tax. A landowner seeks a return on their property in addition to satisfying any tax obligation. A typical rate of return to a landowner should compare to the rate of return possible on other investments in the market place i.e. investments in bonds, stocks, etc.

COMMENT 7: The lessee is responsible for the maintenance of roads, weed control, placement of utilities, etc. These factors should be taken into consideration in the appraised value of the land. It is not appropriate to compare state lease lots to privately owned property in the appraisal process. An independent appraiser should appraise the state leases.

RESPONSE 7: The committee specifically considered the restrictions of the state lease and the costs to the lessee of leasing state land. The 5% lease rate takes into account all those factors reflecting costs to the lessee of leasing state land. Therefore, diminishing the appraised value of the land for the same reasons would not reflect a rate of return to the trust at fair market value. By state statute the land is appraised by the Department of Revenue and provides appraised values to the DNRC when they conduct their cyclical reappraisal cycles.

COMMENT 8: These leases were not originally let to raise money. They were given to encourage people to be good stewards of the land.

RESPONSE 8: The Department cannot manage and assess a lease fee that does not reflect fair market value. This may have been the situation in the 1940's when most of the lease sites were established. The supply and demand for recreational properties over the past 15 to 20 years has impacted the appreciation of the land values, increasing lease fees and revenues to the trust funds for cabin/homesite leases.

COMMENT 9: Why is the market rate for Montana State lands not closer to the State of Idaho's rate of 2.5%?

RESPONSE 9: The State of Idaho land managers were interviewed. Idaho has evidence that their rate of 2.5% of the appraised value of the land does not reflect market value. In addition, the state lease rate of 3.5% was declared unconstitutional by the State Supreme Court. Considering a rate less than 3.5% was not an option.

COMMENT 10: What is the definition of "Fair Market Value"?

RESPONSE 10: The most probable price in cash or in terms equivalent to cash, which lands or interest in land should bring in a competitive and open market under all conditions requisite to a fair sale, where the buyer and seller each act prudently and knowledgeably and the price is not affected by undo

influence.

COMMENT 11: Are the homesites associated with adjacent agricultural and grazing lands included in the lease rate review process?

RESPONSE 11: Yes, the term cabin/homesite is defined in administrative rule as a single family residence. Therefore, legally there is no difference between a cabinsite and homsite.

COMMENT 12: If the negotiated rule making committee found that five percent is fair market value, how can a phase-in period be consistent with the Constitutional requirement that fair market value be attained for the use of school trust land if that rate is not immediately applied?

RESPONSE 12: The committee found that the potential for the loss of income that from immediate implementation of the new lease rate when coupled with new land appraisals was sufficient grounds for establishing a phase-in period. The committee found that a phase-in period would reduce turn over or vacancy of cabinsite lease sites and would reduce the chance that income from lease payments would be disrupted. The committee also found that the establishment of a phase-in period would reduce the amount of leased property offered for sale at any one time thus protecting the marketability of cabinsite lease sites. Precedent for the establishment of a phase-in period is found in the State's implementation of the school equalization payment settlement whereby the change in school funding was phased in over a period of time in order to allow for a smooth transition from the previous school funding structure.

All leases are reappraised every five years. Phasing in the lease rate and appraised value only applies to the first five years the new rate is implemented.

COMMENT 13: If the state needs money for education, they should manage their lands in other ways to generate money. Schools spend money frivolously, i.e. trips to Big Mountain, sports, etc. The state needs to manage their timberland more intensively. State is looking for a monetary value, not fair assessment to the lessees. The new lease fee makes it impossible for native Montanans to have a place on the lake.

RESPONSE 13: The Department feels that the comment is outside the scope of this rule making.

BOARD OF LAND COMMISSIONERS

By: /s/ Marc Racicot
Marc Racicot
CHAIR

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

By: /s/ Arthur R. Clinch
Arthur R. Clinch
DIRECTOR

By: /s/ Donald D. MacIntyre
Donald D. MacIntyre
RULE REVIEWER

Certified to the Secretary of State January 2, 2001.

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

In the matter of the adoption of rules I through XVII and the amendment of ARM 37.86.105, 37.86.2206, 37.86.2207, 37.86.2801, 37.86.3001, 37.86.3005, 37.86.3502, 37.86.3702, 37.88.901, 37.88.905, 37.88.906, 37.88.907, 37.88.1106, 37.88.1116, 46.20.103, 46.20.106, 46.20.114, 46.20.117 and the transfer of Title 46, Chapter 20 pertaining to Mental Health Services	)))))))))))))))))))	NOTICE OF ADOPTION, AMENDMENT AND TRANSFER

TO: All Interested Persons

1. On October 26, 2000, the Department of Public Health and Human Services published notice of the proposed adoption, amendment and transfer of the above-stated rules at page 2889 of the 2000 Montana Administrative Register, issue number 20.

2. The Department has amended rules 37.86.105, 37.86.2206, 37.86.3005 and 37.88.1116 as proposed.

3. The Department has amended and transferred rules 46.20.103 [37.89.103], 46.20.106 [37.89.106], 46.20.114 [37.89.114] and 46.20.117 [37.89.125] as proposed and transferred 46.20.110 [37.89.115], 46.20.113 [37.89.118], 46.20.120 [37.89.119], 46.20.123 [37.89.131], and 46.20.126 [37.89.135] as proposed.

4. The Department has adopted the rules I [37.86.2209], II [37.86.2211], III [37.86.2213], IV [37.86.2217], V, [37.86.2219], VI [37.86.2221], VII [37.86.3007], VIII [37.86.3009], IX [37.86.3011], X [37.86.3014], XI [37.86.3016], XII [37.86.3018], XIII [37.86.3020], XV [37.86.108], XVI [37.86.110] and XVII [37.86.112] as proposed.

5. The Department has adopted the following rule as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

RULE XIV [37.86.3022] OUTPATIENT HOSPITAL SERVICES, PROSPECTIVE PAYMENT METHODOLOGY, PARTIAL HOSPITALIZATION SERVICES (1) Partial hospitalization services will be reimbursed on a prospective per diem rate which shall be the lesser of:

~~(a)~~ the amount specified in the department's medicaid mental health fee schedule. The per diem rates specified in the department's medicaid mental health fee schedule are bundled prospective per diem rates for full-day programs and half-day programs, as defined in ARM 37.86.3001. The bundled prospective per diem rate includes all outpatient psychiatric and psychological treatments and services, laboratory and imaging services, drugs, biologicals, supplies, equipment, therapies, nurses, social workers, psychologists, licensed professional counselors and other outpatient services, that are part of or incident to the partial hospitalization program, except as provided in the department's medicaid mental health fee schedule~~; or~~.

~~(b) an amount of up to 25% less than the amount specified in the department fee schedule if the department determines that:~~

~~(i) the average per case cost of mental health service plan expenditures times the number of enrollees will exceed total appropriations; and~~

~~(ii) there is no other means by which the department can reasonably reduce the cost of mental health services.~~

(2) and (3) remain as proposed.

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

6. The Department has amended the following rules as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

37.86.2207 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), REIMBURSEMENT (1) through (2) remain as proposed.

(3) Reimbursement for the therapeutic portion of therapeutic youth group home treatment services is the lesser of:

(a) the amount specified in the department's medicaid mental health fee schedule. The department hereby adopts and incorporates herein by reference the department's medicaid mental health fee schedule dated July, 2000. A copy of the fee schedule may be obtained from the Department of Public Health and Human Services, Addictive and Mental Disorders Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951; or

~~(b) an amount of up to 25% less than the amount specified in the department fee schedule if the department determines that:~~

~~(i) the average per case cost of mental health service plan expenditures times the number of enrollees will exceed total appropriations; and~~

~~(ii) there is no other means by which the department can reasonably reduce the cost of mental health services.~~

(b) the provider's usual and customary charges (billed charges).

(4) Reimbursement for the therapeutic portion of therapeutic family care treatment services is the lesser of:

(a) the amount specified in the department's medicaid mental health fee schedule; or

~~(b) an amount of up to 25% less than the amount specified in the department fee schedule if the department determines that~~:

~~(i) the average per case cost of mental health service plan expenditures times the number of enrollees will exceed total appropriations; and~~

~~(ii) there is no other means by which the department can reasonably reduce the cost of mental health services.~~

(b) the provider's usual and customary charges (billed charges).

(5) through (10) remain as proposed.

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

37.86.2801 ALL HOSPITAL REIMBURSEMENT, GENERAL (1) through (1)(d) remain as proposed.

(e) For recipients determined medicaid eligible by the department after admission to or discharge from the facility, the certificate of need required under (1)(b) is waived. A retrospective review to determine the medical necessity of the admission to the program and the treatment provided will be completed by the department or its designee at the request of the department, a provider, the individual or the individual's parent or guardian. Request for retrospective review must be:

(i) received within 14 days after the eligibility determination for recipients determined eligible following admission, but before discharge from the partial hospitalization program; or

(ii) received within 90 days after the eligibility determination for recipients determined eligible after discharge from the partial hospitalization program.

(f) through (8) remain as proposed.

AUTH: Sec. 2-4-201, 53-2-201 and 53-6-113, MCA
IMP: Sec. 2-4-201, 53-2-201, 53-6-101, 53-6-111, 53-6-113 and 53-6-141, MCA

37.86.3001 OUTPATIENT HOSPITAL SERVICES, DEFINITIONS

(1) through (4) remain as proposed.

(5) "Partial hospitalization services" means an active treatment program that offers therapeutically intensive, coordinated, structured clinical services provided only to individuals who are determined to have a serious emotional disturbance or severe disabling mental illness. Partial hospitalization services are time-limited and provided within ~~a program that is co-located with the psychiatric unit of a general hospital or with an inpatient psychiatric hospital for individuals under 21~~ either an acute level program or a sub-acute level program. Partial hospitalization services include

day, evening, night and weekend treatment programs that employ an integrated, comprehensive and complementary schedule of recognized treatment or therapeutic activities.

(a) Acute level partial hospitalization is provided by programs which:

(i) are operated by a hospital as described in (5) and are co-located with that hospital such that in an emergency a patient of the acute partial hospitalization program can be transported to the hospital's inpatient psychiatric unit within 15 minutes;

(ii) serve exclusively individuals being discharged from inpatient psychiatric treatment or residential treatment; and

(iii) are designed to stabilize patients sufficiently to allow discharge to a less intensive level of care, on average, after 15 or fewer treatment days.

(b) Acute level partial hospitalization is reimbursed according to Rule XIV [ARM 37.86.3022].

(c) Sub-acute level partial (SAP) hospitalization is provided by programs which:

(i) operate under the license of a general hospital with a distinct psychiatric unit or an inpatient psychiatric hospital for individuals under 21;

(ii) operate in a self-contained facility and offer integrated mental health services appropriate to the individual's needs as identified in an individualized treatment plan;

(iii) provide psychotherapy services consisting of at least 3 group sessions per week and 5 individual and/or family sessions per month;

(iv) encourage and support parent and family involvement;

(v) provide services in a supervised environment by a well-integrated, multi-disciplinary team of professionals which includes but is not limited to program therapists, behavioral specialists, teachers and ancillary staff;

(A) a program therapist must be a licensed mental health professional who is site based;

(B) a program therapist must have an active caseload that does not exceed 10 program clients;

(C) a behavioral specialist must be site based and have a bachelor's degree in a behavioral science field or commensurate experience working with children with serious emotional disturbance. There must be 1 behavioral specialist for each 5 youth in the SAP program; and

(D) all staff responsible for implementing the treatment plan must have a minimum of 24 hours orientation training and 12 additional hours of continuing education each year relating to serious emotional disturbance in children and its treatment. Training must include specific instruction on recognizing the effects of medication.

(vi) provides education services through one of the following:

(A) full collaboration with a school district;

(B) certified education staff within the program; or

(C) interagency agreements with education agencies.

(vii) provide crisis intervention and management, including response outside of the program setting;

(viii) provides psychiatric evaluation, consultation, and medication management on a regular basis. Psychiatric consultation to the program treatment staff is provided at least twice each month and includes at least one face-to-face evaluation with each youth each month;

(ix) serves children or youth with a serious emotional disturbance being discharged from inpatient psychiatric treatment or residential treatment or who would be admitted to such treatment in the absence of partial hospitalization; and

(x) are designed to stabilize patients sufficiently to allow discharge to a less intensive level of care, on average, after 60 or fewer treatment days.

(d) Sub-acute level partial hospitalization is reimbursed at 75% of the rate established for acute level partial hospitalization in Rule XIV [ARM 37.86.3022].

(6) and (7) remain as proposed.

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

37.86.3502 CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS, ELIGIBILITY (1) remains as proposed.

(2) "Severe disabling mental illness" means with respect to a person who is 18 or more years of age that the person has:

(a) remains as proposed.

(b) a DSM-IV diagnosis ~~with a severity specifier of moderate or severe~~ of:

(i) through (d) remain as proposed.

(i) a ~~physician~~ health care professional has determined that medication is necessary to control the symptoms of mental illness;

(ii) through (iv) remain as proposed.

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

37.86.3702 CASE MANAGEMENT SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE, ELIGIBILITY (1) remains as proposed.

(2) "Serious emotional disturbance (SED)" means with respect to a youth between the ages of 6 and 17 years that the youth meets requirements of (2)(a)~~, (b) or (c)~~ and either (2)(b) or (2)(c).

(a) through (d)(vi) remain as proposed.

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

37.88.901 MENTAL HEALTH CENTER SERVICES, DEFINITIONS

(1) through (4) remain as proposed.

~~(5) "Child and adolescent intensive day treatment" means a program which provides integrated, multi-disciplinary mental~~

~~health and education services to youth with serious emotional disturbance within a self-contained setting in a mental health center facility. Intensive day treatment programs must be approved by the addictive and mental disorders division.~~

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

~~(12)~~ (11) "Mental health center services" means child and adolescent day treatment services, ~~child and adolescent intensive day treatment services,~~ adult day treatment services, community-based psychiatric rehabilitation and support respite care, comprehensive school and community treatment, in-training practitioner services and the therapeutic component of crisis intervention services, foster care for mentally ill adults and mental health group home services and programs of assertive community treatment ~~services,~~ as defined in these rules.

(13) through (17) remain as proposed but are renumbered (12) through (16).

(17) Comprehensive school and community treatment means a comprehensive, planned course of outpatient treatment provided primarily in the school to a child or adolescent with a serious emotional disturbance, as defined in ARM 37.89.103(14), through a program operated by a mental health center and approved by the department. To be approved a program must provide the department with a satisfactory written description of the program at least 3 months prior to beginning the service. The department must approve or deny a program within 30 days of receiving a complete application. An existing school-based mental health program shall be deemed to be a comprehensive school and community treatment program until June 30, 2001. Approvals will be granted for a term not to exceed the school year. The program description, at a minimum, must document:

(a) how the program will meet each child's needs for treatment during and outside school hours, including:

(i) individual, family, and group therapy;

(ii) crisis intervention services;

(iii) case management;

(iv) continuing observation, support and behavioral intervention in the classroom and on the playground; and

(v) other services effective in the treatment of the child's emotional disturbance.

(b) how the mental health center will meet each child's needs for treatment during school vacations in a manner integrated in the individual's treatment plan;

(c) limited circumstances which would require a child in the program to access mental health services outside the program and how the program would minimize reliance on other service providers;

(d) admission and discharge criteria for the program; and

(e) how the program will accomplish and ensure:

(i) treatment, crisis and discharge planning and regular updates of such plans;

(ii) family involvement in treatment and discharge planning and in the course of treatment;

(iii) continuing contact and information exchange with persons and agencies significantly involved in the child's treatment;

(iv) coordination of all mental health services and treatments the child receives;

(v) continuing quality improvement including the regular measurement and reporting of program performance and individual outcomes to include comparison with baseline measurements and established benchmarks;

(vi) that all children within the school or the school district, as appropriate, who meet the described criteria for service are considered for admission to the program;

(vii) that all available financial resources for support of services including third party insurance and parent payment are utilized;

(viii) there is an appropriate level of direct or in-kind contributions by the school district; and

(ix) that services delivered are adequately documented to support the reimbursement received.

(18) remains as proposed.

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

37.88.905 MENTAL HEALTH CENTER SERVICES, REQUIREMENTS

(1) through (8) remain as proposed.

(9) Comprehensive school and community treatment must be provided through a program of services staffed by at least 2 mental health workers who work exclusively in the school. At least 1 of the 2 mental health workers must be a licensed psychologist, licensed clinical social worker, or licensed professional counselor with a maximum case load of 12 school or preschool children.

(a) Comprehensive school and community treatment must be provided according to an individualized treatment plan designed by a licensed professional who is a staff member of the school-based mental health services program.

(b) In addition to any clinical records required by mental health center license rules, the provider must maintain for school-based mental health services the records required by ARM 37.85.414, which shall include but are not limited to:

(i) documentation of the client's attendance in school and in program services;

(ii) progress notes for each individual therapy session; and

(iii) weekly overall progress notes.

(c) Comprehensive school and community treatment must be prior authorized by the department or its designee. Comprehensive school and community treatment is not medically necessary when, in the determination of the department, the individual is receiving substantial mental health treatment outside the comprehensive school and community treatment program.

(9) remains as proposed but is renumbered (10).

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

37.88.906 MENTAL HEALTH CENTER SERVICES, COVERED SERVICES

(1) Mental health center services, covered by the medicaid program, include the following:

(a) and (b) remain as proposed.

~~(c) child and adolescent intensive day treatment services;~~

(d) through (f) remain as proposed but are renumbered (c) through (e).

(f) comprehensive school and community treatment;

(g) through (6)(c) remain as proposed.

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

37.88.907 MENTAL HEALTH CENTER SERVICES, REIMBURSEMENT

(1) Medicaid reimbursement for mental health center services shall be the lowest of:

(a) the provider's actual (submitted) charge for the service;

(b) the amount of medicare deductible and coinsurance for services provided to persons who are eligible for both medicare and medicaid. However, total reimbursement from medicare and medicaid shall not exceed the medicaid fee for the service; or

(c) the department's medicaid fee for the service as specified in the department's medicaid mental health fee schedule~~; or~~.

~~(d) an amount of up to 25% less than the amount specified in the department fee schedule if the department determines that:~~

~~(i) the average per case cost of mental health service plan expenditures times the number of enrollees will exceed total appropriations; and~~

~~(ii) there is no other means by which the department can reasonably reduce the cost of mental health services.~~

(2) through (3)(h) remain as proposed.

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

37.88.1106 INPATIENT PSYCHIATRIC SERVICES, REIMBURSEMENT

(1) through (2) remain as proposed.

(3) The statewide bundled per diem rate for inpatient psychiatric services provided by all Montana providers is the lesser of:

(a) the amount specified in the department's medicaid mental health fee schedule; or

~~(b) an amount of up to 25% less than the amount specified in the department fee schedule if the department determines that:~~

~~(i) the average per case cost of mental health service plan expenditures times the number of enrollees will exceed total appropriations; and~~

~~(ii) there is no other means by which the department can reasonably reduce the cost of mental health services.~~

(b) the provider's usual and customary charges (billed charges).

(4) through (13) remain as proposed.

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

37.89.103 MENTAL HEALTH SERVICES PLAN, DEFINITIONS As used in this subchapter, unless expressly provided otherwise, the following definitions apply:

(1) through (13) remain as proposed.

(14) "Serious emotional disturbance (SED)" means with respect to a youth between the ages of 6 and 17 years that the youth meets the following requirements of (2)(a) and either (2)(b) or (2)(c):

(a) ~~the~~ The youth has been determined by a licensed mental health professional as having a mental disorder with a primary diagnosis falling within one of the following DSM-IV (or successor) classifications when applied to the youth's current presentation (current means within the past 12 calendar months unless otherwise specified in the DSM-IV) and the diagnosis has a severity specifier of moderate or severe:

(i) through (xx) remain as proposed.

(b) As a result of the youth's diagnosis determined in (2)(a) and for a period of at least 6 months, the youth consistently and persistently demonstrates behavioral abnormality in two or more spheres, to a significant degree, well outside normative developmental expectations, that cannot be attributed to intellectual, sensory, or health factors ~~has~~:

(i) has failed to establish or maintain developmentally and culturally appropriate relationships with adult care givers or authority figures;

(ii) has failed to demonstrate or maintain developmentally and culturally appropriate peer relationships;

(iii) has failed to demonstrate a developmentally appropriate range and expression of emotion or mood;

(iv) has displayed disruptive behavior sufficient to lead to isolation in or from school, home, therapeutic or recreation settings;

(v) has displayed behavior that is seriously detrimental to the youth's growth, development, safety or welfare, or to the safety or welfare of others; or

(vi) has displayed behavior resulting in substantial documented disruption to the family including, but not limited to, adverse impact on the ability of family members to secure or maintain gainful employment.

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

(d) "Serious emotional disturbance (SED)" with respect to a youth under 6 years of age means the youth exhibits a severe behavioral abnormality that cannot be attributed to intellectual, sensory, or health factors and that results in substantial impairment in functioning for a period of at least

6 months or is predicted to continue for a period of at least 6 months, as manifested by one or more of the following:

(i) through (18) remain as proposed.

AUTH: Sec. 41-3-1103, 52-1-103, 53-2-201, 53-6-113, 53-6-131 and 53-6-701, MCA
IMP: Sec. 41-3-1103, 52-1-103, 53-1-601, 53-1-602, 53-2-201, 53-6-101, 53-6-113, 53-6-116, 53-6-117, 53-6-131, 53-6-701, 53-6-705, 53-21-139 and 53-21-202, MCA

37.89.125 MENTAL HEALTH SERVICES PLAN, PROVIDER REIMBURSEMENT (1) through (1)(b) remain as proposed.

(c) For the room and board component of therapeutic youth group home and therapeutic youth family care, the rate is the lesser of:

(i) remains as proposed.

~~(ii) an amount of up to 25% less than the amount specified in the department fee schedule if the department determines that:~~

~~(A) the average per case cost of mental health service plan expenditures times the number of enrollees will exceed total appropriations; and~~

~~(B) there is no other means by which the department can reasonably reduce the cost of mental health services.~~

(ii) the provider's usual and customary charges (billed charges).

(d) through (4) remain as proposed.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-1-601, 53-2-201, 53-6-101, 53-6-113, 53-6-116, 53-6-701, 53-6-705 and 53-21-202, MCA

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

COMMENT #1: School-based mental health services have been successful in treating children who might not otherwise have had access to mental health services. The proposed change from a "bundled" service to a fee-for-service payment structure will unduly burden school districts and may result in reduced services to mentally and emotionally disturbed students.

RESPONSE: The Department acknowledges that school-based mental health services (SBMH), as a comprehensive, bundled treatment, appears effective and valuable to providers of the service, to parents of children receiving the service, and to teachers and school administrators involved with children receiving the service. In the absence of complete, convincing data on which to base a definitive determination of the value of this service, the Department will maintain the essential elements of the school-based mental health service, albeit in modified form.

To better reflect the scope of the service, in ARM 37.88.901 school-based mental health services is renamed "comprehensive school and community treatment" (CSCT). CSCT has been defined as "a comprehensive, planned course of outpatient treatment provided primarily in the school to a child or adolescent with a serious emotional disturbance". CSCT has replaced all references to "school-based mental health services" in these rules. Several commentors suggested that SBMH be retained as a bundled service, but at a lower rate of reimbursement. The Department will continue to reimburse CSCT on the same bundled basis and at the same per diem rate as for SBMH.

Several commentors proposed that the Department pre-approve SBMH programs to ensure uniform quality and to exercise some control over potential unlimited growth of the service. Other commentors encouraged the Department to include a greater array of services in the bundle of SBMH. The Department agrees with these suggestions. The final amended rule provides that CSCT programs must be approved by the Department at least 3 months prior to beginning services. The rule states that approval depends on written documentation of how the CSCT program will achieve a number of objectives, including provision of a comprehensive array of outpatient services and deflection of the child from outpatient treatment provided outside the CSCT program.

Correspondingly, in ARM 37.88.905(8)(c) the rule specifies that CSCT may be deemed to be not medically necessary for a child receiving substantial outpatient treatment in addition to the CSCT treatment.

Some commentors urged the Department to require SBMH program to collect and report data on program performance and client outcomes. The amended rules at ARM 37.88.901(15) specify that a defined quality measurement and quality improvement program will be required for program approval. Other program approval requirements include defined admission and discharge criteria, treatment and discharge planning processes, coordination with others involved with the child, inclusion of all children meeting admission criteria, collection of private and third-party payments, specified levels of participation by the school district, and adequate documentation of service delivery. Each of these reflects suggestions received from commentors.

Finally, several commentors recommended that the Department make SBMH subject to prior authorization. The amended ARM 37.88.905 requires prior authorization of CSCT beginning immediately.

COMMENT #2: The proposed amendment to ARM 37.86.3502(1)(d)(I) would require a physician's determination that medication is necessary to control the symptoms of mental illness. Residents of rural areas of the state may not have access to a physician. In these areas, a physician assistant-certified, nurse practitioner or other mid-level health care professional is the

only provider available. Please consider adding physician assistants-certified and nurse practitioners as professionals who can make the necessary determination under this rule.

RESPONSE: The Department agrees with this suggestion. In 37.86.3502(1)(d)(I) "physician" is replaced by "health care professional". Section 37-8-103, MCA, defines health care professional to include physician assistants-certified and advanced practice registered nurses.

COMMENT #3: Proposed Rule XIV [ARM 37.86.3022] provides a "bundled" payment methodology for partial hospitalization services. Under this methodology, ancillary services such as laboratory services, imaging services and drugs are included in the mental health fee. This increases the average daily cost of providing partial hospitalization services and the fee may not be adequate to allow a provider to continue offering the services.

RESPONSE: Proposed Rule XIV [ARM 37.86.3022] is adapted from existing ARM 37.86.3005(11), which is repealed. That rule also used a "bundled" payment methodology. The Department did not change the payment methodology for mental health partial hospital services. The Department declines to reimburse any of these services separately. For a discussion of the adequacy of rates, please see the response to Comment #13. The rule will be adopted as proposed, but the Department may consider changes to the payment methodology in future rule proposals.

COMMENT #4: The proposed rate increase for psychiatrist services will promote better access to those services.

RESPONSE: That was the intent of the Department and we will adopt the rule amendment as proposed.

COMMENT #5: The revised definitions of "serious emotional disturbance" (SED) found in ARM 37.86.3702 and 46.20.103 are inconsistent with one another with respect to how many of the criteria must be met. All three criteria (diagnosis, functional deficits and involvement of other service systems) are too stringent.

RESPONSE: The Department is attempting, through revisions to the definition of serious emotional disturbance (SED), to assure that limited public resources are expended for people who are most seriously affected by mental illness. In order to focus on the most seriously affected, the SED designation must require that all three criteria be met. The Department agrees that the definition should be consistent wherever it appears and has made the changes necessary for consistency.

COMMENT #6: Attention deficit hyperactive disorder (ADHD) cannot stand alone as an SED criterion, it should not be mentioned in the definition.

RESPONSE: The Department believes it is important to retain ADHD as an SED criterion in order to assure that functional deficits associated with this diagnosis are given weight in determining whether a child is SED. Therefore, the Department has retained it in these rules.

COMMENT #7: There should be a provision for including children whose functioning deficits can be predicted to persist for 6 months or more.

RESPONSE: The Department agrees that young people whose mental disability is predicted to last for 6 months should be covered by the definition of SED. The definition was changed accordingly.

COMMENT #8: The diagnosis "personality disorder" should not be removed from the definition of SED.

RESPONSE: The diagnosis "personality disorder" in children is relatively rare and, in any case, the previous definition required a co-occurring Axis I diagnosis, making the personality disorder diagnosis superfluous. The Department is attempting to narrow the definition to those most in need, and has retained the definition accordingly.

COMMENT #9: The SED definition should not eliminate automatic SED designation for special education students labeled as emotionally disturbed.

RESPONSE: The Department was reluctant to make this change because of its importance in coordinating mental health and special education services. However, with insufficient resources to meet identified needs, the Department was not able to delegate to another service system determination of eligibility for publicly funded mental health services. The definition will remain as proposed.

COMMENT #10: The additional requirement that the definition for Severe and Disabling Mental Illness (SDMI) include severe or moderate severity of diagnosis is burdensome. Effective treatment could stabilize an illness to the extent that the person would no longer be eligible for services but would relapse without continuation of those services.

RESPONSE: The Department agrees that eligibility rules should not set up a situation in which necessary services to maintain stability are discontinued due to an eligibility definition. Accordingly the proposed requirement for severe and moderate modifiers was not adopted. However, the Department will continue to consider this issue for future rule amendments.

COMMENT #11: The addition of a definition of "community mental health center" is unnecessary.

RESPONSE: State law [53-21-201(1), MCA] makes clear that the community mental health centers are a distinct type of mental health center which provides a wide range of services and serves the role of screening admissions to Montana State Hospital. State law specifies the composition of community mental health center boards. By carrying this distinction into administrative rule the Department has more flexibility in identifying appropriate provider types and encouraging the development of necessary services. The Department has adopted the definition accordingly.

COMMENT #12: The requirement that mental health center services be provided year round is a good idea. Additional requirements should be adopted for mental health centers.

RESPONSE: The Department agrees and has adopted the rule accordingly. The Department is considering a number of changes to mental health center licensing rules. These changes will be the subject of future rulemaking.

COMMENT #13: The proposed amendments to RULE XIV [ARM 37.86.3022], 37.88.1106 and 37.89.125 that would allow the Department to reduce fees up to 25% in the event costs exceeded budget would cause a hardship on mental health providers. The proposed adoption of a fee schedule is not an appropriate rule-making methodology.

RESPONSE: The Department agrees that the proposed language allowing reduction in provider reimbursement of up to 25% was unduly burdensome to mental health service providers. This language has been dropped. The Department does not agree with the comment that replacing fee amounts stated in rule and incorporating by reference an established fee schedule is either inappropriate or contrary to the need to provide opportunity for public comment. These changes will make these rules consistent with other reimbursement rules for the Montana Medicaid program.

While the Department is not retaining the proposed language permitting reduction in reimbursement triggered by costs exceeding appropriations, the need for cost reductions to mitigate current overspending of the program's budget remains. Consequently the Department will go forward with the reduction posed for partial hospitalization services. The fee schedule referenced in Rule XIV [ARM 37.86.3022] will be the fee schedule established on the effective date of this rule, and will reflect a reduction of 25% from the fees stated in the previous rule.

COMMENT #14: The proposal to require partial hospitalization programs to be co-located with an inpatient hospital with a psychiatric ward are unduly burdensome. Existing satellite partial hospitalization programs would be forced to close, leaving the clients of those programs without services. The level of service and the availability of medical and other

services is no less in a satellite partial hospital program than in one co-located.

RESPONSE: The Department agrees that the children now served in satellite programs would potentially be left without appropriate levels of service should those programs cease operation. The Department, however, also continues to believe that a different intensity of service is delivered in co-located programs than in satellite programs. This distinction was maintained by several commentors supporting the proposed co-location requirement. This belief is also supported by the significant difference in the average length of stay between such programs. The relatively brief length of stay (an average of 30.9 days for November 2000 discharges) found uniformly in co-located programs supports the belief that these are high-intensity, brief-duration acute step-down programs. The substantially longer length of stay in satellite programs (an average of 193 days for November discharges) indicates these programs are providing less intensive, long-term, sub-acute services appropriate to diversion from other levels of care.

Consequently, the Department will continue to consider both types of programs to be partial hospitalization programs but will distinguish two levels: acute partial hospitalization and sub-acute partial hospitalization. The final rule requires only acute level programs to be co-located with a hospital. The rule also defines co-location in terms of the time required to transport a patient to an inpatient unit.

Acute level partial hospitalization is defined as serving individuals being discharged from inpatient psychiatric treatment or from psychiatric residential treatment. An acute level program is designed to allow discharge of patients appropriately to a lower level of care after 15 or fewer treatment days, on average.

Sub-acute partial hospitalization is defined and staffing and service requirements are specified. The rule provides that sub-acute programs can serve as either step-down or diversion programs. The rule specifies that a sub-acute program is designed to allow discharge of patients appropriately to a lower level of care after 60 or fewer treatment days on average. Sub-acute partial hospitalization is reimbursed at 75% of the acute partial hospitalization rate.

COMMENT #15: Is it the intent of the Department that partial hospitalization programs literally operate day, evening, night and weekends?

RESPONSE: The proposed language quoted is permissive, not mandatory. The Department's intent is to acknowledge that a partial hospitalization program may operate at any or all of those times.

COMMENT #16: Why is the Department proposing to eliminate the provision that the recipient can be safely and effectively managed in a partial hospitalization setting without significant risk of harm to self or others?

RESPONSE: This language was deleted because it added nothing meaningful to the requirements to be addressed in a certificate of need for this service. Another portion of the requirement states that "the recipient cannot be safely and appropriately treated or contained in a less restrictive level of care". Implicit in this requirement is the prerequisite that the individual can be safely maintained in the treatment level being addressed. The Department will proceed with the proposed deletion.

COMMENT #17: Please clarify who will qualify under ARM 37.88.1116 as someone "knowledgeable about local mental health services".

RESPONSE: The Department added this provision as a means of gaining the flexibility to permit someone other than a case manager to sign the certificate of need in the event that no case manager could appropriately address local service availability. As stated in the rule, the Department will designate an appropriate individual as needed. A likely example, however, would be the regional care coordinators employed by First Health Services. The Department has retained the proposed language in the rule.

COMMENT #18: The proposed intensive day treatment service is a good idea. It will allow patients more convenient mental health services.

RESPONSE: The Department acknowledges nearly unanimous support for the proposed intensive department service. However, the Department had intended this service to be a replacement or substitute for the satellite partial hospitalization programs that were proposed to be eliminated. Those satellite programs will be retained as sub-acute partial hospitalization programs designed to fill essentially the same treatment niche for which the intensive day treatment service was designed. Therefore creation of this service would be unnecessary proliferation of service at a time when the Department has a serious need to restrain, and even reverse, the rapidly increasing cost of services. The Department has deleted all references to intensive day treatment from the final rules.

COMMENT #19: The proposed restrictions on day treatment services and partial hospitalization programs will, along with the recently imposed enrollment limits, encourage mentally ill persons in indigent circumstances to wait until symptoms escalate to the point admission to Montana State Hospital is necessary. The proposed rules will mean that mentally ill

persons who cannot access community services will use more costly inpatient and crisis care in order to receive treatment.

RESPONSE: The only restrictions on day treatment in the proposed rules was a limitation that the Department would pay for day treatment services only to adults with a severe and disabling mental illness. This is essentially formalization of existing practice. This service is inappropriate for persons with a non-serious mental illness. The Department will adopt the proposed change in the rule defining adult day treatment.

The Department will not proceed with the rule amendments that eliminated satellite partial hospitalization programs.

COMMENT #20: The proposed rules do not support the work of the Mental Health Oversight Advisory Council.

RESPONSE: The Department is aware of only one recommendation of the Mental Health Oversight Advisory Council addressing the proposed rule amendments. The council recommended the Department not "unbundle" school-based services. The Department is adopting rules establishing comprehensive community and school treatment that essentially maintain the ability of providers to deliver comprehensive, bundled services to children within the classroom.

8. In addition to the changes made in response to comments, the Department added "the provider's usual and customary charges (billed charges)" to the reimbursement provisions of ARM 37.86.2207 and 37.88.1106. The changes reflect the Department's current practice and make those sections consistent with the Department's other reimbursement rules.

The Department also added the word "within" to ARM 37.86.2801 which was omitted from the proposed rule due to a clerical mistake.

The Department also made a rule number change to ARM 46.20.114 [37.86.119] due to a clerical mistake in the renumbering. The correct section number is ARM 37.89.114.

9. The changes to ARM 37.86.3001 will be effective March 1, 2001. The delayed implementation of this rule will allow outpatient hospital service providers time to adapt to the new reimbursement structure with differentiated acute level partial hospitalization and sub-acute level partial hospitalization components.

The changes to ARM 37.86.105 will be applied retroactive to July 1, 2000. The enhanced rates for psychiatrists were necessary to encourage participation by qualified providers. The rule reflects the Department's practice and will have no adverse effect on the services or benefits provided. The anticipated

fiscal impact of the retroactive effective date is approximately $128,000.

All other rule changes in this notice will be effective the day after publication.

/s/ Dawn Sliva	**/s/ Laurie Ekanger**
Rule Reviewer	**Director, Public Health and Human Services**

Certified to the Secretary of State January 2, 2001.

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

In the Matter of the Amendment of a Rule Pertaining to Refunds of Utility Customer Deposits	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 26, 2000, the Department of Public Service Regulation, Public Service Commission (PSC) published notice of public hearing on the proposed amendment of ARM 38.5.1108 concerning refunds of utility customer deposits, at page 2953 of the 2000 Montana Administrative Register, issue number 20.

2. The PSC has amended ARM 38.5.1108 with the following changes, stricken matter interlined, new matter underlined:

38.5.1108 REFUND OF DEPOSITS (1) through (1)(b) remain the same as proposed.

(c) Any deposit, plus accrued interest, shall be refunded to the customer in the form of a check issued and mailed to the customer no more than 30 days following the termination of service or completion of 12 months satisfactory payment as described above. Other methods of refund (e.g., cash), if agreed to by the customer and the utility, are permitted. In the alternative, in the utility's discretion, unless the customer has specifically directed otherwise, the deposit may be applied to the customer's bill of service in the thirteenth and, if appropriate, subsequent months.

AUTH: 69-3-103, MCA
IMP: 69-3-103, MCA, 1975 HJR 27

3. The following comments were received and appear with the PSC's responses:

COMMENT 1: Montana-Dakota Utilities Co. supports the removal of the customer request requirement, but would prefer that the alternative of applying the refund and interest to the customer account remain intact. Montana Power Company suggests the same thing. The Montana Consumer Counsel, petitioner for this rulemaking, agrees that the alternative of applying the refund to the customer account may remain in the rule.

RESPONSE: The PSC agrees with the comments and modifies the proposed rule accordingly.

COMMENT 2: Hot Springs Telephone Company and Ronan Telephone Company comment that the proposed amendments limit flexibility in form and timing of refunds and the rule does not account for the way telecommunications toll service is billed, which can occur up to several months after termination of service.

RESPONSE: As indicated above the PSC agrees that the

alternative of crediting the customer account should be preserved. In regard to other forms of refund, such as cash refunds, the PSC does not necessarily agree that the existing rule allowed for that type of thing, but does not see a problem with it and amends the rule to clarify that it is permissible. In regard to extending the time for refund, that is a matter that is beyond the scope of the present rulemaking and the PSC denies requests related to that.

/s/ Nancy McCaffree
Nancy McCaffree, Vice-Chair

/s/ Robin A. McHugh
Reviewed by Robin A. McHugh

CERTIFIED TO THE SECRETARY OF STATE DECEMBER 28, 2000.

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

In the Matter of Amendments to Rules Pertaining to Pipeline Safety	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 26, 2000, the Department of Public Service Regulation, Public Service Commission (PSC) published notice of public hearing on the proposed amendment of ARM 38.5.2202 and 38.5.2302 concerning pipeline safety, at page 2956 of the 2000 Montana Administrative Register, issue number 20.

2. The PSC has amended ARM 38.5.2202 and 38.5.2302 exactly as proposed.

3. No comments or testimony were received.

/s/ Nancy McCaffree
Nancy McCaffree, Vice-Chair

/s/ Robin A. McHugh
Reviewed by Robin A. McHugh

CERTIFIED TO THE SECRETARY OF STATE DECEMBER 28, 2000.

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

In the Matter of the Adoption of Rules Pertaining to Flexible Pricing for Regulated Telecommunications Service	))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On July 27, 2000, the Department of Public Service Regulation, Public Service Commission (PSC) published notice of public hearing on the proposed adoption of new Rules I through III concerning flexible pricing for regulated telecommunications services, at page 2000 of the 2000 Montana Administrative Register, issue number 14.

2. The PSC has adopted new Rules I (38.5.2720) and III (38.5.2722) exactly as proposed:

RULE I. (38.5.2720) FLEXIBLE PRICING FOR REGULATED TELECOMMUNICATIONS SERVICE -- GENERAL

AUTH: 69-3-103, MCA
IMP: 69-3-807, MCA

RULE III. (38.5.2722) FLEXIBLE PRICING FOR REGULATED TELECOMMUNICATIONS SERVICE –- APPROVAL

AUTH: 69-3-103, MCA
IMP: 69-3-807, MCA

3. The PSC has adopted new Rule II (38.5.2721) with the following changes, stricken matter interlined, new matter underlined:

RULE II. (38.5.2721) FLEXIBLE PRICING FOR REGULATED TELECOMMUNICATIONS SERVICE -- PROCEDURE (1) Except as provided in (2), ~~Applications~~ applications for flexible pricing must include:

(a) a statement that the application is for flexible pricing in accordance with these rules and a statement that the application is not for detariffing, forbearance, or promotional pricing;

(b) an identification of the tariffed rate and the tariffed operating rules related to such rate which will be affected by or implemented in the flexible pricing, accompanied by a proposed tariff page reflecting all proposed tariff changes, through interlining of material to be deleted and underlining of material to be added, that will result if the application for flexible pricing is approved;

(c) specifically, by each wire center to which the application for flexible pricing pertains:

(i) an identification of the number, size, and distribution of alternative providers of the service to be

flexibly priced and, as of the date of application, the number, size, and distribution of each alternative provider actually providing the service to be flexibly priced;

(ii) documentation of the entry of each alternative provider into the area affected;

(iii) the extent to which services are available from these alternative providers;

(iv) the ability of these alternative providers to make functionally equivalent or substitute service readily available;

(v) the present market share of each alternative provider for the service; and

(vi) an estimate of the number of customers who have chosen service from the alternative providers;

(d) a description of the overall impact of the flexible pricing on the continued availability of existing services at just and reasonable rates, including the continued maintenance of basic service at affordable rates;

(e) a description of the overall impact of the proposed flexible pricing on the continued encouragement of competition in the provision of telecommunications services; and

(f) verification that the alternative lower price or the minimum price in a proposed range of prices cover all relevant incremental costs for each specific geographical area and product mix for which the flexible pricing is proposed.

(2) If the applicant does not have access to one or more of the information items required in (1)(c)(i) through (vi), including through being prohibited by law from accessing the information, the applicant shall so state in its application, explain in reasonable detail why access is not available, and request that the commission waive the requirement to provide the information.

~~(2)~~ (3) Applications for flexible pricing will be noticed to the public and processed as contested cases in accordance with commission procedural rules.

AUTH: 69-3-103, MCA
IMP: 69-3-807, MCA

4. The following comments were received and appear with the PSC's responses:

COMMENT 1: Montana Wireless, Inc., dba Blackfoot Communications, is generally supportive of the proposed rules, but suggests that clarity is necessary at two points. One, Rule II(1)(c)(i) should be amended to require the applicant for flexible pricing to identify alternative providers actually providing service. Two, Rule II(1)(f) should be amended to specifically identify that opportunity costs are included in all relevant incremental costs.

RESPONSE: The PSC agrees that Rule II(1)(c)(i) should be amended to require identification of alternative providers actually providing service and amends the rule to include this requirement. The PSC does not agree that it is necessary to include the suggested identification of opportunity costs in Rule II(1)(f), as it would be redundant.

COMMENT 2: Qwest Corporation suggests the rules could be viewed as targeting only three carriers in Montana, primarily Qwest. Qwest does not object to Rules I or III. Qwest comments that Rule II is unreasonable and would impose onerous and burdensome filing requirements -- requirements which are applicable in detariffing, which flexible pricing is not, requirements for information that applicants may not have access to or may be prohibited from accessing, or requirements that could be presented only through generalized statements of limited use to the PSC.

RESPONSE: The proposed rules are not targeting a carrier or a few carriers. It is simply the case that the number of carriers subject to the rules happens to be limited in Montana. This is not unusual in Montana. The PSC disagrees that Rule II is unreasonable. For the most part the information required is a statutory requirement, § 69-3-807(3), MCA, and in all other ways essential to a proper PSC determination regarding flexible pricing. The PSC disagrees that the statutory requirements which serve as the basis for certain provisions within Rule II are limited to detariffing. Section 69-3-807, MCA, which the proposed rules implement, applies to all applications for alternatives to specific rates, tariffs, or fares, including flexible pricing. The PSC agrees that an applicant's access to the information required to be filed may be limited and amends the rule to allow for a waiver of the filing requirements. Applicants should understand however that the PSC likely will need the required information at some point in the proceeding and the final PSC decision on the application may be delayed (to obtain the information through other ways) if the information is not included in the application.

/s/ Nancy McCaffree
Nancy McCaffree, Vice-Chair

/s/ Robin A. McHugh
Reviewed by Robin A. McHugh

CERTIFIED TO THE SECRETARY OF STATE DECEMBER 28, 2000.

VOLUME NO. 48 OPINION NO. 20

CITIES AND TOWNS - Determination of salary for deputies and undersheriff in a department of public safety;
CITIES AND TOWNS - Power to demote or terminate undersheriff without a hearing in a department of public safety;
COUNTY GOVERNMENT - Determination of salary for deputies and undersheriff in a department of public safety;
COUNTY GOVERNMENT - Power to demote or terminate undersheriff without a hearing in a department of public safety;
PEACE OFFICERS - Determination of salary for deputies and undersheriff in a department of public safety;
PEACE OFFICERS - Power to demote or terminate undersheriff without a hearing in a department of public safety;
POLICE - Determination of salary for deputies and undersheriff in a department of public safety;
POLICE - Power to demote or terminate undersheriff without a hearing in a department of public safety;
POLICE DEPARTMENTS - Determination of salary for deputies and undersheriff in a department of public safety;
POLICE DEPARTMENTS - Power to demote or terminate undersheriff without a hearing in a department of public safety;
SALARIES - Determination of salary for deputies and undersheriff in a department of public safety;
SHERIFFS - Determination of salary for deputies and undersheriff in a department of public safety;
SHERIFFS - Power to demote or terminate undersheriff without a hearing in a department of public safety;
MONTANA CODE ANNOTATED - Title 7, chapter 32, part 1; sections 7-4-2503 to -2510, -2503(1), 7-32-104, -106 to -110, -2102;
MONTANA LAWS OF 1985 - Chapter 256.

HELD: 1. The public safety commission in a department of public safety created pursuant to Mont. Code Ann. title 7, chapter 32, part 1, may set the salary of a deputy sheriff employed in the department at any level at or above the amount that would be paid to the deputy under Mont. Code Ann. § 7-4-2508.

2. The due process provisions of Mont. Code Ann. §§ 7-32-107 to -110 do not apply upon termination of an undersheriff appointed to serve in a department of public safety.

December 12, 2000

Mr. Dale Hubber
Prairie County Attorney
P.O. Box 215
Terry, MT 59349-0215

Dear Mr. Hubber:

You have requested a letter of advice on two questions arising from the demotion of the undersheriff in the Prairie County Department of Public Safety. Since I have determined that the questions you raise may be of interest to other county and municipal governments in Montana, and because the answer to your questions is not clear from existing statutes, I have decided to treat your letter as a request for a formal opinion raising the following questions:

1. Do the provisions of Mont. Code Ann. §§ 7-4-2507 to -2510 limit the ability of the commissioners of a department of public safety created pursuant to Mont. Code Ann. title 7, chapter 32, part 1, to establish the salary of deputy sheriffs and undersheriffs who work in the department?

2. Do the provisions of Mont. Code Ann. §§ 7-32-106 to -110, describing the due process rights of "subordinate employees" of a department of public safety upon termination, apply to an appointed undersheriff working in a department of public safety?

Your letter informs me that in 1994, Prairie County and the Town of Terry entered an interlocal agreement to form a department of public safety pursuant to Mont. Code Ann. title 7, chapter 32, part 1. The agreement created a three-member public safety commission that would exercise "general supervisory authority over the entire operation of the department of public safety as set forth in Title 7, Chapter 32, part I [sic], of the Montana Code Annotated." Law Enforcement Consolidation Agreement, ¶ 4. It further provided that the sheriff would exercise the authority of the director of the department of public safety and stated that the "director shall have the powers and perform the duties conferred on and required of Sheriff's [sic] and police officers." Id., ¶ 5.

Your letter further informs me that at the time the issue addressed in your letter arose, the staff of the department of public safety consisted of the sheriff, an undersheriff, and one deputy sheriff. Earlier this year, the sheriff demoted the undersheriff to the position of deputy sheriff and promoted the then-serving deputy sheriff to the position of undersheriff. The public safety commission disagreed with the demotion, and acted officially to set the salary of the deputy sheriff at 95 percent of that of the sheriff, an amount equal to the salary of the undersheriff.

The sheriff has taken issue with the commission's action, arguing that under Mont. Code Ann. § 7-4-2508, the salary of the

deputy can be set at no more than 90 percent of that of the sheriff, and that the undersheriff's salary must exceed that of the deputy by at least 5 percent of the salary of the sheriff, because under that statute the undersheriff must be paid 95 percent of the salary of the sheriff, while a deputy may receive no more than 90 percent of the sheriff's salary. The sheriff has established the salary of the deputy accordingly, reducing it to an amount that is 90 percent of the sheriff's salary.

I.

A department of public safety is a consolidated city-county law enforcement agency created pursuant to Mont. Code Ann. title 7, chapter 32, part 1. The statutes governing salaries under a department of public safety differ from those that apply to sheriffs, undersheriffs, and deputies generally. Mont. Code Ann. § 7-4-2503(1) establishes the formula for calculation of the salary of a sheriff who is not a director of a department of public safety. Mont. Code Ann. § 7-4-2508 requires such a sheriff to fix the compensation of the undersheriff at 95 percent of the sheriff's salary. It then provides a sliding scale formula for calculation of the salary of a deputy. For a county with a population under 15,000, such as Prairie County, the deputy's salary must be fixed at a figure between 85 percent and 90 percent of the salary of the sheriff. Mont. Code Ann. § 7-4-2510 then provides longevity increments that may be added to the salaries determined by § 7-4-2508.

In contrast, the statute governing salaries in a department of public safety provides as follows:

> 7-32-104. Salaries. The provisions of 7-4-2503 [setting formula for calculation of sheriff's salary] notwithstanding, the salaries of the director and employees of the department of public safety shall be established by the public safety commission and shall be paid by the city or town with the board of county commissioners. The salary of the director may not be less than that specified for the sheriff in 7-4-2503. The salaries of employees may not be less than the salaries specified in 7-4-2508 and 7-4-2510; however, employees are not required to be paid any fixed percentage of the director's or sheriff's salary.

Under this statute, the legislature provided that salaries of personnel serving in a department of public safety be set by a different process than that set forth in Mont. Code Ann. §§ 7-4-2503 to -2510. For one thing, the salary of the director of the department of public safety is set by the public safety commission, not by the county commission, while the public safety commission, rather than the sheriff, is given the authority to set salaries for the employees. For another, Mont.

Code Ann. § 7-4-2508 requires the sheriff to set the deputy's salary within a range of at least 85 percent but not more than 90 percent of the sheriff's salary. In contrast, Mont. Code Ann. § 7-32-104 provides that the salary for the deputy, set by the commission, "may not be less than the salaries specified in 7-4-2508 and 7-4-2510."

To add to the confusion, Mont. Code Ann. § 7-4-2507 provides:

> If there is a conflict between 7-4-2508 through 7-4-2510 and any other law, 7-4-2508 through 7-4-2510 govern with respect to undersheriffs and deputy sheriffs.

Mont. Code Ann. § 7-32-104 was already on the books when this provision was enacted in 1981. However, the language in the last sentence of § 7-32-104 was enacted by an amendment adopted in 1985. 1985 Mont. Laws ch. 256, § 1. It is presumed that the legislature enacted this amendment with knowledge of the provisions of existing law. Huether v. Sixteenth Judicial Dist. Court, 2000 MT 158, ¶ 20 (June 20, 2000).

In construing statutes, a court is obligated to adopt a reading of the law that gives effect to all provisions if possible. Id. In this case, it is not possible to do so because Mont. Code Ann. §§ 7-4-2508 and 7-32-104 directly conflict. It is not possible to follow the provisions of § 7-4-2508 setting the undersheriff's salary at 95 percent of that of the sheriff and setting the deputy's salary in the range of 85-90 percent of the sheriff's salary, and also to follow the provision of the last sentence of § 7-32-104, providing that the commission need not set the salaries of employees of a department of public safety at a set percentage of that of the director/sheriff.

In this case, I hold that the provisions of Mont. Code Ann. § 7-2-104 control, because they are the more specific, see, e.g., Montana Dep't of Rev. v. Kaiser Cement Corp., 245 Mont. 502, 507, 803 P.2d 1061, 1064 (1990). The 1985 legislature specifically addressed the question of the setting of the salaries of employees working in a department of public safety and provided that the public safety commission would set their salaries at or above the floor amount they would be paid under Mont. Code Ann. § 7-4-2508. The legislative history of this enactment suggests that the changes were proposed in part to overrule the effects of a district court decision in a Toole County case that had held that the public safety commission must pay the deputies in a department of public safety the percentage salaries set by § 7-4-2508. Mins., Hr'g of House Comm. on Local Gov't, Feb. 12, 1985, Ex. 1.

The 1985 legislature did not specifically address Mont. Code Ann. § 7-4-2507, which on its face would suggest that any such conflicts be resolved in favor of the application of the

percentages set forth in Mont. Code Ann. § 7-4-2508. However, I find it appropriate to consider the legislative history, since the conflicting language of the statutes raises an ambiguity in their construction. In this case the clear intention of the legislature, as expressed in the 1985 amendments to Mont. Code Ann. § 7-32-104, was that the percentages set forth in the more general statute apply only as a floor for the salaries of employees of a department of public safety. Section 7-32-104 therefore operates as an implicit exception to the provisions of § 7-4-2507.

Applied to the facts of your case, it is my opinion that the public safety commission had the authority to set the deputy sheriff's salary at 95 percent of that of the sheriff, because that figure exceeds the floor amount set in Mont. Code Ann. § 7-2-104. I also hold that the sheriff lacked the authority to reset the salary of the deputy at a lesser amount after the commission had acted, since under § 7-32-104, the power to set salaries of employees in a department of public safety lies with the public safety commission, not with the sheriff.

II.

You also inquire whether the undersheriff serving in a department of public safety serves at the pleasure of the sheriff, or whether the undersheriff is entitled to the hearing procedure for discharge of employees provided in Mont. Code Ann. § 7-32-109. Your request assumes that the demotion of the undersheriff constitutes a "discharge or termination of employment" under Mont. Code Ann. §§ 7-32-106 to -110. I accept your assumption for purposes of this opinion, but I express no opinion as to whether the due process provisions of §§ 7-32-106 to -110 apply to a demotion that does not end the employment of a subordinate employee to whom those provisions apply.

The statutes dealing with sheriff's departments generally differentiate between the undersheriff, who is appointed by and serves at the pleasure of the sheriff, Mont. Code Ann. § 7-32-2102, and deputies, who have some due process rights in the event of termination, Mont. Code Ann. §§ 7-32-2107 to -2110; Holly v. Preuss, 172 Mont. 422, 426-27, 564 P.2d 1303, 1306 (1977). The statutes dealing with departments of public safety do not specifically mention the office of undersheriff. They provide that upon consolidation, the "officers and patrol officers" of the municipality and the "deputies of the county sheriff's office" become subordinates of the director of the department of public safety, without mention of an undersheriff. However, the Prairie County/Terry interlocal agreement specifically contemplates that the Prairie County Department of Public Safety will include "a Sheriff, Undersheriff, and as many deputies as are needed." Law Enforcement Consolidation Agreement, ¶ 3.

The statutes dealing with departments of public safety provide due process rights for terminated "subordinate employees" of the director of the department of public safety. Mont. Code Ann. §§ 7-32-107 to -110. "Subordinate employee" is defined as follows:

> "Employee" or "subordinate employee" means but is not limited to any officer or patrol officer of the city or town police department, any deputy of the county sheriff's office, or any person employed as a clerk, dispatcher, or secretary by the department of public safety or so employed by the city or town police department or the county sheriff's office prior to the establishment of the department of safety [sic].

Mont. Code Ann. § 7-32-106. The undersheriff does not fit within any of the specific categories of employees (officers or patrol officers, deputies, clerks, dispatchers, or secretaries) mentioned in the statute. See Holly, 172 Mont. at 424-26 (noting similarities between the office of deputy and that of undersheriff, but concluding that the terms are not interchangeable). However, the inclusion in the statute of the language "means *but is not limited to*" suggests that the lack of a specific reference is not necessarily controlling.

In this case, resorting to the usual aids to statutory interpretation is not helpful. The legislative history of the various statutes contributes nothing, since it makes no reference to the office of undersheriff in a department of public safety. The statute creating the office of undersheriff was enacted prior to statehood, but it was amended twice in 1985, after the enactment of the statutes creating the department of public safety, without addressing this particular issue. Similarly, the legislature has revisited title 7, chapter 32, part 1 on several occasions without addressing this issue. Neither set of statutes can be said to be the more specific. One is specific as to "deputies" within a department of public safety, but makes no mention of an undersheriff. The other is specific as to the office of undersheriff, but makes no mention of a department of public safety.

In my opinion, a court faced with this issue would turn to the public policy behind the statutes that provide that the undersheriff serves at the pleasure of the sheriff. See, e.g., Willoughby v. Loomis, 264 Mont. 44, 52, 869 P.2d 271, 276 (1993) ("Statutes may not be interpreted to defeat their intent or purpose; the object sought to be achieved by the legislature is our prime consideration in interpreting them."). As the Montana Supreme Court observed in Holly:

> Representative government requires an elected official be able to implement new or different

> policies and a fully tenured carryover staff might resist such changes. Having the undersheriff, who is the sheriff's second in command, not-tenured serves to make the sheriff's administration of his office more efficient and effective. Further the undersheriff would be more loyal to the sheriff's policies than would necessarily be true if the undersheriff was a tenured carryover from a prior defeated administration.

172 Mont. at 427. While these observations may not all be pertinent to the factual situation that brought forth your letter, they do suggest that a court faced with this issue, on which no clear answer may be found in the statutes, would probably opt to advance the public policy found persuasive by the Court in Holly. Therefore, in my opinion, the undersheriff in a department of public safety, like an undersheriff serving in a regular sheriff's department, serves at the pleasure of the sheriff and does not have the right to a hearing upon termination granted to other employees of the department of public safety under Mont. Code Ann. §§ 7-32-106 to -110.

THEREFORE, IT IS MY OPINION:

1. The public safety commission in a department of public safety created pursuant to Mont. Code Ann. title 7, chapter 32, part 1, may set the salary of a deputy sheriff employed in the department at any level at or above the amount that would be paid to the deputy under Mont. Code Ann. § 7-4-2508.

2. The due process provisions of Mont. Code Ann. §§ 7-32-107 to -110 do not apply upon termination of an undersheriff appointed to serve in a department of public safety.

Sincerely,

/s/ Joseph P. Mazurek

JOSEPH P. MAZUREK
Attorney General

jpm/cdt/dm

VOLUME NO. 48 OPINION NO. 21

COUNTY GOVERNMENT - Authority of county solid waste management district to charge school district properties for waste management services;
LOCAL GOVERNMENT - Authority of county solid waste management district to charge school district properties for waste management services;
SCHOOL DISTRICTS - Authority of county solid waste management district to charge school district properties for waste management services;
SOLID WASTE - Authority of county solid waste management district to charge school district properties for waste management services;
TAXATION AND REVENUE - Authority of county solid waste management district to charge school district properties for waste management services;
MONTANA CODE ANNOTATED - Sections 1-2-103, 7-13-201(2), -202 (4)(a), -202(5), -203(2), -231(2), - 232(3)(a), - 234(1), 15-6-201(1)(a)(ii);
MONTANA CONSTITUTION - Article VIII, section 5;
OPINIONS OF THE ATTORNEY GENERAL - 46 Op. Att'y Gen. No. 7 (July 7, 1995), 43 Op. Att'y Gen. No. 46 (1989), 42 Op. Att'y Gen. No. 73 (1988), 42 Op. Att'y Gen. No. 21 (1987), 40 Op. Att'y Gen. No. 22 (1983).

HELD: Mont. Code Ann. § 15-6-201(1)(a)(ii) does not exempt school district properties from paying reasonable solid waste management fees which do not exceed the cost of the services they use.

December 15, 2000

Mr. Robert Zimmerman
Sanders County Attorney
P.O. Box 519
Thompson Falls, MT 59873

Dear Mr. Zimmerman:

You have requested my opinion whether Mont. Code Ann. § 15-6-201(1)(a)(ii) exempts school district properties from the payment of assessments levied by the Sanders County Solid Waste Management District. As discussed below, because the assessments are not taxes within the meaning of the statute, I conclude that the school districts are not exempt from their payment.

Article VIII, section 5 of the Montana Constitution authorizes the legislature to exempt state property from taxation. The legislature implemented this constitutional provision in Mont.

Code Ann. § 15-6-201(1)(a)(ii), which specifically exempts school district property from taxation.

The Thompson Falls School District and the Montana School Boards Association (hereinafter the "School Districts") contend that the public schools within the Sanders County Solid Waste Management District (hereinafter "SWMD") are exempt from payment of the SWMD's fees because such assessments are, in actuality, taxes. The School Districts contend that the assessments are levied for the public good, that they are not directly related to the value of the benefits conferred on the properties, and that they are not use-driven.

In Sanders County a private contractor collects the garbage, which is then taken to roll-off sites or transfer stations operated by the SWMD, after which it is hauled to an approved landfill in Missoula County. The SWMD assesses property owners a fee to cover its costs, based upon an annual family residential unit charge of $75. A unit fee of the kind utilized by the SWMD is specifically authorized by statute. Mont. Code Ann. § 7-13-232(3)(a). The School Districts do not contend that the SWMD uses revenue generated from its fee assessments for purposes unrelated to the management of solid waste. All revenues received by the SWMD are required by statute to be used solely for the purpose for which the SWMD was created. See Mont. Code Ann. §§ 7-13-231(2), -234(1).

In June 1998, the SWMD adopted a formula for calculating the respective fees of the public schools in Sanders County. By calculating total revenue needed from all schools ($6375) and dividing that figure by the $75 unit fee, it was determined there were 85 units to be assessed against the schools. Then, dividing total enrollment (1671) by the 85 units, it was determined that there were 19.66 students per unit. After dividing the schools' enrollment figures by the 19.66 figure, the annual fees were allocated to the schools. This formula resulted in fees ranging from $225 for the smallest school (Paradise) to $2625 for the largest school (Thompson Falls). The total annual fee assessed against the five public schools in Sanders County is $6375.

All statutes "are to be liberally construed with a view to effect their objects and to promote justice." Mont. Code Ann. § 1-2-103. The object of the pertinent provision in Mont. Code Ann. § 15-6-201(1)(a)(ii) is to exempt school district properties from taxation. Thus, application of the exemption provision turns upon whether the SWMD's assessments are taxes. The United States Supreme Court has observed:

> "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.

> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes."

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 622-23 (1981) (quoted case omitted). However, it is well recognized that taxation does not include special assessments or user fees. See 46 Op. Att'y Gen. No. 7 at 3-4 (July 7, 1995). Thus, the exemption does not apply if the SWMD's charges are in the nature of special assessments or user fees.

The purpose and effect of taxation is to compel taxpayers to support a variety of public programs and services which they may never use and from which they may receive no direct or individual benefit. Accordingly, the issue raised by your opinion request is whether the SWMD's fee system has that purpose or effect. "The central inquiry will thus normally be whether the purpose of the levy or assessment is to compensate the district for benefits directly conferred upon a particular piece of property within its jurisdiction in direct proportion to the cost of those benefits; i.e., whether the levy is in the nature of a user fee." 42 Op. Att'y Gen. No. 21 at 83 (1987) (emphasis added). "An assessment is imposed against specific property to defray the cost of a specific benefit to that property, the benefit to be commensurate with the assessment." Vail v. Custer County, 132 Mont. 205, 217, 315 P.2d 993, 1000 (1957).

The purpose of the SWMD's fee system is to recoup the costs of running its solid waste management program, not to raise general revenue or to fund other programs. In addition, a family residential unit fee is a recognized tool by which to apportion such costs. Mont. Code Ann. § 7-13-232(3)(a).

In 43 Op. Att'y Gen. No. 46 at 159-60 (1989), Attorney General Racicot held that water and sewer levies designed to satisfy expenses in connection with federal loan repayment obligations constituted property taxes, because the expenses associated with loan repayments could not be segregated on the basis of specific benefits conferred on particular properties. See also 46 Att'y Gen. No. 7 at 4-5 (July 7, 1995) (holding that fire services fees were taxes rather than assessments); 42 Op. Att'y Gen. No. 73 at 289, 291-92 (1988) (holding that conservation district assessments to fund incidental expenses and loan programs were taxes). In contrast, the purpose of the SWMD's assessments here is to fund a specific, identifiable service. In addition, the amount of waste generated by users provides a basis for measuring the benefits received.

"If charges are primarily intended to raise money, they are taxes. If the charges are primarily tools of regulation, they are not taxes." King County Fire Protection Dists. v. Housing Auth. of King County, 872 P.2d 516, 523 (Wash. 1994). Regulatory fees can be considered taxes when excess revenues are used to fund other governmental programs. See, e.g., Town of Eclectic v. Mays, 547 So. 2d 96, 98, 105 (Ala. 1989) (discussing the illegal use of excess garbage service revenues). If fees are used "as a mere device to lessen the burden of taxation for general governmental purposes, such funds should, of course, be considered in the category of taxes." Himebaugh v. City of Canton, 61 N.E.2d 483, 485 (Ohio 1945). Here, the School Districts do not contend that the SWMD is operating at a surplus, nor do they contend that the SWMD's revenues are used to fund other programs, which is prohibited by statute. See Mont. Code Ann. § 7-13-234(1).

The absence of alternative solid waste services in Sanders County does, as a practical matter, render the SWMD's fee system mandatory. Thus, its charges are best characterized as special assessments rather than user fees. However, the fact that users cannot opt out of the system does not render such assessments taxes. "A property owner cannot opt out of a municipal solid waste disposal system by simply not requesting the service." Ennis v. City of Ray, 595 N.W.2d 305, 308 (N.D. 1999), quoting 7 Eugene McQuillin, Law of Municipal Corporations § 24.250 (3d rev. ed. 1997). The solid wastes generated by the public schools in Sanders County are a cost to the SWMD. However, even if the school districts did not utilize the SWMD's services, their properties would still benefit by virtue of the availability of the service to the property. See 40 Op. Att'y Gen. No. 22 (1983).

Although the infrastructure needed to operate a solid waste system is not located on or appurtenant to the assessed properties, this is a function of the nature of the service, not an indication that waste management provides no direct benefit to the affected properties. The benefits from the disposal and containment of solid waste are comparable to the benefits provided by irrigation districts, which, because of the nature of the service provided (irrigation), requires the improvements to be located on or appurtenant to the affected properties. In Montana, irrigation district assessments are not considered taxes. Vail, 132 Mont. at 217, 315 P.2d at 1000. See also 42 Op. Att'y Gen. No. 21 at 82-83 (1987). Like irrigation services, the purpose of the SWMD's assessment is to recoup the costs of providing infrastructure and services which directly and tangibly benefit affected properties.

Having determined that the purpose of the SWMD's fee system is to recoup its service costs on the basis of use, I now consider whether the effect of the SWMD's fee system is to tax the public schools in Sanders County. In other words, do the SWMD's assessments operate like taxes? As one court has noted, the

issue is not whether the benefit conferred is different from the benefits to the community as a whole. Rather, the issue is whether a "logical relationship" exists between the benefit to individual properties and the services provided. Lake County v. Water Oak Mgmt. Corp., 695 So. 2d 667, 669-70 (Fla. 1997). The SWMD's fee system, in particular the fees assessed against the schools, is reasonably related to the services provided, i.e., the fees are in direct (logical) proportion to the benefits conferred.

The Montana legislature has "deemed [it] necessary to provide for the creation of solid waste management districts to control storage, collection, and disposal of solid waste." See Mont. Code Ann. § 7-13-201(2). "There is a marked distinction between the exercise of taxing power and of police power." 16 Eugene McQuillin, Law of Municipal Corporations § 44.02 (rev. ed. 1994). Accordingly, special assessments may be levied throughout the community as a whole. Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180, 183 (Fla. 1995). See Mont. Code Ann. §§ 7-13-202(5), -203(2). See also 40 Op. Att'y Gen. No. 22 (discussing the benefits of a county-wide refuse disposal district). Although a county-wide solid waste management program provides intangible and indirect benefits to the public as a whole, individual properties that use such services are also directly benefitted.

The School Districts' solid waste charges are based upon a $75 residential unit charge which, in the case of the schools, comprises 19.66 students. Although inequities may exist in the SWMD's fee system, the School Districts acknowledge that such inequities are not determinative of whether the assessments constitute taxes. In addition, the School Districts do not contend that the sizeable 19.66-student unit used to calculate the fees is resulting in their schools carrying an excessive cost burden in comparison to other property owners in Sanders County.

There are more precise ways to measure solid waste than the current residential unit fee system, e.g., measuring its volume or weight. See Mont. Code Ann. § 7-13-232(3)(a). However, there is no indication this would lessen the schools' costs. If, for example, the SWMD imposed landfill fees, the garbage haulers would then pass these costs on to their customers, including the public schools. See, e.g., Barnhill Sanitation Serv., Inc. v. Gasten County, 362 S.E.2d 161, 167 (N.C. Ct. App. 1987) (holding that landfill fees are not taxes). Regardless, volume or weight is only one measure of the actual costs of disposing of and containing various types of solid waste. See Mont. Code Ann. § 7-13-202(4)(a), defining "solid waste." I cannot conclude, based on the factual record before me, that the effect of the SWMD's assessments is to tax the School Districts' properties.

The purpose of the SWMD's assessments is to recoup the costs of its beneficial services based upon use. In addition, the operation of the SWMD's fee system does not result in the School Districts' properties bearing disproportionate or excessive costs for the services they use.

THEREFORE, IT IS MY OPINION:

> **Mont. Code Ann. § 15-6-201(1)(a)(ii) does not exempt school district properties from paying reasonable solid waste management fees which do not exceed the cost of the services they use.**

Sincerely,

/s/ Joseph P. Mazurek

JOSEPH P. MAZUREK
Attorney General

jpm/mwm/dm

VOLUME NO. 48 OPINION NO. 22

PEACE OFFICERS - Peace officer employment, education and certification standards;
STATUTORY CONSTRUCTION - Construction of statute's provisions in manner which gives meaning and effect to each;
STATUTORY CONSTRUCTION - Construing plain meaning of words of statute;
MONTANA CODE ANNOTATED - Sections 1-2-101, 7-32-303, -303(5)(a), (5)(b), (5)(c), -303(6).

HELD: **Mont. Code Ann. § 7-32-303(6) authorizes only one extension, not to exceed 180 days, to the requirement that every peace officer must attend and successfully complete, within one year of his or her initial appointment, an appropriate peace officer basic training course certified by the Board of Crime Control.**

December 18, 2000

Mr. Jim Oppedahl
Executive Director
Montana Board of Crime Control
P.O. Box 201408
Helena, MT 59620-1408

Dear Mr. Oppedahl:

You have requested my opinion on the following question, which I have rephrased as follows:

> **May the Board of Crime Control grant more than one 180-day extension under Mont. Code Ann. § 7-32-303(6) for a peace officer to complete basic training?**

In my opinion, the Board may not.

Mont. Code Ann. § 7-32-303 governs peace officer employment, education and certification standards. Relevant to your question is subsection (5)(a), which provides:

> **(5)(a) Except as provided in subsections (5)(b) and (5)(c), it is the duty of an appointing authority to cause each peace officer appointed under its authority to attend and successfully complete, within 1 year of the initial appointment, an appropriate peace officer basic course certified by the board of crime control. Any peace officer appointed after September 30, 1983, who fails to meet the minimum requirements as set forth in subsection (2) or who fails to complete the basic course as required by this subsection (a)**

> forfeits the position, authority, and arrest powers accorded a peace officer in this state.

Thus, the general requirement is that a peace officer must attend and successfully complete an appropriate peace officer basic training course within one year of his or her initial appointment.

Subsections (5)(b) and (5)(c) provide exceptions to that general rule; however, they only apply to peace officers who, at some time prior in their careers as peace officers, have received a basic certificate from the Board of Crime Control (Board) or the equivalent certification from another state. Subsection (5)(c) reiterates the one-year rule in requiring former officers to pass a basic equivalency test and to complete a legal training course conducted by the Montana Law Enforcement Academy.

You asked for my construction of subsection (6), which grants the Board authority to extend the one-year time requirement of subsections (5)(a) and (5)(c). Specifically, you asked whether more than one 180-day extension to the one-year time requirement may be granted. Subsection (6) states:

> (6) The board of crime control may extend the 1-year time requirements of subsections (5)(a) and (5)(c) upon the written application of the peace officer and the appointing authority of the officer. The application must explain the circumstances that make the extension necessary. Factors that the board may consider in granting or denying the extension include but are not limited to illness of the peace officer or a member of the peace officer's immediate family, absence of reasonable access to the basic course or the legal training course, and an unreasonable shortage of personnel within the department. The board may not grant an extension to exceed 180 days.

In light of the rules of statutory construction, I conclude that the Board's interpretation that subsection (6) authorizes the Board to grant only one 180-day extension is correct. Statutes must be construed or interpreted in accordance with the intent of the legislature. State v. Christensen, 265 Mont. 374, 376, 877 P.2d 468, 469 (1994). In construing a statute, I must look first to the plain meaning of the words of the statute; if the language is clear and unambiguous, no further interpretation is necessary. Id.

The statutory language of Mont. Code Ann. § 7-32-303(6) is clear and unambiguous. In relevant part it states, "The board may not grant an extension to exceed 180 days." My opinion is that this language expresses a clear intent by the legislature to give the Board authority to grant one extension, but placed upon the Board the constraint that an extension could not exceed 180 days.

Mont. Code Ann. § 1-2-101 expresses a preference that, where possible, a statute be interpreted in a manner which gives meaning to each particular provision of the statute. Additionally, the Montana Supreme Court has stated that any statutory interpretation that renders any sections of the statute superfluous and does not give effect to all of the words used must be avoided. State v. Berger, 259 Mont. 364, 367, 856 P.2d 552, 554 (1993).

The legislative intent in § 7-32-303(6) is expressed unambiguously through the straight-forward process attendant to extension requests. The statute requires the Board to act upon "the written application of the peace officer" which, in turn, "must explain the circumstances that make the extension necessary." It then identifies certain circumstances that may be considered by the Board "in granting or denying the extension." The statute concludes by prohibiting the Board from granting an extension exceeding 180 days. Subsection (6) thus contemplates a one-time process initiated by the submission of an extension request and a determination that, if favorable, cannot extend the normal deadline more than 180 days. The provision, given literal effect, is not susceptible to a construction under which a peace officer may tender multiple applications whose intended or practical effect is to secure extensions exceeding the 180-day limit. Any other conclusion, moreover, would produce inconsistency with § 7-32-303(5)(a), since interpreting subsection (6) to allow multiple extensions over 180 days to an officer who has not received his or her basic certification would undermine subsection (5)(a)'s requirement that peace officers complete the educational requirements imposed upon them within one year of their appointment except where an extension is granted under the following subsection. Put otherwise, it makes little sense to impose a one-year deadline, with the possibility of an extension for a specified maximum length, if through the simple use of multiple extensions that length may be exceeded.

In sum, it is clear that § 7-32-303(6) recognizes that there are certain legitimate reasons an officer may need an extension beyond the one-year requirement set forth in § 7-32-303(5)(a). Nonetheless, the overriding intent of the statute is to require that all peace officers receive the proper education within one year of their appointment, except where compelling circumstances exist to justify an extension not to exceed 180 days. The public and officer safety reasons underlying this requirement are obvious.

THEREFORE, IT IS MY OPINION:

> Mont. Code Ann. § 7-32-303(6) authorizes only one extension, not to exceed 180 days, to the requirement that every peace officer must attend and successfully complete, within one year of his or her initial appointment, an

appropriate peace officer basic training course certified by the Board of Crime Control.

Sincerely,

/s/ Joseph P. Mazurek

JOSEPH P. MAZUREK
Attorney General

jpm/ans/dm

VOLUME NO. 48 OPINION NO. 23

**CLERKS - Duty of clerk and recorder to record document with multiple reconveyances and fee charged;
COUNTIES - Duty of clerk and recorder to record document with multiple reconveyances and fee charged;
FEES - Duty of clerk and recorder to record document with multiple reconveyances and fee charged;
REAL PROPERTY - Duty of clerk and recorder to record document with multiple reconveyances and fee charged;
MONTANA CODE ANNOTATED - Sections 7-4-2613, -2619, -2631, -2632, 71-1-111, -211, -305;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op Att'y Gen. No. 11 (1985).**

HELD: 1. A county clerk and recorder may not refuse to file a "blanket document" that contains a listing of multiple reconveyances of trust indentures, provided the appropriate fee is paid.

2. A county clerk and recorder must charge the fee described in Mont. Code Ann. § 7-4-2632 for each page of a blanket document.

December 20, 2000

**Mr. Mike McGrath
Lewis and Clark County Attorney
228 Broadway, Courthouse
Helena, MT 59601**

Dear Mr. McGrath:

You have requested my opinion regarding the criteria a county clerk and recorder must use to determine the appropriate fee for "blanket documents." I have broken down your request into two issues which I have phrased as follows:

1. May a county clerk and recorder refuse to file a "blanket document" which contains a list of reconveyances of trust indentures?

2. If not, what is the appropriate fee for a clerk and recorder to charge for the filing of a blanket document?

You have indicated that questions have arisen with respect to the propriety and appropriate fee for filing "blanket documents" with the Lewis and Clark County clerk and recorder. A title insurance company attempted to file with the clerk's office a six-page document which was entitled a "Full Reconveyance." This document was a list of "reconveyances" of trust indentures that

had been certified by the president of a title company and notarized.

As used in this opinion, the terms "reconveyance," "satisfaction of mortgage," "release of mortgage" and "discharge of mortgage" are intended to have the same meaning.

As many as 14 reconveyances were listed on one sheet of paper. The form for each reconveyance was roughly as follows:

Grantor:	Name (s)
Beneficiary:	Name(s)
Recorded:	Date of recording, which book had the recording and at what page
Legal:	Legal description of property

The Lewis and Clark County clerk and recorder refused to accept and record the "Full Reconveyance" on the ground that each reconveyance must be on a separate sheet of paper and such multiple or blanket filings could not be accepted. The clerk relied upon an opinion from the Missoula County Attorney, dated May 1988, which opined that each assignment of a mortgage must be presented for filing to a clerk and recorder on a separate sheet of paper.

You have asked in your request what is the appropriate fee for such a document. Before addressing that question, however, I will address whether the clerk may refuse to accept and record "blanket documents."

The Lewis and Clark County clerk and recorder describes the recording process in this way. When the clerk receives a reconveyance for recording, the clerk has the reconveyance microfilmed. Two copies are made of the microfilm, one for use by the county records department and one for title companies. Handwritten on each of the microfilm copies are the book and page number of the original mortgage. The reconveyance is also photocopied for the Department of Revenue and title companies.

After the microfilming and photocopying, the clerk must index the reconveyance. See Mont. Code Ann. § 7-4-2619(5). The information from the release is also indexed pursuant to Mont. Code Ann. §§ 7-4-2619(1) and (2) and 71-1-211, which require indexing under the names of the grantors of the property and cross-indexing under the names of the grantees. The original is then returned to the person or entity that originally sent the mortgage release to the clerk.

There is little doubt that the clerk, as a general matter, must record reconveyances of trust indentures. Under Mont. Code Ann. § 7-4-2613(1)(a) the clerk must record releases of mortgages. The reconveyance of the trust indenture operates the same as a

release or satisfaction of the mortgage. A trust indenture is considered a mortgage on real property and is subject to the laws relating to mortgages, except to the extent that the provisions dealing specifically with the small tract financing act, title 71, chapter 1, part 3, provide otherwise. Mont. Code Ann. § 71-1-305. Nothing in the small tract financing act addresses the duty of a clerk to record reconveyances. Therefore, under § 7-4-2613(1)(a), a clerk and recorder must record reconveyances of trust indentures.

Mont. Code Ann. § 71-1-211 describes the process for releasing a mortgage and provides:

> (1) A mortgage shall be discharged upon the record thereof by the county clerk in whose custody it shall be whenever there shall be presented to him a certificate executed by the mortgagee, his personal representative or assignee, acknowledged or proved and certified as in this code prescribed to entitle a conveyance to be recorded, specifying that such mortgage has been paid or otherwise satisfied or discharged.
>
> (2) Every such certificate and the proof and acknowledgment thereof shall be recorded at full length, and a reference shall be made to the book and page containing such record in the mortgagor and mortgagee indexes as to the discharge of the mortgage.

The blanket filings of the reconveyances received by the Lewis and Clark County clerk and recorder contained the appropriate acknowledgment and certification showing the reconveyances of the trust indentures.

A clerk and recorder is required to record only those documents which are "authorized by law to be recorded." Rocky Mountain Timberlands v. Lund, 265 Mont. 463, 467, 877 P.2d 1018, 1021 (1994). In Rocky Mountain Timberlands, the Court held that, although the clerk had a general duty to record "deeds," the clerk had no duty to accept and record a "deed" that was not "authorized by law." In that case, the deed was improper and not authorized by law because it did not effectively operate as a transfer of property from one party to another. Instead, the purported deed was simply an attempt by one person to divide a parcel into two parts.

Here, with respect to reconveyances of trust indentures, the only requirements are those relating to releases of mortgages. In order to effectuate a release of a mortgage, the mortgagee or its agent must acknowledge and certify that such a release has taken place. Mont. Code Ann. § 71-1-111. Although § 71-1-111(1) states that "a certificate" must be presented to the clerk and recorder, there is no requirement for each certificate to be on a separate sheet of paper.

In the absence of a specific statutory requirement that each certificate of reconveyance must be on a separate sheet of paper, and as long as each reconveyance meets the statutory requirements for a release of a mortgage, the clerk and recorder is obligated to accept for filing a multi-page document listing more than one reconveyance on each page. See also 41 Op Att'y Gen. No. 11 (1985) (clerk may not refuse to accept trust indenture that does not include the amount secured and a maturity date).

The next question is what is the "appropriate fee" for accepting and recording such blanket documents. Mont. Code Ann. §§ 7-4-2631 and -2632 describe the fees which may be charged by a clerk and recorder. Section 7-4-2632 provides:

> **Where recording is done by photographic or similar process, the county clerk and recorder shall charge $6 for each page or fraction of a page of the instrument for recording.**

Because the Lewis and Clark County clerk and recorder does the recording by photographic and other mechanical means, this section controls the determination of the appropriate filing fee. By its plain language, Mont. Code Ann. § 7-4-2632 sets the general standard of a $6-per-page filing fee. The legislative history of Mont. Code Ann. § 7-4-2632 supports the interpretation that this fee should be applied to blanket documents. In 1985, Mont. Code Ann. § 7-4-2632 was amended to increase the per-page fee from $2.50 to $5, and Mont. Code Ann. § 7-4-2631 was amended to delete a provision that allowed the clerk to charge $.50 for each name that was indexed. This legislative history to these amendments indicates that the clerks and recorders had agreed to forego the $.50 charge for indexing each name in exchange for the significant increase in Mont. Code Ann. § 7-4-2632. HB 77; Mins., House Local Gov't Comm., Jan. 8, 1985. There had been significant confusion caused by basing the filing fee upon the number of times the clerk had to index a transaction. To alleviate this confusion, the Montana Clerks and Recorders Association suggested the use of a flat fee based upon the number of pages in a recorded document. Applying this rationale and the intent to avoid confusion that is caused by basing the filing fee on the number of names to be indexed, I conclude that the $6 flat fee per page is the appropriate fee for filing blanket documents, regardless of the number of transactions per page on the document.

THEREFORE, IT IS MY OPINION:

1. **A county clerk and recorder may not refuse to file a "blanket document" that contains a listing of multiple reconveyances of trust indentures, provided the appropriate fee is paid.**

2. A county clerk and recorder must charge the fee described in Mont. Code Ann. § 7-4-2632 for each page of a blanket document.

Sincerely,

/s/ Joseph P. Mazurek

JOSEPH P. MAZUREK
Attorney General

jpm/elg/dm

VOLUME NO. 48 OPINION NO. 24

INDIANS - Application of light vehicle registration fee to tribally owned vehicles;
INDIANS - Application of light vehicle registration fee to vehicle owned by enrolled tribal members residing on their reservations;
INDIANS - Application of light vehicle registration fee to vehicle owned by Indian not residing on the reservation at which he or she is enrolled;
MOTOR VEHICLES - Application of light vehicle registration fee to tribally owned vehicles;
MOTOR VEHICLES - Application of light vehicle registration fee to vehicle owned by enrolled tribal members residing on their reservations;
MOTOR VEHICLES - Application of light vehicle registration fee to vehicle owned by Indian not residing on the reservation at which he or she is enrolled;
MOTOR VEHICLES - Application of light vehicle registration fee to motor vehicle owned by non-resident active duty military personnel stationed in Montana;
TAXATION - Determination of whether light vehicle registration fee operates as a tax for purposes of tax exemptions for Indians and Indian tribes;
TAXATION - Determination of whether light vehicle registration fee operates as a tax for purposes of tax exemption for non-resident active duty military personnel;
MONTANA CODE ANNOTATED - Sections 61-3-321, -456, -502, -508 to -511, 61-10-201;
MONTANA LAWS OF 1999 - Chapter 515;
MONTANA LAWS OF 1999 (MAY 2000 SPECIAL SESSION) - Chapter 11;
OPINIONS OF THE ATTORNEY GENERAL - 46 Op. Att'y Gen. No. 7 (1995), 43 Op. Att'y Gen. No. 46 (1989), 42 Op. Att'y Gen. No. 21 (1987), 39 Op. Att'y Gen. No. 46 (1981), 39 Op. Att'y Gen. No. 45 (1981), 37 Op. Att'y Gen. No. 28 (1977);
UNITED STATES CODE - Title 50, app. § 574;
UNITED STATES CONSTITUTION - Article VI, clause 2.

HELD: 1. The light vehicle registration fee established in 1999 Mont. Laws, ch. 515, §§ 1-3, ratified by the voters as L.R. 115, may not be assessed against tribally owned vehicles or vehicles owned by enrolled tribal members residing on their reservations.

2. The light vehicle registration fee established in 1999 Mont. Laws, ch. 515, §§ 1-3, ratified by the voters as L.R. 115, may not be assessed against non-resident active duty military personnel stationed in Montana.

December 27, 2000

Mr. Larry D. Epstein
Glacier County Attorney
P.O. Box 428
Cut Bank, MT 59427

Dear Mr. Epstein:

You have requested my opinion on the following questions:

1. May the motor vehicle registration fees imposed pursuant to legislative referendum measure 115 ("L.R. 115") be assessed against Indian tribes with respect to tribally owned vehicles or enrolled tribal members residing on their reservations with respect to their personal vehicles?

2. May the same fees be imposed against non-resident active duty military personnel stationed in Montana with respect to their personal vehicles?

I.

You have asked for an analysis of the applicability of the new light vehicle registration fee, imposed by L.R. 115, referred to the voters in 1999 Mont. Laws, ch. 515, to Indians, tribal members, tribal governmental fleets, and to non-resident active duty military personnel. Legislative Referendum 115 created a "light vehicle registration fee" ("LVRF"), which "replace[es] the current system of taxation for automobiles, vans, sport utility vehicles, and light trucks." 1999 Mont. Laws, ch. 515, Title. The LVRF is an annually assessed, three-tiered fee based on vehicle age. The fee is $195 for vehicles four or fewer years old, $65 for vehicles five to ten years old, and $6 for vehicles 11 years old or older. The LVRF is "in addition to other annual registration fees." 1999 Mont. Laws, ch. 515, § 1(1). The "other annual registration fees" to which the statute refers are: (1) the $10.25 to $15.25 registration fee required under Mont. Code Ann. §§ 61-3-321 and -456; (2) the $1.50 to $2 junk-vehicle disposal fee of Mont. Code Ann. § 61-3-508; (3) the $1.50 weed control fee of Mont. Code Ann. § 61-3-510; (4) the $1 county motor vehicle computer fee, Mont. Code Ann. § 61-3-511; and, where applicable, (4) the gross vehicle weight fee of Mont. Code Ann. § 61-10-201. Under the statute, light vehicles may also be subject to a local option vehicle tax or flat fee. 1999 Mont. Laws, §§ 37, 38.

Currently, tribal members, tribal governments, and non-resident active duty military personnel stationed in Montana pay the "other annual registration fees" referred to in the referendum.

However, tribal members residing on their reservations and tribal governments have not been obligated to pay the sales tax on new motor vehicles, the 1.4 percent annual motor vehicle value tax, or any county option tax, and military personnel have been exempt from the 1.4 percent annual motor vehicle value tax and any county option tax. The "other annual registration fees" currently being paid by tribal members, tribal governments, and non-resident active duty military personnel are not in issue in your opinion request.

II.

Although clearly denominated as a fee, the LVRF shares many salient characteristics of the prior tax, which it replaced. The prior tax was preempted by federal law, and was not assessed against tribal members residing on their reservations or tribal governments. 39 Op. Att'y Gen. No. 45 (1981); Assiniboine & Sioux Tribes v. Montana, 568 F. Supp. 269 (D. Mont. 1983); accord Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976).

The question posed is whether the structure of the LVRF is sufficiently different from the prior taxes and license fees to warrant its assessment against tribal members and tribal governments. This question is a complicated one, requiring application of federal Indian law principles as well as state law governing whether fees are substantively taxes or actually fees for purposes of determining application of exemptions from certain taxes.

A.

The federal government has plenary authority over Indians. Under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, federal law preempts conflicting state laws. Absent express Congressional authorization, states may not tax or apply their laws to tribal members or their property, or to tribal governments. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995); Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 126 (1993); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 475 (1976); Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1357 (9th Cir. 1993); Standing Rock Sioux Tribe v. Janklow, 103 F. Supp. 2d 1146, 1153-54 (D.S.D. 2000). Although the United States Supreme Court recently has held that Congressional authorization exists for states to tax tribally owned real property no longer held in trust, Cass County v. Leach Lake Band of Chippewa Indians, 524 U.S. 103 (1998), there remains no Congressional authorization for states to tax personal property of tribes or of tribal members residing on their reservations. Bryan v. Itasca County, 426 U.S. 373, 391 (1976); Standing Rock Sioux Tribe, 103 F. Supp. 2d at 1153-54.

Federal law does not operate to divest a state of authority over persons of Indian heritage who are not tribal members residing on their own reservation. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 160-61 (1980). Thus, nontribal members and other non-Indians residing on reservations are subject to all state laws. That is because federal Indian law is derived from the treaty relationship between the United States and its federally recognized tribes. It is a political classification, not a racial one. Morton v. Mancari, 417 U.S. 535, 553-55 (1974). Thus, federal law does not preempt any state laws applying to individuals of Indian descent who are not enrolled members of the tribe on whose reservation they reside. Colville, 447 U.S. at 160-61; Assiniboine and Sioux Tribes, 568 F. Supp. at 275.

B.

Application of state law to the on-reservation conduct of tribal governments is generally considered an undue infringement on tribal sovereignty, sometimes expressed as the right of the Indians to make their own laws and be governed by them. Williams v. Lee, 358 U.S. 217, 220 (1959); In re Marriage of Skillen, 1998 MT 43, ¶ 17, 287 Mont. 399, 956 P.2d 1; State ex rel. Iron Bear v. District Court, 162 Mont. 335, 340, 512 P.2d 1292, 1295 (1973). A tribe and its members are, however, subject to nondiscriminatory taxes and fees for off-reservation conduct. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 157-58 (1973). With respect to mobile personal property, the task of a state wishing to tax tribal members' or tribes' interests is, therefore, to craft a tax which applies only to off-reservation use. See 39 Op. Att'y Gen. No. 45 (1981). For vehicles, obviously, the problematic issue for a state wishing to apply a personal property tax , sales tax, or vehicle registration fee to tribal members' vehicles is how to allocate a tax only to off-reservation miles driven. See Standing Rock Sioux, 103 F. Supp. 2d at 1159-60.

All the tribal governments in Montana own some vehicles, which they register to the Tribe and use for governmental purposes. Although state laws, including nondiscriminatory state fees, would apply to off-reservation tribal governmental conduct, Mescalero Apache Tribe, 411 U.S. at 257-58, as a practical matter it may be impossible to identify that portion of the use which occurs off-reservation. Thus, I believe that regardless of whether this is concluded to be a fee or a tax, the LVRF cannot be applied to tribally owned vehicles, as such application would be preempted by federal law because it interferes with tribal government and it is not expressly authorized by Congress. See 37 Op. Att'y Gen. No. 28 (1977) (holding workers' compensation laws not applicable to tribal businesses operating on reservations); In re Skillen, 1998 MT 43, ¶ 17.

C.

As explained above, L.R. 115 replaced the prior new motor vehicle sales tax and 1.4 percent annual vehicle value tax with a three-tiered, age-based flat fee. L.R. 115 intended to replace the taxes with a fee. Its title includes the following language: "An act revising the taxation of certain vehicles; replacing the current system of taxation of automobiles . . . with a registration fee on light vehicles . . . ."

Both prior Attorney General's Opinions and federal Indian case law provide, however, that the characterization as a fee or a tax is not determinative. On very similar facts, in 39 Op. Att'y Gen. No. 45 (1981), the Attorney General held a license fee which had replaced a property tax based on vehicle value was functionally a tax, and therefore, could not be applied to tribal members residing on their reservations. See also 46 Op. Att'y Gen. No. 7 at 4-5 (1995) (fire service fees not fees but taxes); 43 Op. Att'y Gen. No. 46 at 159-60 (1989) (water and sewer levies designed to satisfy expenses in connection with federal loan repayment obligations were property taxes because the expenses associated with loan repayments could not be segregated based on benefit conferred to each property). "Under the teaching of Supreme Court precedent it is the nature and characteristics of the particular tax that determines whether the tax is permissible, not the nature of the label applied to it." Sac & Fox, 508 U.S. at 127-28; Colville, 447 U.S. at 163. "This requires examination of all the attributes of the particular tax." United States ex rel. Cheyenne River Sioux v. Johnson, 105 F.3d 1552, 1557 (8th Cir. 1997).

With respect to tribal members residing on the reservation of the Tribe in which they are enrolled, in general, if a "fee" operates more as a sales tax or a property tax, it cannot be applied, for the reasons noted above. In Assiniboine & Sioux Tribes, the United States District Court for the District of Montana held that tribal members residing on their reservations are exempt from both the Montana new vehicle sales tax, regardless of situs of purchase, and from state personal property tax. 568 F. Supp. at 275. If, however, the light vehicle registration fee is truly a fee for registering a vehicle in the state of Montana, rather than operationally a property tax or a sales tax, then it can be applied to anyone who seeks to register his or her car in Montana. Cheyenne River Sioux, 105 F.3d at 1559.

The legislature clearly intended to impose a fee. The language "in lieu of a tax," which will generally trigger a finding that the fee operates as a tax rather than a fee, was deleted as applied to light vehicles, and does not appear in any section that creates, or refers to, the light vehicle registration fee as such. See, e.g., 1999 Mont. Laws, §§ 1-3 and 7 (amending Mont. Code Ann. § 15-8-202(1)), and 33 (amending Mont. Code Ann. § 61-3-506). However, the language of the bill and the attached

analysis,[1] indicate that the proceeds are essentially distributed in the same manner as the preexisting personal property taxes on vehicles.

The LVRF is specifically deductible from state income taxes, see 1999 Mont. Laws, ch. 515, § 10 (amending Mont. Code Ann. § 15-30-121 to include light vehicle registration fees paid during the tax year as a deduction in computing net income for tax purposes, as were the taxes it replaced). Also, credits that were available to some for the prior taxes remain available for the LVRF. See, e.g., id., § 11 (amending Mont. Code Ann. § 15-50-207(2) to allow payment of the LVRF as a credit against a contractor's corporation license tax or income tax). Additionally, the bill maintains essentially every express exemption for the LVRF that was available under the value-based tax system it replaced. Id., § 1(2)(a) and (b) (exempting from the LVRF "light vehicles that meet the description of property exempt from taxation under 15-6-201(1)(a), (1)(c) through (1)(e), (1)(g), (1)(m), (1)(o), (1)(q) or (1)(w), 15-6-203, or 15-6-215, except as provided in 61-3-520" and "a motor vehicle owned by a disabled veteran qualifying for special license plates under 61-3-332(10) or a motor vehicle registered under 61-3-456").

The proceeds of the light vehicle registration fee for new vehicles are distributed to the state highway restricted state special revenue account. Id., § 34; 1999 Mont. Laws (May 2000 Spec. Sess.), ch. 11, § 11. Thus, the LVRF paid on a new vehicle funds the same account to which the repealed new car sales tax use was dedicated. Cf. Mont. Code Ann. § 61-3-502(6) (1999) (allocation of new car sales tax proceeds). For previously registered light vehicles, the funds from the LVRF are distributed for local government and school purposes pursuant to Mont. Code Ann. § 61-3-509, as amended by May 2000 Spec. Sess. Laws, ch. 11, § 16. Thus, the LVRF is distributed similarly to the proceeds from the former new car sales tax which it replaced, and which predominantly went to "the highway nonrestricted account of the state special revenue fund," Mont. Code Ann. § 61-3-502(6) (1999), and the 1.4 percent vehicle value tax, which was distributed, after deduction of the district court fee, for local and school purposes.

A Montana Attorney General's Opinion addressed a very similar issue with respect to another motor vehicle license fee in 1981. In 39 Op. Att'y Gen. No. 45, it was held that the license fee based on a vehicle's age and weight, and which was expressly in lieu of a tax, operated as a tax and therefore could not be applied to tribal members residing on their reservations. That

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[1] HB 540 Impact on Local Government and School Districts, prepared for the Legislative Finance Committee by Jim Standaert, Senior Fiscal Analyst, dated June 6, 2000, at 7.

Opinion noted that the license fee replaced a value-based tax, was based on vehicle age and weight, and was in addition to other annual registration fees. The funds generated by the license fee were distributed in the same manner as the funds generated from the tax it replaced. It noted the fee was not based on off-reservation miles driven, and was substantively and functionally a tax. Under Moe and Colville, it therefore could not be levied on tribal members residing on their reservations.

Various Attorney General's Opinions provide further guidance as to when a fee is a true fee for services and when it is a tax. In 46 Op. Att'y Gen. No. 7, it was held that fire protection fees assessed by a city could not be assessed against property exempted from property taxation because they were more in the nature of a tax than a fee. Although denominated a fee, they were not apportioned or assessed against specific properties based on the cost of providing those benefits to those properties. This type of analysis is soundly based in long-standing Montana law. "The central inquiry will thus normally be whether the purpose of the levy or assessment is to compensate . . . for benefits directly conferred upon a particular piece of property within its jurisdiction in direct proportion to the cost of those benefits; i.e., whether the levy is in the nature of a user fee." 42 Op. Att'y Gen. No. 21 at 83 (1987). "An assessment is imposed against specific property to defray the costs of a specific benefit to that property, the benefit to be commensurate with the assessment." Vail v. Custer County, 132 Mont. 205, 217, 315 P.2d 993, 1000 (1957).

The LVRF is indistinguishable from the license fee held equivalent to a property tax in the 39 Op. Att'y Gen. No. 45 (1981). It is not related to the cost of administering the vehicle registration system or off-reservation miles driven. The funds raised are distributed in essentially the same manner as the sales and value taxes they replaced. Although the "in lieu of tax" language was removed from the characterization, the title of the bill and the substance and structure of the fee clearly indicate that the LVRF functions as a three-tiered, value-based annual motor vehicle tax.

Like the license fee held impermissibly applied to tribal members, this fee is assessed annually, and based on age. The 1981 fee ranged from $15 to $90, the LVRF ranges from $6 to $195. The fee addressed earlier was based on age and weight, but the question remains whether age is a surrogate for value, as was age and weight. A fee based on value, even if assessed annually, is more like a property tax than a fee, and cannot be assessed against tribal members. Cheyenne River Sioux, 105 F.3d at 1558. Certainly, based on standard valuations, the age of a car is one of the most salient characteristics determining value, as all Blue Book valuations are based on age. Weight, the additional characteristic in the earlier case, does relate to value, but not as directly; e.g., an old, small Mercedes will still be more valuable than a newer but heavier passenger car.

Thus, the removal of weight as a determiner of the fee is not significant. Indeed, use of weight in calculating the fee indicates an assessment more in the nature of a fee, because the vehicle's weight, unlike its age, directly relates to its impact on the condition of the highways and therefore the cost of administering transportation-related state services to that vehicle. In this sense, then, the LVRF is even less like a fee than the 1981 fee determined to be a tax.

The earlier opinion also relied on the language stating that the fee was "in lieu of a tax." Although this term of art does not appear in the pertinent sections, the title of the bill indicates it is "replacing the current system of taxation of automobiles . . . with a registration fee on light vehicles." 1999 Mont. Laws, ch. 515, Title. There is no meaningful distinction between the terms "in lieu of" and "replacing with." Thus, the lack of the specific terms of art and their replacement with synonyms cannot be meaningful. The earlier fee was also distributed in essentially the same manner as personal property taxes; thus, on this element, the fees addressed in 1981 and now are substantively indistinguishable.

Comparing the LVRF with the fees upheld in Cheyenne River Sioux, both are assessed annually as a condition precedent to issuance of state plates. However, the South Dakota fee ranged between $20 and $40 for average noncommercial vehicles, whereas the LVRF ranges from $6 to $195. Thus, I find Cheyenne River Sioux distinguishable from the matter presented here.

In conclusion, the light vehicle registration fee imposed by 1999 Mont. Laws, ch. 515, §§ 1-3, is substantively indistinguishable from its predecessor tax and the 1981 tax held to be more akin to a personal property tax in 39 Op. Att'y Gen. No. 45. Therefore, it cannot be levied against tribal members residing on their reservations. With respect to tribal members and tribal governments, the LVRF should be administered in the same manner as the taxes it replaced.

III.

The conclusion that the new light vehicle registration fee is functionally a tax, rather than a fee, also affects active military personnel serving in Montana.

Under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. § 574, a non-resident serviceperson stationed in a state under military orders has immunity from personal property and income taxation of that state. This exemption covers motor vehicles and taxation, including "license, fees, or excises imposed in respect to motor vehicles or the use thereof," provided the "license, fee or excise required by the State . . . of which the person is a resident or in which he is domiciled has been paid."

The purpose of § 574, as elucidated by the United States Supreme Court, is to relieve a serviceperson of the burden of supporting the government of a state in which the person was residing solely in compliance with military orders. California v. Buzzard, 382 U.S. 386, 393 (1966). This relief extends, independent of the label attached by the state, to a vehicle "license fee" that serves primarily a revenue interest, narrower in purpose but not different in kind from taxes raised to defray the general expenses of government. Id. at 395; see also United States v. Highwood, 712 F. Supp. 138, 142 (N.D. Ill. 1989) ($15-$75 annual license fee based on vehicle weight was revenue-raising measure that could not be enforced against non-resident service personnel from adjacent army installation).

Thus, non-resident active duty service personnel may only be subject to those taxes or fees that are essential to the functioning of the host state's licensing and registration laws. Buzzard at 395. In Montana, prior to 1999 Mont. Laws, ch. 515, those fees have been determined to be the fees set forth in Mont. Code Ann. § 61-3-321--the $10.25 to $15.25 registration or license fee and the $2 license plate fee. 39 Op. Att'y Gen. No. 45 (1981). An earlier flat vehicle licensing fee, based on vehicle age and weight, the proceeds of which were used in the same manner as the prior ad valorem property tax on vehicles and served primarily a revenue purpose, was determined to be "more akin to a property tax than a registration fee" and thus was a fee from which non-resident active duty military personnel were determined to be exempt. Id.

Under the analysis set forth in Part II.C, supra, the LVRF is indistinguishable from the fee discussed in the 1981 opinion. Accordingly, it cannot be assessed for the registration of a light vehicle owned by a non-resident active duty serviceperson stationed in Montana.

THEREFORE, IT IS MY OPINION:

1. The light vehicle registration fee established in 1999 Mont. Laws, Ch. 515, §§ 1-3, ratified by the voters as L.R. 115, may not be assessed against tribally owned vehicles or vehicles owned by enrolled tribal members residing on their reservations.

2. The light vehicle registration fee established in 1999 Mont. Laws, ch. 515, §§ 1-3, ratified by the voters as L.R. 115, may not be assessed against non-resident active duty military personnel stationed in Montana.

Sincerely,

/s/ Joseph P. Mazurek

JOSEPH P. MAZUREK
Attorney General

VOLUME NO. 48 OPINION NO. 25

CITIES AND TOWNS - Authority of self-governing city to establish tiered resort tax schedule;
LOCAL GOVERNMENT - Authority of self-governing city to establish tiered resort tax schedule;
MUNICIPAL CORPORATIONS - Authority of self-governing city to establish tiered resort tax schedule;
PUBLIC FUNDS - Authority of self-governing city to establish tiered resort tax schedule;
MONTANA CODE ANNOTATED - Sections 7-1-101, -106, -112, 7-6-1501 to -1509, 15-10-420;
MONTANA CONSTITUTION - Article XI, section 6;
MONTANA LAWS OF 1985 - Chapter 729;
OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 5 (1991), 41 Op. Att'y Gen. No. 75 (1986).

HELD: A municipality with self-governing powers may, under Mont. Code Ann. §§ 7-6-1501 to -1509, establish a tiered resort tax schedule providing different tax rates, none of which exceed 3 percent, for similar goods or services according to the character of the business in which the goods or services are sold or offered.

December 28, 2000

Mr. John M. Phelps
Whitefish City Attorney
204 Central Avenue
Whitefish, MT 59937

Dear Mr. Phelps:

You have requested my opinion on a question concerning a self-governing city's power to enact a tiered resort tax. In particular, you ask:

> **May a charter city with self-governing powers adopt and enforce a tiered resort tax rate, applying different rates of tax to different categories of establishments and retail items, instead of applying a flat rate to all establishments and retail items?**

You also asked whether the proposed tiered tax schedule would meet constitutional challenges on equal protection grounds. Although I decline to give an opinion on the constitutionality of the resort tax statutory framework itself, inasmuch as it is my duty as Attorney General to defend constitutional challenges against state statutes, my staff has researched the issue and

will provide the results of that research by separate letter of advice.

The City of Whitefish, a city with self-governing powers under its charter, currently imposes a flat 2 percent resort tax on all establishments and retail items subject to the tax. Pursuant to Mont. Code Ann. § 7-6-1504(1), the existing resort tax was approved by the Whitefish electors at an election held on November 7, 1995. The City Council has considered submitting to the Whitefish electors an amendment to the resort tax that would vary the percentage of the tax in the following manner:

1. The rate of the resort tax would be 3 percent on the retail value of all goods and services sold, except for goods and services sold for resale, at hotels, motels, and other lodging or camping facilities;

2. The rate of the resort tax would be 2 percent on the retail value of all goods and services sold, except for goods and services sold for resale, at:

   a. restaurants, fast food stores, and other food service establishments;

   b. taverns, bars, nightclubs, lounges, and other public establishments that serve beer, wine, liquor, or other alcoholic beverages by the drink; and

   c. destination ski resorts and other destination recreational facilities.

3. The rate of the resort tax would be 1 percent on luxuries, as defined by Mont. Code Ann. § 7-6-1501(1), to mean any gift item, luxury item, or other item normally sold to the public or to transient visitors or tourists.

The Whitefish charter was adopted by the electors of Whitefish in 1980 and amended in 1985. Under the Montana Constitution, article XI, section 6 (incorporated within Mont. Code Ann. § 7-1-101), "A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter." A self-governing city has all the powers of government save those specifically prohibited. D & F Sanitation Serv. v. City of Billings, 219 Mont. 437, 445, 713 P.2d 977, 982 (1986); 44 Op. Att'y Gen. No. 5, 402 (1991). In this regard, Mont. Code Ann. § 7-1-106 provides:

> The powers and authority of a local government unit with self-government powers shall be liberally

> construed. Every reasonable doubt as to the existence of a local government power or authority shall be resolved in favor of the existence of that power or authority.

Mont. Code Ann. § 7-1-112(1) restricts the taxing authority of local governments with self-governing powers. It provides:

> A local government with self-government powers is prohibited the exercise of the following powers unless the power is specifically delegated by law:
>
> (1) the power to authorize a tax on income or the sale of goods or services, except that, subject to 15-10-420, this section may not be construed to limit the authority of a local government to levy any other tax or establish the rate of any other tax; . . . .

In my opinion, the requirement of delegation has been satisfied by Mont. Code Ann. § 7-6-1502, which provides:

> As required by 7-1-112, 7-6-1501 through 7-6-1507 specifically delegate to the electors of each respective resort community the power to authorize their municipality to impose a resort tax within the corporate boundary of the municipality as provided in 7-6-1501 through 7-6-1507.

The resort tax statutes set a maximum level of 3 percent without mention of a differential schedule of tax rates. Mont. Code Ann. § 7-6-1503(1).

Well-established rules of statutory construction do not require reference to the legislative history of a statute when it is not ambiguous. When interpreting statutes, the role of a court "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. § 1-2-101, quoted in State ex rel. Keyes v. Montana Thirteenth Jud. Dist. Ct., 1998 MT 34, ¶ 15, 288 Mont. 27, 955 P.2d 639. See also In re R.L.S., 1999 MT 34, ¶ 12, 293 Mont. 288, 977 P.2d 967 ("It is not our function to insert language into a statute which has not been placed there by the Legislature"). "Where the language is clear and unambiguous, no further interpretation is required." Keyes, ¶ 15. See also GBN, Inc. v. Montana Dep't of Revenue, 249 Mont. 261, 265, 815 P.2d 595, 597 (1991); State ex rel. Roberts v. Public Serv. Comm'n, 242 Mont. 242, 246, 790 P.2d 489, 492 (1990). Further, "an interpretation of a statute which gives it effect is preferred to one which renders it void." Mead v. M.S.B., Inc., 264 Mont. 465, 474, 872 P.2d 782, 788 (1994), citing Mont. Code Ann. § 1-3-232. "In particular, 'whenever there are differing possible interpretations of [a] statute, a constitutional interpretation is favored over one

that is not.'" Huether v. Sixteenth Jud. Dist. Ct., 2000 MT 158, ¶ 28, 57 State Rptr. 647, 4 P.3d 1193, citing Department of State Lands v. Pettibone, 216 Mont. 361, 374, 702 P.2d 948, 956 (1985). "A statute should be interpreted to give a lawful result if possible." Link v. City of Lewistown, 253 Mont. 451, 454, 833 P.2d 1070, 1073 (1992), citing Grossman v. Dep't of Natural Resources, 209 Mont. 427, 451, 682 P.2d 1319, 1332 (1984) ("Neither statutory nor constitutional construction should lead to absurd results, if reasonable construction will avoid it.").

In this instance, although the resort tax statutes are not ambiguous from the standpoint of establishing a maximum rate of tax for a "resort area" or a "resort community," they are arguably ambiguous on the question of whether a differential tax schedule is permissible. The statutes neither prohibit nor explicitly permit a differential schedule. In that circumstance, it is proper to refer to the legislative history. Montana Dep't of Revenue v. Puget Sound Power & Light Co., 179 Mont. 255, 263, 587 P.2d 1282, 1287 (1978). Accord Albright v. State, 281 Mont. 196, 210, 933 P.2d 815, 825 (1997). The statutes enacted as chapter 729 of the 1985 Montana Laws originated as House Bill 826. Records of testimony and evidence before the committees considering the bill show that the principal aim of the resort tax was to fund services in resort areas. These areas require extra revenue to offset the extraordinary cost of providing public facilities and services for the tourist season. These must be maintained even during the off-season, when the area's population has decreased markedly. The minutes of the committee meetings, together with the summarized and written comments from both proponents and opponents, do not refer to a differential tax schedule applying different rates according to the character of a business. There was instead concern that the bill, if enacted, be drawn to apply restrictively to resort areas so that it would not be interpreted as a general sales tax. See, e.g., Mins., Senate Taxation Comm., Apr. 23, 1985, at 1.

A statute's words and phrases "are construed according to the context and the approved usage of the language," although technical terms are to be given the "peculiar and appropriate" meaning they have acquired in law or through statutory definition. Mont. Code Ann. § 1-2-106. See Billings Firefighters Local 521 v. City of Billings, 1999 MT 6, ¶¶ 20-21, 293 Mont. 41, 973 P.2d 222. The statute that fixes the resort tax rate is Mont. Code Ann. § 7-6-1503: "(1) The rate of the resort tax must be established by the election petition or resolution provided for in 7-6-1504, but the rate may not exceed 3%." "Exceed" is defined as (transitively) "[t]o go or be beyond the limit or measure of; to overdo or overtax" and (intransitively) "[t]o go too far; to pass the proper or usual bounds or measure." Webster's New International Dictionary 888 (2d ed. 1941). Given the meaning of the word "exceed," it is

clear that the statute sets an upper limit for the tax rate, but does not specify a particular rate. An ordinance fixing differential rates is thus not inconsistent with the word "exceed," since none of the proposed rates exceed 3 percent.

Section 7-6-1503 refers to a singular rate by its use of the term, "the rate." Although the term could be interpreted to mean that the statute permits only a single tax rate, Mont. Code Ann. § 1-2-105(3) provides, "The singular includes the plural and the plural the singular." See Hauswirth v. Mueller, 25 Mont. 156, 162, 64 P. 324, 326 (1901). Multiple rates are not expressly prohibited. Had the legislature desired otherwise, it could have so provided in unequivocal terms. See North v. Bunday, 226 Mont. 247, 251-56, 735 P.2d 270, 272-76 (1987).

A differential tax structure is not inconsistent with the discernible concerns revealed in the committee minutes. Indeed, it is arguable that a differential rate furthers the express purpose of the resort tax statutes by taxing at a higher rate those businesses drawing more of their customers from tourists than those serving a greater proportion of local residents. Motels, hotels, and lodging facilities typically serve tourists, in contrast to destination ski resorts or other recreational facilities that are heavily used by local residents as well as by tourists.

Mont. Code Ann. § 7-1-106 obligates me to resolve all reasonable doubts as to the existence of the power to levy a tiered resort tax in favor of the existence of the power. Accordingly, I hold that applying a different tax rate not to exceed 3 percent to the goods and services sold at businesses of differing character within the resort area is within the power of a resort community operating under a self-government charter.

THEREFORE, IT IS MY OPINION:

> A municipality with self-governing powers may, under Mont. Code Ann. §§ 7-6-1501 to -1509, establish a tiered resort tax schedule providing different tax rates, none of which exceed 3 percent, for similar goods or services according to the character of the business in which the goods or services are sold or offered.

Sincerely,

/s/ Joseph P. Mazurek

JOSEPH P. MAZUREK
Attorney General

jpm/jbw/dm

VOLUME NO. 48 OPINION NO. 26

APPROPRIATIONS - Encumbrance and reversion of funds appropriated but unexpended at close of fiscal year;
COAL SEVERANCE TAX TRUST FUND - Reversion at close of fiscal year of funds appropriated for Microbusiness Development Program;
COMMERCE, DEPARTMENT OF - Authority to encumber appropriated but unexpended funds after fiscal year-end;
CONTRACTS - Loan agreements entered into after fiscal year-end;
ADMINISTRATIVE RULES OF MONTANA - Rule 8.99.505(3) (1997);
MONTANA CODE ANNOTATED - Sections 17-6-402(2), -407, -407 (1995), 17-7-302, -302(1), -304(1), 27-1-105;
MONTANA CONSTITUTION - Article VIII, section 9;
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 4 (1983).

HELD: The Department of Commerce may not encumber unexpended funds from an appropriation for the Microbusiness Development Program by committing those funds after fiscal year-end.

December 29, 2000

Peter S. Blouke, Ph.D., Director
Department of Commerce
P.O. Box 200501
Helena, MT 59620-0501

Dear Dr. Blouke:

You have requested an Attorney General's Opinion concerning the use of an appropriation to the Department of Commerce (Department) from the Coal Severance Tax Trust Fund (Coal Tax Fund) for purposes of the Microbusiness Development Program. Your inquiry arises as a result of an audit which led to a dispute between the Department and the Legislative Auditor about whether the funds are validly encumbered and thus available for use by the Department, or whether they should have reverted to the Coal Tax Fund in accordance with Mont. Code Ann. § 17-7-304(1). The following background information is relevant to your inquiry.

The Department of Commerce administers the Microbusiness Development Program pursuant to grant of authority under the Microbusiness Development Act, Mont. Code Ann. §§ 17-6-401 to -411. The purpose of the program is to foster development of small businesses in Montana. Mont. Code Ann. § 17-6-402(2). This is accomplished through a revolving loan fund from which the Department makes development loans to regional Microbusiness Development Corporations (MBDCs), which in turn loan funds to small businesses. The funds for these loans come from an

appropriation made to the Department by the legislature from the Coal Tax Fund. Mont. Code Ann. § 17-6-407 (1995).

In June 1997, the Department entered into commitments with several MBDCs to loan funds contingent upon the MBDCs providing matching funds by September 30, 1997. When no matching funds were received by that date, however, the Department amended the contracts to extend the time period for matching funds until September 30, 1999.

The Legislative Auditor discovered the encumbrances during a recent audit and determined that the funds were validly encumbered to September 30, 1997. When the contingency did not occur by that date, however, the Auditor considered the funds no longer validly encumbered and concluded that they should have reverted to the Coal Tax Fund. The Department responds that the funds were validly encumbered beyond September 30, 1997, by virtue of the contract amendments extending the contingency for another two years. The question presented then is whether the Department has legal authority to retain funds allocated to it under Mont. Code Ann. § 17-6-407 by amending certain loan agreements for an additional two-year period.

Montana law contemplates that an appropriation for a specific purpose will revert to the fund or account from which it was originally appropriated after the expiration of the time for which it was appropriated. Mont. Code Ann. § 17-7-304(1). Appropriations for an unspecified period of time must revert at the end of the biennium in light of the balanced budget requirement of article VIII, section 9 of the Montana Constitution. The appropriation in question was subject to reversion on June 30, 1997. The Department, however, attempted to avoid reversion by encumbering the funds to September 30, 1997, and then to September 30, 1999.

Encumbrances of fiscal year-end obligations are authorized by Mont. Code Ann. § 17-7-302, which provides in relevant part:

> (1) Any valid obligation not paid within the fiscal year, including valid written interagency or intra-agency service agreements for systems development, shall be encumbered for payment thereof at the end of each fiscal year in the department of adminstration's accounts. Except as provided in subsection (2), an appropriation shall be deemed to be encumbered at the time and to the extent that a valid obligation against the appropriation is created.

The operative wording of this statute is "valid obligation." This phrase was construed in 40 Op. Att'y Gen. No. 4 (1983), in which former Attorney General Mike Greely observed the significance of the term "obligation" as connoting a legally binding duty to perform or refrain from performing an act. 40

Op. Att'y Gen. No. 4 at 17, citing Mont. Code Ann. § 27-1-105; Kinsman v. Stanhope, 50 Mont. 41, 47, 144 P. 1083, 1084 (1914).

By its own rule, the Department had the authority to enter into a legally binding commitment with the MBDCs for up to three months, with the contingency that cash collateral be forthcoming. Montana Administrative Rule 8.99.505(3) (1997) provided:

> In order to assist an MBDC in obtaining collateral from other sources, the department may provide a legally binding commitment to an MBDC to award a development loan, contingent upon receipt and deposit of cash collateral as specified in the loan agreement. Such a commitment must have an expiration date; the duration of such commitment may be no longer than one calendar quarter, so that commitments to MBDCs without collateral cash on hand do not unreasonably delay lending to MBDCs with cash collateral ready and available.

This created a valid encumbrance until September 30, 1997. Once the contingency expired, however, the Department had no authority to contract further in order to encumber funds. Mont. Code Ann. § 17-7-302 contemplates that the encumbrances arise as a result of a legally binding duty created during the fiscal year in which the funds were available--in other words, prior to June 30, 1997. There is no provision in the law for encumbering funds after fiscal year-end. Any such provision would directly conflict with the statute requiring reversion of unexpended funds, Mont. Code Ann. § 17-7-304(1).

This is not to say, however, that the Department could have entered into a legally binding commitment for more than two years *prior to* the expiration of the fiscal year. While that question is not presented here, it appears that such a commitment would be an end-run around Montana's biennial budget process and the reversion provisions of Mont. Code Ann. § 17-7-304(1).

Since the Department's commitments were made after fiscal year-end, they do not constitute a valid obligation under Mont. Code Ann. § 17-7-302. The fact that there was a legally binding obligation in place to September 30, 1997, is of no consequence. Once the contingency expired on that date, so did the Department's legal obligation. The Department has no inherent authority to encumber funds in any other manner than that prescribed by statute. 40 Op. Att'y Gen. No. 4 at 17. Thus, any unexpended balance from the appropriation should have reverted to the Coal Tax Fund pursuant to Mont. Code Ann. § 17-7-304(1) as of that date.

THEREFORE, IT IS MY OPINION:

The Department of Commerce may not encumber unexpended funds from an appropriation for the Microbusiness Development Program by committing those funds after fiscal year-end.

Sincerely,

/s/ Joseph P. Mazurek

JOSEPH P. MAZUREK
Attorney General

jpm/jma/dm

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Business and Labor Interim Committee:

- **Department of Agriculture;**
- **Department of Commerce;**
- **Department of Labor and Industry;**
- **Department of Livestock;**
- **Department of Public Service Regulation; and**
- **Office of the State Auditor and Insurance Commissioner.**

Education Interim Committee:

- **State Board of Education;**
- **Board of Public Education;**
- **Board of Regents of Higher Education; and**
- **Office of Public Instruction.**

Children, Families, Health, and Human Services Interim Committee:

- **Department of Public Health and Human Services.**

Law, Justice, and Indian Affairs Interim Committee:

- **Department of Corrections; and**
- **Department of Justice.**

Revenue and Taxation Interim Committee:

- **Department of Revenue; and**
- **Department of Transportation.**

State Administration, Public Retirement Systems, and Veterans' Affairs Interim Committee:

- **Department of Administration;**
- **Department of Military Affairs; and**
- **Office of the Secretary of State.**

Environmental Quality Council:

- **Department of Environmental Quality;**
- **Department of Fish, Wildlife, and Parks; and**
- **Department of Natural Resources and Conservation.**

These interim committees and the EQC have 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. They also 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, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is PO Box 201706, Helena, MT 59620-1706.

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, 2000. This table includes those rules adopted during the period October 1, 2000 through December 31, 2000 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, 2000, 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 1999 and 2000 Montana Administrative Registers.

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