MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 17

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

In the matter of the amendment of ARM 2.21.1803 and 2.21.1812 in the Exempt Compensatory Time Policy	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On October 9, 2001, the Department of Administration (Department) proposes to amend ARM 2.21.1803 and 2.21.1812 pertaining to exempt compensatory time.

2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in this rule making process and need alternative accessible formats of this notice. If you require an accommodation, contact the Department no later than 5:00 p.m. on September 21, 2001 to advise us of the nature of the accommodation that you need. Please contact State Personnel Division, Department of Administration, P.O. Box 200127, Helena, MT 59620-0127; telephone (406) 444-3871; TDD (406) 444-1421; FAX (406) 444-0544; or E-mail hpeck@state.mt.us.

3. The rules as proposed to be amended provide as follows. Matter to be added is underlined, matter to be deleted is interlined.

2.21.1803 DEFINITIONS
(1) remains the same.
(2) "Exempt employee" means an employee ~~in a position designated as executive, administrative, or professional, which~~ who is not subject to the overtime pay provisions of the federal FLSA and its regulations. It does not mean officers and employees listed in 2-18-103, MCA, or exempt personal staff of elected officials as described in 2-18-104, et al., MCA. ~~Exemptions~~ FLSA exempt employees are listed in ~~Section 13 of~~ the FLSA at 29 U.S.C. Chapter 8, section 213 and further defined in 29 CFR 541.

AUTH: Sec. 2-18-102, MCA
IMP: Sec. 2-18-102, MCA

2.21.1812 EXEMPT EMPLOYEES AND EXEMPT COMPENSATORY TIME
(1) through (12) remain the same.
~~(13) This rule does not authorize an extension of termination date for officers or employees exempted or personal staff listed in 2-18-103 or 2-18-104 MCA.~~

AUTH: Sec. 2-18-102, MCA
IMP: Sec. 2-18-102, MCA

REASON: It is necessary to clarify the persons to whom the exempt compensatory time policy applies. The language in the current rules has led to confusion regarding the applicability of the rule to employees described in 2-18-103 and 2-18-104, MCA. However, the amended and current rules are not and cannot be applicable to those persons listed in 2-18-103 and 2-18-104, MCA. The Department of Administration adopted the exempt compensatory time rules under authority provided to it in 2-18-102, MCA. Because the employees described in 2-18-103 and 2-18-104, MCA, are expressly excepted from the provisions of 2-18-102, MCA, (as well as other provisions of Parts 1 through 3 and 10 of Title 2, Chapter 18), the Department does not have the legal authority to extend this rule to these employees. In summary, if the statute under which the Department has adopted these rules does not apply to these employees, then the administrative rules themselves cannot apply. The department believes current statute places the authority, responsibility, and duty to define many of the terms and conditions of employment (including compensatory time policy) with the authority that appoints these employees.

4. Concerned persons may submit their data, views or arguments in writing to Hal Peck, State Personnel Division, Department of Administration, P.O. Box 200127, Helena, MT 59620-0127; or E-mail to hpeck@state.mt.us. Comments must be received no later than October 8, 2001.

5. If persons who are directly affected by the proposed action 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 to the address listed above. A written request for hearing must be received no later than October 8, 2001.

6. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate 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 more than 25, based on the number of state employees.

7. The Department of Administration maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the department. Persons who wish to have their name added to the mailing 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 personnel rules. Such written request may be mailed or delivered to Hal Peck, Department of

Administration, State Personnel Division, P.O. Box 200127, Helena, MT 59620-0127; E-mailed to hpeck@state.mt.us; or made by completing a request form at any rules hearing held by the Department of Administration.

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

By: /s/ *Barbara Ranf*
Barbara Ranf, Director,
Department of Administration

By: /s/ *Dal Smilie*
Dal Smilie, Rule Reviewer

Certified to the Secretary of State August 27, 2001

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

In the matter of the proposed amendment of ARM 6.6.4202, 6.6.4203, 6.6.4204, 6.6.4205, 6.6.4209, 6.6.4210, 6.6.4211, 6.6.4212, and adoption of Rule I pertaining to continuing education program for insurance producers and consultants	)	AMENDED NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On August 23, 2001, the State Auditor and Commissioner of Insurance published a notice at page 1511 of the 2001 Montana Administrative Register, Issue Number 16, of public hearing on the proposed amendment and adoption of the above-captioned rules. The notice of proposed agency action is amended because the time of the hearing was inadvertently omitted from the notice. The time of the hearing is noted as being at 9:30 a.m. on September 25, 2001.

2. The State Auditor's Office 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 office no later than 5:00 p.m., September 17, 2001, to advise us as to the nature of the accommodation needed. Please contact Kevin Phillips, State Auditor's Office, 840 Helena Avenue, Helena, Montana 59601; telephone (406) 444-3496; Montana Relay 1-800-332-6145; TDD (406) 444-3246; facsimile (406) 444-3497; or e-mail to kephillips@state.mt.us.

3. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Kevin F. Phillips, Montana Insurance Department, 840 Helena Avenue, Helena, Montana 59601, or by e-mail to kephillips@state.mt.us, and must be received no later than October 2, 2001.

4. Kevin E. Phillips has been designated to preside over and conduct the hearing.

5. 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, 840 Helena Avenue, Helena, MT 59601, faxed to 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.

JOHN MORRISON, State Auditor
and Commissioner of Securities

By: /s/ Angela Caruso
Angela Caruso
Deputy Insurance Commissioner

By: /s/ Elizabeth L. Griffing
Elizabeth L. Griffing
Rules Reviewer

Certified to the Secretary of State on August 28, 2001.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the adoption of new rules pertaining to the collection of motor fuel tax for diesel vehicles found to have dyed fuel in the supply tank	) NOTICE OF PROPOSED ADOPTION) NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On October 26, 2001, the Department of Transportation proposes to adopt new rules concerning the collection of motor fuel tax for diesel powered vehicles found to have dyed fuel in the supply tank.

2. The Department of Transportation will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department no later than 5:00 p.m. on September 14, 2001 to advise us of the nature of the accommodation you need. Please contact Robert Turner, Fuel Tax Management and Analysis Bureau, P. O. Box 201001, Helena, MT 59620-1001, (406) 444-7672 or TTY users can call (406) 444-7696, fax (406) 444-6032, or e-mail boturner@state.mt.us.

3. The proposed new rules provide as follows:

NEW RULE I DEFINITIONS The following definitions apply for estimating the capacity of a supply tank in diesel-powered vehicles:

(1) "Automobile" is a self-propelled passenger vehicle that usually has four wheels and an internal combustion engine and is not a pick-up truck or truck. This vehicle is commonly referred to as a car, motor vehicle or automobile.

(2) "Combination" is a motor vehicle used, designed, or maintained for transportation of persons or property and has two or more axles whose gross weight exceeds 46,000 pounds or a combination of vehicles whose combined licensed weight exceeds 46,000 pounds.

(3) "Pick-up truck" is a vehicle licensed under a flat gross vehicle weight (GVW) fee and has a manufacturer's rated capacity of 1/4 ton, 1/2 ton, 3/4 ton or 1 ton. This vehicle, regardless of how it is registered and plated, is also commonly known as a pick-up truck, van or sport utility vehicle.

(4) "Truck" is a vehicle licensed under graduating gross vehicle weight (GVW) fees and has a manufacturer's rated capacity exceeding 1 ton, but not exceeding 46,000 pounds.

AUTH: 15-70-104, MCA
IMP: 15-70-321, MCA

REASON: The new rule is necessary to provide a definition section, to define types of diesel powered vehicles and to provide categories for these types of vehicles. The definitions are necessary to implement the following proposed new rule.

NEW RULE II ESTIMATE OF DIESEL POWERED VEHICLES SUPPLY TANKS (1) When a diesel powered vehicle is found to have dyed fuel in the supply tank(s) and has been traveling on public roads, the department will assess the special fuels tax on each of the diesel powered vehicle's supply tank(s) as if the tank(s) were full.

(2) When assessing the special fuel tax on a diesel powered vehicle, the following average supply tank capacities will be used:

(a) 17 gallons for an automobile;
(b) 27 gallons for a pick-up truck;
(c) 63 gallons for a truck;
(d) 100 gallons for a combination.

(3) All assessments of the special fuel tax on diesel vehicles will be rounded for the convenience of the taxpayer and the department.

(4) The operator or owner of the vehicle may request a hearing if they disagree with the assessed amount.

AUTH: 15-70-104, 61-10-155, MCA
IMP: 15-70-321, 15-70-330 and 61-10-141, MCA

REASON: This new rule is necessary to give guidance to agency employees when assessing the special fuel tax on diesel vehicles that are consuming dyed fuel on public roads. By defining the average fuel tank capacity of the diesel vehicles, the special fuel tax can be calculated in a reasonable and convenient manner. The tax will be estimated on the full tank because the agency's experience has been that motorists fully fill a gas tank when refueling. This assumption can be questioned by an owner or operator if a hearing is requested. It is virtually impossible to estimate how much additional money will be collected as a result of the rule, but, based upon recent experience, about six vehicles will be found per month to have dyed fuel in the tank. At an average of $20 per tank, the additional tax should be between $1,000 and $2,000 per year.

4. Concerned persons may submit their data, views, or arguments concerning the proposed rules in writing to Robert Turner, Fuel Tax Management and Analysis Bureau, Department of Transportation, P. O. Box 201001, Helena, MT 59620-1001, by facsimile (406) 444-6032 or by electronic mail via the internet to boturner@state.mt.us to be received no later than October 4, 2001.

5. If persons who are directly affected by the proposed action 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 Robert Turner, Fuel Tax Management and Analysis Bureau, Department of Transportation, P. O. Box 201001, Helena, MT 59620-1001, by facsimile (406) 444-6032 or by electronic mail via the internet to boturner@state.mt.us. The comments must be received no later than 5:00 p.m. on October 4, 2001.

6. If the Department of Transportation receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of those who are directly affected by the proposed action, from the appropriate Administrative Rule Review Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who are 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 directly affected has been determined to be 10,000, based on the 100,000 diesel vehicles registered in Montana, which may be affected by rules covering the collection of motor fuel tax for diesel vehicles found to have dyed fuel in the supply tank.

7. The Department of Transportation maintains a list of interested persons who wish to receive notices of the 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 the subject area or areas of interest of the person requesting notice, including, but not limited to, rules proposed by the Administration Division, Aeronautics Division, Highways and Engineering Division, Maintenance Division, Motor Carrier Services Division, and Rail, Transit and Planning Division. Such written request may be mailed or delivered to the Montana Department of Transportation, Legal Services, P.O. Box 201001, Helena, MT 59620-1001, faxed to the office at (406) 444-7206, e-mailed to lmanley@state.mt.us, or may be made by completing a request form at any rules hearing held by the department.

8. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

MONTANA DEPARTMENT OF TRANSPORTATION

By: /s/ *David A. Galt*
Director, Department of Transportation

By: /s/ *Lyle R. Manley*
Rule Reviewer

Certified to the Secretary of State August 27, 2001.

BEFORE THE BOARD OF PUBLIC ACCOUNTANTS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment of ARM 8.54.410, pertaining to fees	)))	AMENDED NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On June 21, 2001, the Board of Public Accountants published a notice at page 1020 in the 2001 Montana Administrative Register, Issue Number 12, of the proposed amendment of ARM 8.54.410. The notice of proposed agency action is being amended because some persons did not receive the notice due to an error in the mailing process by the Board office.

2. On September 26, 2001, at 9:00 a.m. a public hearing will be held in the Business Standards Division, Department of Labor and Industry, conference room #487, 4th Floor of the Federal Building, 301 South Park Avenue, Helena, Montana, to consider the amendment of the above noted rule.

3. The department 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 Board of Public Accountants no later than 5:00 p.m. on September 18, 2001 to advise us of the nature of the accommodation that you need. Please contact Susanne Criswell, Board of Public Accountants, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2389; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2309; e-mail dlibsdpac@state.mt.us.

4. Concerned persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Public Accountants, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, and must be received no later than 5:00 p.m., September 26, 2001. If comments are submitted in writing, the Board requests that the person submit seven copies of their comments.

5. Mark Cadwallader, attorney, has been designated to preside over and conduct the hearing.

6. The Board of Public Accountants maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this Board. 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 all Board of Public Accountants administrative

rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Public Accountants, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2309, e-mailed to dlibsdpac@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

BOARD OF PUBLIC ACCOUNTANTS
BERYL ARGALL STOVER, CPA
CHAIRMAN

By: /s/ MIKE FOSTER
Mike Foster, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

By: /s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

Certified to the Secretary of State: August 27, 2001.

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

In the matter of the amendment of ARM 37.40.905, 37.83.802, 37.83.811, 37.83.812, 37.83.825, 37.85.406, 37.86.105, 37.86.610, 37.86.705, 37.86.1406, 37.86.1706, 37.86.1806, 37.86.1807, 37.86.2005, 37.86.2207, 37.86.2605, 37.86.4413, 37.88.206, 37.88.306, 37.88.606 and 37.88.907 pertaining to medicare and medicaid cross-over pricing	)	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On October 6, 2001, the Department of Public Health and Human Services proposes to amend the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you need to request an accommodation, contact the department no later than 5:00 p.m. on September 13, 2001, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rules as proposed to be amended provide as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.40.905 HOME DIALYSIS FOR END STAGE RENAL DISEASE, REIMBURSEMENT (1) Reimbursement for equipment shall be the lesser of the following:

(a) the provider's usual and customary charges which are reasonable; or~~, or the amount allowable by medicare.~~

(b) the medicaid established fee for that service.

(2) remains the same.

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

37.83.802 QUALIFIED MEDICARE BENEFICIARIES, DEFINITIONS

(1) through (11) remain the same.

(12) "Medicare allowable rate" means the reasonable charge for the medical service reimbursable under medicare Part B. ~~and is the lowest of:~~

~~(a) the provider's customary charge;~~
~~(b) the medicare prevailing charge; or~~
~~(c) the provider's actual or billed charge.~~
(13) through (19) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-131, MCA

37.83.811 QUALIFIED MEDICARE BENEFICIARIES, COVERAGE ~~AND REIMBURSEMENT~~ OF DEDUCTIBLES AND COINSURANCE FOR MEDICARE SERVICES ALSO COVERED BY FULL MEDICAID (1) through (2) remain the same.

~~(3) Reimbursement for services of:~~

~~(a) Subsections (1)(a) through (e) above is the medicare deductibles and coinsurance.~~

~~(b) Subsections (1)(f) through (k) above is the lowest of:~~
~~(i) the provider's submitted charge;~~
~~(ii) the medicare allowed rate; or~~
~~(iii) the medicaid fee or rate.~~

~~(4) Reimbursement from medicaid may not exceed an amount which would cause total payment to the provider from both medicare and other third party payors and medicaid to be greater than the medicare allowable charge or rate.~~

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-131, MCA

37.83.812 QUALIFIED MEDICARE BENEFICIARIES, PAYMENT FOR CHIROPRACTIC SERVICES AS MEDICARE SERVICES NOT COVERED BY FULL MEDICAID (1) remains the same.

(2) Reimbursement for chiropractic services is the lowest of:

(a) the provider's submitted charge; or
~~(b) the medicare allowed rate; or~~
~~(c)~~ (b) the medicaid fee for the service.

~~(3) The medicaid fee for this service is the medicare prevailing fee effective on July 1, 1989.~~

(4) remains the same in text but is renumbered (3).

AUTH: Sec. 53-6-101 and 53-6-131, MCA
IMP: Sec. 53-6-101 and 53-6-131, MCA

37.83.825 QUALIFIED MEDICARE BENEFICIARIES, PAYMENTS TO PROVIDERS (1) and (1)(a) remain the same.

(2) Payment in full, except as otherwise provided in (2)(a) below, for services provided to medicaid qualified medicare beneficiaries, is the medicaid payment as determined under ARM 37.83.811, ~~and~~ 37.83.812 and 37.85.406 plus the qualified medicare beneficiary's copayment as provided for in ARM 37.83.826. A provider may not collect any amount from the person which is in excess of payment in full even if that payment is less than the medicare insurance deductibles and coinsurance. Where a person is eligible for medicaid under both medicaid qualified medicare beneficiary and another medicaid

category, a provider must accept the medicaid payment as payment in full.

(a) remains the same.

(3) Subject to the requirements of this rule, the Montana medicaid program pays the lowest of the following for qualified medicare beneficiary services:

(a) the provider's usual and customary charge for the service; or

(b) the appropriate medicaid allowed amount as provided in ARM 37.85.406(18).

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-6-101 and 53-6-131, MCA

37.85.406 BILLING, REIMBURSEMENT, CLAIMS PROCESSING, AND PAYMENT (1) through (1)(c) remain the same.

(2) For purposes of this ~~section~~ rule:

(a) through (17) remain the same.

(18) Except as otherwise provided in the rules of the department which pertain to the method of determining payment rates for claims of recipients who have medicare and medicaid coverage (cross-over claims), the medicaid allowed amount for medicare covered services is:

(a) for facility based providers who generally bill on the UB-92 billing form, for covered medical services the full medicare co-insurance and deductible as defined by the medicare carrier;

(i) there is an exception for inpatient ancillary services with medicare Part B coverage only (no medicare Part A) or FQHCs: medicare payments for these services are treated as third party payments and are offset against the medicaid payment;

(b) for medical providers who generally bill on the HCFA-1500 billing form, for covered medical services the lower of:

(i) the medicare co-insurance and deductible (if not met); or

(ii) the medicaid fee less the amount paid by medicare for the same service, not to exceed the medicaid fee for that service;

(c) for mental health services that are subject to the medicare psychiatric reduction, the lower of:

(i) the medicaid allowed amount; or

(ii) the medicare allowed amount, less the medicare paid amount;

(d) for services to recipients eligible to receive both medicare and medicaid benefits, an amount not to exceed the medicare allowed amount in instances where the medicaid fee is higher than the medicare allowable.

(19) For all purposes of this rule, the amount of the provider's usual and customary charge may not exceed the reasonable charge usually and customarily charged to all payers.

(20) Reimbursement from medicaid may not exceed an amount which would cause total payment to the provider from both medicaid and all other payers to exceed the medicaid fee.

AUTH: Sec. 53-2-201 and 53-6-113, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-131 and 53-6-141, MCA

37.86.105 PHYSICIAN SERVICES, REIMBURSEMENT/GENERAL REQUIREMENTS AND MODIFIERS (1) through (2)(b) remain the same.

~~(c) for services provided to persons who are eligible for both medicare and medicaid, reimbursement is made for the medicare deductible and coinsurance. However, total reimbursement from medicare and medicaid shall not exceed the medicaid fee for the service.~~

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

(4) Reimbursement to physicians for physician-administered drugs which are billed under HCPCS "J" and "Q" codes is either according to a fee schedule established by the department and updated at least annually based upon the Montana estimated acquisition cost or maximum allowable cost, as defined in ARM ~~37.82.102~~ 37.86.1101 or the provider's usual and customary charge, whichever is lower. No dispensing fee is paid to physicians.

(a) The maximum allowable cost limitation shall not apply in those cases where the physician certifies in their own handwriting that in their medical judgment a specific brand name drug is medically necessary for a particular patient. Acceptable certification statements are "brand necessary" or "brand required~~.~~". A check-off box on a form or a rubber stamp is not acceptable.

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

37.86.610 THERAPIES, REIMBURSEMENT (1) remains the same.

(2) Subject to the requirements of this rule, the Montana medicaid program pays the following for therapy services:

(a) through (a)(ii) remain the same.

~~(b) For patients who are eligible for both medicare and medicaid, reimbursement is made for the medicare deductible and coinsurance. However, total reimbursement from medicare and medicaid shall not exceed the medicaid fee for the service.~~

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

37.86.705 AUDIOLOGY SERVICES, REIMBURSEMENT (1) remains the same.

(2) Subject to the requirements of this rule, the Montana medicaid program pays the following for audiology services:

(a) through (a)(ii) remain the same.

~~(b) For patients who are eligible for both medicare and medicaid, reimbursement is made for the medicare deductible and coinsurance. However, total reimbursement from medicare and medicaid shall not exceed the medicaid fee for the service.~~

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

37.86.1406 CLINIC SERVICES, REIMBURSEMENT (1) through (2) remain the same.

(3) Public health department services are reimbursed at the lowest of the following:

~~(a) the medicare maximum allowable rates as determined by the medicare explanation of benefits;~~

~~(b)~~ (a) the fees established by the ~~public health~~ department; or

~~(c)~~ (b) reimbursement for either physician services, provided in accordance with the methodologies described in ARM 37.85.212 and 37.86.105, or mid-level practitioner services, provided in accordance with the methodologies described in ARM 37.85.212 and 37.86.205.

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

37.86.1706 FAMILY PLANNING SERVICES, REIMBURSEMENT

(1) Reimbursement for family planning services is as follows:

(a) and (b) remain the same.

(c) for local delegate agencies the lowest of ~~the following medicare fee,~~ the provider's usual and customary charge for this service or the department's fee schedule.

(2) The fees in the department's fee schedule for the local delegate agencies are for each item or procedure the average of the charges for that item or procedure submitted by the delegate agencies during the preceding fiscal year. The adjustments to the fee schedule based upon the annual averaging may not exceed the adjustment for family planning services authorized by the legislature for that fiscal year. The fees in the fee schedule for services provided by physicians or mid-level practitioners may not exceed the fees available for those services set forth in ARM 37.86.105 or 37.86.205 and 37.86.212.

(3) remains the same.

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

37.86.1806 PROSTHETIC DEVICES, DURABLE MEDICAL EQUIPMENT, AND MEDICAL SUPPLIES, REIMBURSEMENT REQUIREMENTS

(1) Requirements for the purchase or rental of prosthetic devices, durable medical equipment, medical supplies and related maintenance, repair and services are as follows:

(a) Subject to the requirements of this rule, the department will pay the lowest of the following for prosthetic devices, durable medical equipment, medical supplies and related maintenance, repair and services ~~not also covered by medicare for the recipient~~:

(i) and (ii) remain the same.

~~(b) Subject to the requirements of this rule, the~~

~~department will pay the lowest of the following for prosthetic devices, durable medical equipment, medical supplies and related maintenance, repair and services which are also covered by medicare for the recipient:~~

~~(i) the provider's usual and customary charge for the item;~~

~~(ii) the department's fee schedule maintained in accordance with the methodology described in ARM 37.86.1807(2); or~~

~~(iii) the amount allowable for the same item under medicare.~~

(c) through (f) remain the same in text but are renumbered (b) through (e).

(2) through (7) remain the same.

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

37.86.1807 PROSTHETIC DEVICES, DURABLE MEDICAL EQUIPMENT, AND MEDICAL SUPPLIES, FEE SCHEDULE (1) remains the same.

(2) The department's fee schedule, referred to in ARM 37.86.1806(1), for items other than wheelchairs and wheelchair accessories, shall include fees set and maintained according to the following methodology:

(a) remains the same.

(b) Upon review of the aggregate number of billings as provided in (2)(a), the department will establish a fee for each item which has been billed at least 50 times by all providers in the aggregate during the previous 12-month period. The department shall set each such fee at 90% of the average charge billed by all providers in the aggregate for such item during such previous 12-month period. For purposes of determining the number of billings and the average charge, the department will consider only those billings that comply with ARM 37.86.1806(1)~~(c)~~(b).

(b)(i) through (4)(b) remain the same.

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

37.86.2005 OPTOMETRIC SERVICES, REIMBURSEMENT

(1) Subject to the requirements of this rule, the Montana medicaid program pays the following for optometric services:

(a) through (a)(ii) remain the same.

~~(b) For patients who are eligible for both medicare and medicaid, reimbursement is made for the medicare deductible and coinsurance. However, total reimbursement for medicare and medicaid shall not exceed the medicaid fee for the service.~~

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

37.86.2207 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), REIMBURSEMENT (1) Reimbursement for an EPSDT service, except as otherwise provided in this rule, is the lowest of the following:

(a) the provider's usual and customary charge for the service; or

~~(b) the amount allowable for the same service under medicare if the service is also covered by medicare for the recipient; or~~

~~(c)~~ (b) the reimbursement determined in accordance with the methodologies provided in ARM 37.85.212 and 37.86.105 except for the by-report method.

(2) through (10) remain the same.

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

37.86.2605 AMBULANCE SERVICES, REIMBURSEMENT (1) Except as provided in (3), the department pays the lowest of the following for ambulance services:

(a) the provider's usual and customary charge for the service; or

~~(b) the amount allowable for the same service under medicare; or~~

~~(c)~~ (b) the amount listed in the department's fee schedule.

(2) through (4) remain the same.

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

37.86.4413 RURAL HEALTH CLINICS AND FEDERALLY QUALIFIED HEALTH CENTERS, REIMBURSEMENT FOR OTHER PROVIDER-BASED ENTITIES AND FOR INDEPENDENT ENTITIES (1) through (9) remain the same.

~~(10) For crossover claims, the medicaid payment will be:~~

~~(a) for RHC crossover claims, up to the full amount of the medicare allowable charge, including applicable medicare deductibles and coinsurance, less any applicable medicaid copayment amount and any other third party payments in addition to medicare; and~~

~~(b) for FQHC crossover claims, the difference between the medicare payments for the visit and the FQHC's medicaid all-inclusive rate per visit applicable to the service determined in accordance with (2) through (9), less any applicable medicaid copayment amount and any other third party payments in addition to medicare.~~

(11) through (12)(b)(iii) remain the same in text but are renumbered (10) through (11)(b)(iii).

(c) The interim rates determined under this rule are temporary rates and are subject to adjustment and settlement as provided in ~~(12)~~ (11)(b) and ARM 37.86.4420 upon retrospective determination of the provider's all-inclusive core and other ambulatory service rates per visit as provided in (2) through (9).

(12)(d) through (13) remain the same in text but are renumbered (11)(d) through (12).

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

37.88.206 LICENSED CLINICAL SOCIAL WORK SERVICES, REIMBURSEMENT (1) remains the same.

(2) Subject to the requirements of this rule, the Montana medicaid program pays the following for licensed clinical social worker services:

(a) through (a)(ii) remain the same.

~~(b) For patients who are eligible for both medicare and medicaid, reimbursement is made for the medicare deductible and coinsurance. However, total reimbursement from medicare and medicaid shall not exceed the medicaid fee for the service.~~

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

37.88.306 LICENSED PROFESSIONAL COUNSELOR SERVICES, REIMBURSEMENT (1) remains the same.

(2) Subject to the requirements of this rule, the Montana medicaid program pays the following for licensed professional counselor services:

(a) through (a)(ii) remain the same.

~~(b) For patients who are eligible for both medicare and medicaid, reimbursement is made for the medicare deductible and coinsurance. However, total reimbursement from medicare and medicaid shall not exceed the medicaid fee for the service.~~

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

37.88.606 LICENSED PSYCHOLOGIST SERVICES, REIMBURSEMENT
(1) remains the same.

(2) Subject to the requirements of this rule, the Montana medicaid program pays the following for licensed psychologist services:

(a) through (a)(ii) remain the same.

~~(b) For patients who are eligible for both medicare and medicaid, reimbursement is made for the medicare deductible and coinsurance. However, total reimbursement from medicare and medicaid shall not exceed the medicaid fee for the service.~~

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

~~(c)~~ <u>(b)</u> the department's medicaid fee for the service as specified in the department's medicaid mental health fee schedule.

(2) through (2)(h) remain the same.

AUTH: Sec. 53-2-201 and <u>53-6-113</u>, MCA
IMP: Sec. <u>53-6-101</u> and 53-6-113, MCA

3. On August 9, 2001, the Department of Public Health and Human Services adopted amendments to the Medicare/Medicaid cross-over pricing amendments on page 1476 of the 2001 Montana Administrative Register, issue number 15. The Department proposes to apply the amendments retroactively to dates of service beginning July 1, 1999, however, this was not indicated in the previous notice. The amendments proposed in this notice are the same as those adopted and are not intended to make any substantive changes to the rules as adopted on August 10, 2001. The retroactive applicability date is intended to reflect the Department's practice and will have no adverse effect on the services or benefits provided. The Department developed the Medicare/Medicaid cross-over pricing methodology reflected in these rules beginning with dates of service July 1, 1999 and after. Since the payment methodology was developed on an ongoing basis, the minimal rate increases provided by these rules were allocated and disbursed in the years claims were submitted. Consequently there is no fiscal impact from the retroactive applicability date.

4. In these rules, the Department is proposing revision of the Medicare/Medicaid cross-over pricing methodology. In general, the proposed amendments only affect claims for mental health services and claims with Medicare deductibles. The Department's current methodology is acceptable for claims that have Medicare coinsurance because the reimbursement amounts result in the same payment. Therefore, the proposed rules would not affect those claims.

The proposed amendments would conform Medicare/Medicaid cross-over pricing methodology to regulations promulgated by the Health Care Financing Administration (HCFA) at 42 CFR 447.15, which limit participation in the Medicaid program to providers who accept, as payment in full, the amounts paid by the Department plus any deductible, coinsurance or copayment required by the State Medicaid Plan. The proposed rule changes are necessary to preserve federal financial participation in the Montana Medicaid programs under the Balanced Budget Act of 1997 (Pub. Law No. 105-33) and sections 1902(n) and 3909 of the Social Security Act.

Medicare/Medicaid cross-over claims are claims for medical services in which both the Medicare and Medicaid programs are

potentially liable because the recipient of medical services is entitled to Medicare and is also (a) eligible for Medicaid; (b) eligible for the Qualified Medicare Beneficiary program (QMB); or (c) eligible for both QMB and Medicaid. QMB is a program under which Medicaid pays the recipient's Medicare premiums, coinsurance and deductibles. A Medicaid recipient may be required to pay a Medicaid copayment as provided in ARM 37.85.204.

The proposed amendments are necessary to accommodate the processing of claims for mental health services by the Department for dates of service beginning July 1, 1999. On that date, the Department's contract with Montana Community Partners for Mental Health Managed Care terminated and the duty to process claims for mental health services for Medicaid recipients and certain other eligible low-income individuals returned to the Department.

Under current rules, when a recipient is eligible for both Medicare and Medicaid, Montana Medicaid reimburses the lowest of: (a) the provider's actual submitted charge for the service; (b) the amount payable by Medicare for the same service (which is generally less than the Medicare allowable amount); or (c) the Department's Medicaid fee for the specific service. To meet HCFA compliance criteria, the Department must reimburse up to the provider's charge or the Medicare or Medicaid maximum allowable limit (rate), as defined at ARM 37.83.802(12), whichever is less.

The alternative to the proposed amendments would be to ignore HCFA compliance criteria and risk loss of federal financial participation. Maintenance of disparate Medicaid and Medicare rates for mental health services and claims with Medicare deductibles could possibly risk loss of provider participation. The Department finds this alternative unacceptable.

The Department estimates the fiscal effect of these rule amendments will be an increase of $57,000.00 per annum in overall Medicaid expenditures. This is not a significant rate increase, and the Department anticipates no measurable change in provider participation as a result of these rules. Approximately 3,143 Montana Medicaid recipients are affected by this amendment in that they are dually eligible for Medicare and Medicaid and also receive mental health services.

5. Interested persons may submit their data, views or arguments concerning the proposed action in writing to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on October 4, 2001. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled

according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

6. If a person who is directly affected by the proposed action wishes to express data, views and arguments orally or in writing at a public hearing, that person must make a written request for a public hearing and submit such request, along with any written comments to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on October 4, 2001.

7. If the Department of Public Health and Human Services receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of those who are directly affected by the proposed action, from the Administrative Rule Review Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who are directly affected, a hearing will be held at a later date and a notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 32 based on the 3,143 individuals covered by Medicaid and Medicare or who are QMBs also covered by Medicaid.

/s/ Dawn Sliva	/s/ Gail Gray
Rule Reviewer	Director, Public Health and Human Services

Certified to the Secretary of State August 27, 2001.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 44.15.102 and 44.15.103 regarding filing fees for notary public licensure, bonding requirements and new rule for notarial acts under federal authority and foreign notarial acts	)	NOTICE OF PUBLIC HEARING

TO: All Concerned Persons

1. On September 27, 2001, a public hearing will be held at 10:00 a.m. in the Secretary of State's Office Conference Room at room 260 of the State Capitol, Helena, Montana, to consider the proposed amendment of ARM 44.15.102 and 44.15.103 regarding filing fees for Notary Public licensure, bonding requirements and adoption of new rule for notarial acts under federal authority and foreign notarial acts.

2. The Secretary of State 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 request an accommodation, contact the Secretary of State no later than 5:00 p.m. on September 24, 2001, to advise us of the nature of the accommodation that you need. Please contact Janice Doggett, Secretary of State's Office, P.O. Box 202801, Helena, MT 59620-2801; telephone (406) 444-2034; FAX (406) 444-3976; e-mail jdoggett@state.mt.us.

3. The rules as proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

<u>44.15.102 APPLICATION FEE</u> (1) The applicant shall submit a ~~$20~~ <u>$25</u> non-refundable application fee.

AUTH: Sec. 1-5-408, MCA
IMP: Sec. 1-5-408, MCA

<u>44.15.103 NOTARY BOND</u> (1) The applicant shall submit with the application and fee, a bond from an approved bonding company in the amount of ~~$5000~~ <u>$10,000</u> for the duration of the period of the notary commission. The bonding company shall notify the secretary of state's office if the bond is canceled or otherwise not honored.

AUTH: Sec. 2-4-201, MCA
IMP: Sec. 1-5-405, MCA

4. The proposed new rule provides as follows:

<u>RULE I FOREIGN NOTARY, APOSTILLE FEES AND FEDERAL AUTHORITY</u> (1) The applicant shall submit a $10 non-refundable application fee.

AUTH: Sec. 1-5-408, MCA
IMP: Sec. 1-5-607 and 1-5-608, MCA

5. State law requires that the fees of the Secretary of State be commensurate with overall office costs. Fees for state notaries have not been increased since 1993. The Montana Legislature passed HB 443 that: increases the official notary bond from $5,000 and $10,000; and provides the Secretary of State's office with a mechanism to recover costs to maintain accurate information on notary licenses. The Secretary of State determined that it was more efficient for the office and more effective for the consumer to increase the application fee instead of charging multiple fees for changes to notary licenses.

6. The cumulative amount of the increase for all fees will be approximately $24,000 affecting approximately 2,466 people.

7. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Janice Doggett, Secretary of State's Office, P.O. Box 202801, Helena, Montana 59620-2801, or by e-mailing jdoggett@state.mt.us, and must be received no later than October 4, 2001.

8. Janice Doggett, address given in paragraph 7 above, has been designated to preside over and conduct the hearing.

9. The Secretary of State 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 administrative rules, corporations, elections, notaries, records, uniform commercial code or combination thereof. Such written request may be mailed or delivered to the Secretary of State's Office, Administrative Rules Bureau, 1236 Sixth Avenue, P.O. Box 202801, Helena, MT 59620-2801, faxed to the office at (406) 444-5833, e-mailed to klubke@state.mt.us, or may be made by completing a request form at any rules hearing held by the Secretary of State's Office.

10. The bill sponsor notice requirements of 2-4-302, MCA apply and have been fulfilled.

11. These rules will be effective October 12, 2001 and will be applied retroactively to October 1, 2001.

/s/ Bob Brown
BOB BROWN
Secretary of State

/s/ Janice Doggett
JANICE DOGGETT
Rule Reviewer

Dated this 27th day of August, 2001

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 4.14.301, 4.14.302, 4.14.303, 4.14.305, 4.14.306, 4.14.307, 4.14.308, 4.14.309, 4.14.310, 4.14.311, 4.14.312, 4.14.313, 4.14.314, 4.14.315, 4.14.316 and 4.14.601 relating to loan qualifications	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On July 19, 2001 the Department of Agriculture published notice of the proposed amendment of ARM 4.14.301, 4.14.302, 4.14.303, 4.14.305, 4.14.306, 4.14.307, 4.14.308, 4.14.309, 4.14.310, 4.14.311, 4.14.312, 4.14.313, 4.14.314, 4.14.315, 4.14.316 and 4.14.601 relating to loan qualifications at page 1231 of the 2001 Montana Administrative Register, Issue Number 14.

2. The agency has amended ARM 4.14.301, 4.14.302, 4.14.303, 4.14.305, 4.14.306, 4.14.308, 4.14.309, 4.14.310, 4.14.311, 4.14.312, 4.14.313, 4.14.314, 4.14.315, 4.14.316 and 4.14.601 as proposed.

3. The agency has amended ARM 4.14.307 with the following changes, stricken matter interlined, new matter underlined:

4.14.307 LOANS TO BEGINNING FARMERS/RANCHERS AND SECURITY ARRANGEMENTS (1) Loans to beginning farmers/ranchers involve the financial institution, beginning farmer/rancher, and the authority. The program involves either the sale of the individual industrial development bonds, to individual financial institutions or a public bond sale to provide funds for an aggregation of loans.

(2) The authority will make the loan to the eligible beginning farmer/rancher and the financial institution will purchase the bond as an investment or the loan will be made from a portion of an aggregate bond sale. To facilitate the servicing of the loan the financial institution and the authority will enter into an agency relationship whereby the financial institution agrees to act as agent and fiduciary for the authority for all purposes in connection with servicing the loan.

(3) The financial institution will make its own security evaluation of the loan and the beginning farmer's/rancher's ability to repay principal and interest payments. The interest rate and other conditions of the loan are set by the financial institution. The interest rate may be either variable or fixed for the term of the loan as long as the method for determining

the rate is contained in the loan agreement and the rate is reasonable as determined by the authority.

~~(2)~~ (4) In no case may the loan repayment period (term) exceed 30 years. The principal and interest shall be limited obligations, payable solely out of the revenue derived from the debt obligation, collateral, or other security furnished by or on the behalf of the beginning farmer/rancher (a co-signer on the note is permissible).

(5) The bond which is issued by the authority is a non-recourse obligation. The principal and interest on the bond do not constitute an indebtedness of the authority or a charge against its general credit or general fund. It should also be noted that any recording or filing fees associated with the loan will be paid by the beginning farmer/rancher or financial institution not the authority.

REASON: At the suggestion of the Secretary of State's office, this rule was broken into smaller segments for ease of reading.

3. No comments or testimony were received.

By: /s/ W. Ralph Peck
Ralph Peck
Director

/s/ Tim Meloy
Tim Meloy, Attorney
Rule Reviewer

Certified to the Secretary of State August 27, 2001.

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

In the matter of the adoption of new rules I through IV, amendment of ARM 12.9.601, 12.9.602, 12.9.604, 12.9.605, 12.9.701, 12.9.702, 12.9.703, 12.9.704, and 12.9.705, and the repeal of ARM 12.9.603 pertaining to the upland game bird release program	NOTICE OF ADOPTION, AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On July 19, 2001, the Department of Fish, Wildlife and Parks (department) published notice of the proposed adoption, amendment, and repeal of the above stated rules at page 1280 of the 2001 Montana Administrative Register, Issue Number 14.

2. The department has adopted new rule I (ARM 12.9.611), new rule II (ARM 12.9.608), new rule IV (ARM 12.9.606), amended ARM 12.9.605, 12.9.701 and 12.9.703, and repealed ARM 12.9.603 exactly as proposed. The department has adopted new rule III (ARM 12.9.615) and amended ARM 12.9.601, 12.9.602, 12.9.604, 12.9.702, 12.9.704, and 12.9.705 with the following changes, stricken matter interlined, new matter underlined:

NEW RULE III (ARM 12.9.615) SUPPLEMENTAL FEEDING

(1) ~~In the case of an emergency situation being declared by the governor due to extreme weather conditions, t~~The department may enter into agreements with individuals, organizations, or other agencies to provide supplemental feeding for upland birds during extreme weather events. Supplemental feeding will be considered on a case-by-case basis. The threat posed to the upland game bird population will be evaluated on a county-wide basis. The department will use the following guidelines to determine when supplemental feeding should occur:

(a) a severe winter storm where 90% or more of the naturally occurring food sources are covered with snow and ice, and conditions are such that the upland birds are unable to obtain food for a period of five or more days; or

(b) the affected area is large enough that it presents a serious threat to the viability of the population within the county.

(2) Supplemental feeding will be done only within areas 1/4 miles or closer to winter cover. Winter cover includes but is not limited to the following examples:

(a) minimum three row uncultivated shelterbelt comprised of trees five years or older;
(b) minimum four row uncultivated shelterbelt comprised of shrubs and trees;
(c) woody drainages;
(d) river or stream courses ungrazed by livestock for at least the previous 12 months; and
(e) cattail sloughs ungrazed by livestock for at least the previous 12 months.
(3) The department shall not enter into agreements for supplemental feeding on lands leased or closed for hunting, on shooting preserves, or during open pheasant season.
(4) Feeding will stop when conditions moderate.
(5) No feeding operation may begin after March 30.

AUTH: 87-1-249, MCA
IMP: 87-1-248, MCA

12.9.601 DEPARTMENT AUTHORIZATION OF PROJECTS (1) The department may authorize organizations or individuals to participate in the upland game bird release program following the submission of a written application describing the proposed project on forms provided by the department and a review of that application. All applications must include the following information:
(a) through (f) remain as proposed.
(g) specific cover types and their percentages shall be provided with a habitat map or be delineated on a habitat map, ~~(specifying types and percentages) or~~ natural resource conservation service (NRCS) conservation plan, or aerial photo covering the land on which the birds are to be released;
(h) the number of acres at the release site; and
(i) any other information deemed relevant by the department which is included on the project application form.

AUTH: 87-1-249, MCA
IMP: 87-1-248, MCA

12.9.602 REQUIREMENTS OF PROJECTS INVOLVING PHEASANT RELEASES (1) The department will not authorize participation in the upland game bird release program for pheasants unless the proposed project meets the following requirements:
(a) through (h) remain as proposed.
(i) ~~all~~ within one mile of each release ~~sites~~ habitat must ~~contain~~ be available that consists of at least 10% permanent winter cover as described in ARM 12.9.615(2), 25% idle cover such as undisturbed residual vegetation 10 or more inches high and 10% food sources, such as cultivated grain, to be considered for authorization;
(j) conservation reserve grass-legume planting may be considered as idle cover provided the planting has not been

mowed or grazed by livestock in the preceding 12 month period;

(j) through (l)(iii) remain the same, but are renumbered (k) through (m)(iii).

(m) sites will be inspected by department personnel to determine the number of birds that may be released. This number will be determined by:

(i) ~~the acres of the least represented or most limiting required habitat component within a one-mile radius of the release site~~ the required habitat component (~~woody~~ winter cover, ~~nesting cover of~~ idle cover, food sources) that occupies the fewest acres within one mile of the site release; and

(ii) the number of birds that the area will support assuming one bird will require approximately three acres of habitat within a one-mile radius of the release site and there is a 60% mortality rate of released birds;

(n) banding of birds will be required in specified study areas and will be done by the department prior to release;

(o) all releases must be verified at the time of release by a department employee who will submit the verification form signed by the landowner for payment to the landowner or their designee; ~~and~~

(p) ~~no~~ sites may be stocked ~~more than three times in a five year period unless unusual environmental conditions warrant reconsideration~~ for a period of five consecutive years. If a viable population is not established during that period, the department will no longer consider the site as being capable of supporting populations and will not fund any additional releases unless habitat changes are made that would make the site more suitable for the establishment of a viable population; and

(q) in the case of extreme weather conditions, the department will evaluate the area pursuant to ARM 12.9.615 to determine if the department will authorize the continued stocking of sites currently being used for an additional five years.

(2) For good cause shown, the department may waive any requirement listed in (1).

AUTH: 87-1-249, MCA
IMP: 87-1-248, MCA

12.9.604 PAYMENT BY DEPARTMENT (1) The department will pay authorized pheasant release projects for live birds released in compliance with all the provisions of this subchapter at a rate equivalent to the average cost of ~~10 to 14~~ 10 week old pheasants being raised and offered for sale to the public by NPIP certified hatcheries or game bird growers in Montana. The price will be determined by surveying hatcheries and growers in March of each year. If circumstances prevent the department from timely release of birds contracted for release at 10 weeks of age, the

department will cover the additional expenses incurred by the hatchery or grower on behalf of the department.

AUTH: 87-1-249, MCA
IMP: 87-1-248, MCA

12.9.702 PROJECT REQUIREMENTS (1) Projects must meet the following requirements before the department may authorize participation in the program:

(a) through (d) remain as proposed.

(e) all projects on private lands must be open to public hunting for upland game birds for the duration of the project. Reasonable use limitations on numbers of hunters and areas to be hunted may be allowed; however, user fees may not be ~~changed~~ charged. Projects located within a leased or commercial hunting operation will not be considered.

AUTH: 87-1-249, MCA
IMP: 87-1-248, MCA

12.9.704 REPORTING REQUIREMENTS (1) through (1)(f) remain the same.

(2) The department will assist with preparation of reports in the following ways:

(a) department personnel will develop a monitoring schedule for all habitat enhancement projects; and

(b) the program coordinator will maintain a copy of regional monitoring plans and annual status of projects monitored and new projects added to the plan.

(3) The department will compile an annual summary of the birds released under the upland game bird release and pheasant release programs, the release locations, and the associated costs of those releases.

(4) The department will compile an annual summary of projects undertaken under the upland game bird habitat enhancement program, the types of projects entered into, and the associated costs of those projects.

AUTH: 87-1-249, MCA
IMP: 87-1-248, MCA

12.9.705 PAYMENT BY DEPARTMENT (1) The department will compensate individuals or organizations by cost-sharing the actual costs incurred for completed upland game bird habitat enhancement projects as set forth in a contract. The department's share will be negotiated on an individual project basis for cost-sharing projects. In-kind services such as labor may be used for the programs participants' portion of the cost-share.

(a) requests for payments must be accompanied by invoices, receipts or similar proof of expenses;

(b) all requests for payment must include verification by department personnel that the work for which payment has been requested has been completed~~.~~ ; and

(c) the department will cover no more than 75% of the total cost of any upland game bird habitat enhancement project entered into with a cooperator resulting in improvements on property owned or controlled by that cooperator.

(2) through (3) remain the same.

(4) For qualified upland game bird habitat enhancement projects sponsored by ~~individuals or~~ organizations, the department may reimburse the sponsor for up to 10% of the cost of the project and may cover up to 100% of the cost of the material required for the project.

(a) requests for payment must be accompanied by invoices, receipts or similar proof of expenses; and

(b) all requests for payment must include verification by department personnel that the work for which payment had been requested has been completed.

(5) The following are costs limitations under the upland game bird habitat enhancement program:

(a) department costs for any project may not exceed $100,000 without commission authorization, and no project will be funded for more than $200,000;

(b) department expenses on any project for purchase of ~~land,~~ buildings~~,~~ or equipment will not exceed $25,000, and all equipment purchased by the department will remain property of the department; and

(c) the department will cover no more than 50% of the cost of wells, pipelines, and roads~~; and~~.

~~(d) the department will cover no more than 75% of the total cost of any upland game bird habitat enhancement project.~~

AUTH: 87-1-249, MCA
IMP: 87-1-248, MCA

3. The department received 10 written and 7 oral comments regarding this rulemaking. With one exception all persons commenting supported portion of the rules and offered alternative recommendations to other portions of the rules. Based on the public input received the department determined that with the changes made, these rules would allow the department to implement the programs as described in SB 304. It is the desire of the department to keep these rules in place over a period of time to evaluate if the rules are achieving the objectives of the upland game bird program. The department's responses to the adverse comments or comments suggesting changes appear below:

COMMENT 1: One individual asked what recourse the public has if the department ignores the rules adopted.

RESPONSE: The department is obligated to follow the rules adopted unless, as stated in ARM 12.9.602(2), in the case of pheasant releases, the department may "for good cause" waive any of the requirements. If a person believes the department is not following the rules as adopted, they can file a complaint with the Environmental Quality Council stating the nature of the rule violation. That body will investigate and, if the complaint is justified, require that the department make adjustments to the program to bring it into compliance with the rules.

COMMENT 2: One individual wanted to know what assurances the public has that the department will accept and implement recommendations into the new rules.

RESPONSE: The department considers all comments that it receives. The department intends to implement the program in the best possible manner and be in compliance with the statute as laid out in SB 304. However, neither rule nor statute requires the department to implement every suggestion into the new rules. Some comments received may be outside the scope of the department's authority and may not be feasible to implement due to funding, workloads, or are in conflict with one another.

COMMENT 3: Four individuals wanted the department to require that all upland game bird releases consist only of wild/free ranging stock as is required for turkey releases.

RESPONSE: Montana currently supports large enough populations of wild/free ranging turkeys that trapping and transplant operations are possible. Turkey populations also grow to levels where they may become a nuisance to individual landowners that request removal of these birds due to depredation and damage. On the other hand, pheasants are not currently a source of damage or depredation on private land and therefore, private landowners are reluctant to allow the department to trap and take wild pheasants from their property. Few public lands provide a large enough surplus for trapping and any surplus would not provide consistent trapping opportunities over time.

Also, under the provisions of SB 304, the department is required to meet annual spending requirements for releasing upland birds. Given the few opportunities to trap and move wild pheasants these requirements could not be met on an annual basis if the department were only allowed to trap and move wild pheasants from a limited source.

COMMENT 4: Three individuals believed that adjacent landowner consent should be required for pheasant releases.

RESPONSE: Adjacent landowner consent is not required for pheasant releases because pheasants typically do not

cause damage or depredation as turkeys can. Additionally, pheasant releases take place in areas with enough available habitat to accommodate some level of public hunting.

COMMENT 5: Another individual commented that funding of pheasant releases should be on a year-by-year basis with no carry-over or accumulation of the stocking funds.

RESPONSE: SB 304 made no provision for moving unexpended funding from this portion of the program to other program elements. Consequently, monies earmarked for upland bird releases on an annual basis that are not expended will accumulate until a change is made in the legislation that will address this issue.

COMMENT 6: Five individuals commented that the department must create criteria for determining "extreme winter conditions."

RESPONSE: The department agrees with this comment and made amendments to new rule III (ARM 12.9.615) to clarify "extreme winter conditions."

COMMENT 7: Two individuals commented that round bales should be used to supplement feed and that the department should provide food plots in these areas.

RESPONSE: The department will provide for the use of round bales of barley hay or other suitable grain/hay mixes when they are available, however, a requirement to only use this type of supplemental feeding would be too restrictive and not accomplish the intent of the legislation. The department will also make efforts to increase the availability of winter food plots if necessary in areas where supplemental feeding is needed to sustain viable populations. In most cases, the lack of winter cover is the problem, not the lack of available food source. Problems arise when the stubble or any standing crop remaining is covered by snow or ice, and birds are prevented from using these areas as a food source.

COMMENT 8: One individual commented that the requirement for legal descriptions, maps, and aerial photos of the release site and the delineation of habitat types is too time consuming for people releasing the birds. This individual stated that these individuals are the ones filling in the applications.

RESPONSE: These maps and aerial photos provide necessary information. They are tools that help determine the carrying capacity of the release site. They also assist the department in finding the site when conducting evaluations and when supervising the releases.

COMMENT 9: Four individuals thought the legal description should include the actual release site and the habitat structure within a one-mile radius.

RESPONSE: The rule already requires a legal description of the release site at ARM 12.9.601(1)(e) and a habitat map or aerial photo of the site at ARM 12.9.601(1)(g).

COMMENT 10: Three individuals thought that ARM 12.9.601(1)(g) should be clarified to provide for a definition of the habitat complex, including inventory of types and percentages.

RESPONSE: Requiring an inventory of habitat types is unnecessary because the department inspects these sites in order to determine the number of birds that the site will accommodate. Because conditions can vary widely between years on some of these sites and cropping patterns may change, the depiction of habitat structure may be outdated on any materials the department could request from the landowner.

COMMENT 11: Three individuals raised concern that ten-week old birds may be too young.

RESPONSE: Information gathered in several different studies and presented in D.L. Allen's book, Pheasants of North America (1956, Stackpole publishing; Harrisburg Pennsylvania) indicate that survival rates for pheasants did not increase once the birds attained ten to twelve weeks of age (p. 72-73). Ten-week old birds are also less expensive to obtain and more birds can be raised in less space than is required by older birds. Additionally, studies have shown that once the birds get older, they become more aggressive with each other and mortality rates may increase. Therefore, the department determined that ten weeks is the best age for release.

COMMENT 12: Three individuals questioned whether the release would take place if some of ten-week old birds are not fully-feathered.

RESPONSE: The release would still take place, but the department will only pay for those birds that meet the standard set out in the rules. The rule requires that the birds be ten weeks old at release and fully feathered pursuant to ARM 12.9.602(1)(c).

COMMENT 13: One individual stated that prior rules established that there would be no releases of pheasants in either Richland or Roosevelt counties with the intent of studying the effects of planting birds. This individual

thought that given the time that has elapsed these counties should be open to pheasant releases.

RESPONSE: Legislative audit requires program monitoring. Three counties, Richland, Roosevelt and Fergus, have been excluded from pheasant releases in the past as a control for monitoring purposes. Data gathered on these counties will be a part of the monitoring program for pheasant releases that the department has been developing. The department will continue to leave them out of the pheasant release portion of the program to continue to serve as control areas for monitoring program effectiveness.

COMMENT 14: Three individuals stated that the term "release site" needs to be defined to determine whether it is the actual site of the release or the land within a one-mile radius of the release.

RESPONSE: The department recognizes the deficiency of the definition and has added language to ARM 12.9.602(1)(i) to clarify that certain habitat must exist within one mile of the actual site where birds are released.

COMMENT 15: One individual suggested language to clarify in ARM 12.9.602(1)(i) the definition of "permanent winter cover."

RESPONSE: The department concurs with this comment and incorporated the suggested language into the rule.

COMMENT 16: An individual commented that ARM 12.9.602(1)(m)(i) should include definitions of the terms "least represented" and "most limiting required habitat component."

RESPONSE: The department concurs with this comment and added language to define and clarify "least represented" and "most limiting required habitat component."

COMMENT 17: One individual stated that it was unreasonable for the department to pay for the 60% of the birds that are expected to die as referenced in ARM 12.9.602(1)(m)(ii).

RESPONSE: The department will pay for birds that meet the standard of the proposed rule. If those birds subsequently die after release, the department will not have the means to recover, nor does the program allow for the recovery of the money paid for the birds that have died. While high losses of pen-reared birds are acknowledged, the use of pen-reared birds is the only option available to the department to comply with the requirements of the statute because Montana does not have a consistent source of wild pheasants for trapping.

<u>COMMENT 18</u>: One individual commented that one bird per approximately three acres of habitat seems like a lot of ground for one bird, especially with the significant mortality rate. This individual wanted to know what scientific evidence the department used to make that determination.

<u>RESPONSE</u>: Data were taken from 23 studies done in good to excellent pheasant habitat in western and midwestern states during the period of 1940 to 1990. The studies gathered information on numbers of nests per hectare or acre. These 23 studies indicated that on average, in good to excellent habitat, researchers found one nest for every 21 acres of yearlong habitat. These studies were conducted across a variety of habitats and results were influenced by a wide variety of climatic conditions that when combined are believed to represent the "average" number of acres of year-long habitat associated with one nesting hen pheasant. This does not mean a person would have to search 21 acres to find one nest in any given area; it does mean that when the diversity of habitats that make up year-long range for pheasants is considered, on average, one nest should be found for every 21 acres of year-long habitat where it is in good to excellent condition.

Data were also taken from six studies conducted in the midwest where broods were surveyed during midsummer, approximately eight weeks following the hatch. Survey areas were again in good to excellent habitat and spanned several years with their associated climatic conditions. The data indicated that on average one could expect to see 6.3 chicks per hen in good to excellent cover approximately eight weeks after hatching. References for the data are given in Bibliography 1 at the end of this rule notice.

Using the information from these studies, the department made the following calculations to ascertain an approximate number of pheasant chicks that could be expected to be found in good habitat at eight weeks of age:

Acres of yearlong habitat per nest	21
Average brood size at eight weeks	6.3
<u>Average acres of habitat / chick</u>	<u>3.33</u>

The above analysis indicates that at midsummer, good pheasant habitat will support approximately one eight week-old chick for every three acres of yearlong habitat.

Over stocking the habitat would be detrimental to both resident and introduced birds and result in higher mortality rates and additional expenses as excess birds would be forced into less secure or lower quality habitat. Crowding results in increasing the potential for disease transmission

and higher mortality associated with competition for food and space.

Upon request, the department will provide summaries of the information gathered from the studies referenced here.

COMMENT 19: Several people commented that there should be some type of monitoring of the birds, such as banding the birds, indexing the site, spring crow count surveys, mid-winter sex ratio, or winter cover use surveys. This monitoring would measure the effectiveness of the release program.

RESPONSE: The department has been directed by the legislative auditor's office to develop a monitoring plan for the upland game bird program. The department is currently developing this plan and will be monitoring the success or failure of this program. However, due to limited availability of personnel and time constraints it will not be possible to monitor every release, nor does the department believe it is necessary to do so in order to quantify the effectiveness of the program. Monitoring will begin more intently in 2002 after the rules have been adopted and will be based on both the use of banded birds and current and/or newly established population surveys or crow counts. Many releases are expected to occur on lands enrolled in block management where there is a better opportunity to collect data on hunter numbers and hunter success than has been available in the past. In addition, funding for program administration will allow for more effective monitoring than was previously possible.

COMMENT 20: One individual commented that participating landowners should be required to report numbers of hunters, hunter days, and hunter success to allow effective monitoring of the program.

RESPONSE: In many cases, the persons participating in this program may not necessarily be residents on the property where releases take place. This poses a problem for collection of this type of information by the landowner. It is the department's intention to use information obtained through releases on the block management areas or other landowners willing to gather this information.

COMMENT 21: One individual commented that a department biologist or game warden should verify releases.

RESPONSE: In some cases, due to constraints on time and availability, a biologist or game wardens may not be on site during each release. Therefore, it may be necessary to hire individuals to oversee different parts of this program. In those cases, department personnel will train the individuals on any technical aspects of their duties.

Additionally, department personnel will oversee all of the activities carried out by hired individuals.

COMMENT 22: Two individuals questioned why the rule limits stocking to no more than three times in a five year period when, if survival rates are as poor as the department asserts, the areas could probably be stocked more generously and more frequently. One of the individuals wondered what data the department used as the basis of this decision.

RESPONSE: Senate Bill 304 specifically states that the intent of this program is to establish viable pheasant populations. Little data are available on the numbers of birds originally released by most states in establishing populations. There are accounts that indicate that at several sites only a few birds were released and that some large populations were started with a only a few initial releases. Studies were done in states such as South Dakota, Colorado, Utah, and Nebraska and the results of the studies indicated that the high population of pheasants of the North-Central region was the result of introducing a few pheasants into suitable habitat where they multiplied rapidly. Continued artificial stocking was not necessary. A bibliography reflecting some of the studies used in determining this criteria is found in Bibliography 2 at the end of this rule notice.

Evidence does exist that in good habitat populations do become established following one transplant:

> Fall release of 2,465 F1[(a)] generation pheasants as made in September and October 1970. Birds were concentrated within 2 miles of the release site, but ranged as far as 21 miles away. The stocking resulted in a good population within 3 miles of the release site the first year with slight expansion the next year. (Habitat condition on the areas was somewhat favorable - 70% row crops, 8% pasture, 6% hay, 16% idle and other uses). May, J. F. 1973. "Survival of pen-reared ring-necked pheasants released in southeast Iowa." M.S. Thesis, Iowa State Univ., Ames. 121 pp.

([a])F1 refers to the first generation of chicks produced by wild stock.

> Over 2,500 female F1 generation pheasants were released at three sites in northern Iowa in October, 1978 and 1979. Winter flush counts, spring crowing and roadside counts, and summer roadside counts were utilized as indices to the pheasant populations at the release sites. There was a significant positive correlation between

> August roadside counts and winter flush counts at the Brushy Creek area but not at the other areas. Cock calls were not significantly correlated with other population indices on any area. <u>Stocking of female F1 generation progeny did not significantly increase the populations on any of the three release sites. Populations on the release sites fluctuated in the same pattern that occurred with pheasants on surrounding private land where no birds were stocked.</u> August roadside counts on all three study areas were significantly correlated with August roadside routes from the entire Cash Grain Region. Wild cocks were present in sufficient numbers for reproduction without stocking. Pheasant stocking in Iowa is not recommended in the future unless sufficient <u>vacant</u> habitat exists that is <u>spatially removed</u> from existing populations. Possible alternatives to increase pheasant numbers in northern Iowa are proposed. Rybarczyk, W. and J. B. Wooley, Jr. 1983. "Evaluation of supplemental pheasant stocking in three isolated areas of potential habitat." Comp. Rpt., Proj. No. W-115-R, Study No. 1. 16 pp.

While there are no hard and fast rules on the number of years that a site should be stocked in order to establish a pheasant population, the literature shows that single small releases into good, vacant habitat have been highly successful. It becomes obvious over a reasonable period of time if a site is not suitable for the establishment of a population when the releasing of birds does not result in a self sustaining population. The issue is determining the period of time necessary to artificially populate an area before concluding that the area will not support a viable population no matter how many pheasant transplants occur. The department believes it has an obligation to provide a cutoff where no more funding will be used in attempting to populate an area that is not capable of supporting a population. The department added language to ARM 12.9.602 to change the number of times a site may be stocked from three to five years. The language also addresses when a site should be taken off the books until it can be shown the habitat has been altered in a manner that would be considered more suitable to the establishment of a viable population.

<u>COMMENT 23</u>: An individual commented that the term "unusual environmental conditions" needs to be defined.

<u>RESPONSE</u>: By clarifying that if, after a period of five years, a viable population is not established in a release area, a site will no longer be considered as capable of supporting a viable population unless habitat changes are

made, the department eliminated the need to define "unusual environmental conditions." However, there is a need to allow for releases to continue into approved habitat when populations are lost due to weather conditions prior to the end of the five year stocking period. ARM 12.9.602 will reflect these changes.

COMMENT 24: An individual stated that by waiving any one of the requirements in ARM 12.9.602(1) the Department could jeopardize the goal of the program. This individual believed that the criteria as spelled out in section (1) should be adhered to completely by any and all participants.

RESPONSE: The intent of this program is the establishment of viable pheasant populations. In order to waive any requirement under this section, the department would have to justify such an action. The intent of this section is not to circumvent the requirements of the program but to allow for the intent of the program to be carried out under unforeseen circumstances not covered by these rules.

COMMENT 25: A number of individuals commented on the age of the bird at release and wanted to know when the department would determine the payment for the birds and how it would be decided. Some commentors thought ARM 12.9.604 meant that the department would pay the 14-week-old price for a 10-week-old bird.

RESPONSE: The department recognizes that the use of 14-week-old birds to determine the payment for birds obtained from commercial hatcheries was confusing. ARM 12.9.604 was changed by deleting the 10-14 week wording and the department will use the price of 10 week old birds to determine the price paid.

COMMENT 26: One individual expressed concern that the department would arbitrarily increase the bird price to the 14-week-old price and pay growers that price.

RESPONSE: With the adoption of the new language in ARM 12.9.602(1)(a) concerning the age of the bird at release, the department may not arbitrarily or capriciously raise the age of birds to be released without proceeding through the formal rulemaking process, which includes public notice and public input. The department will pay for the additional expenses incurred by the hatchery or grower because of circumstances that prevent the department from timely release of the birds.

COMMENT 27: An individual questioned why the department jumped from paying a previously proposed payment of $4 per bird for 14-week old birds to $6 per bird for ten-week old birds.

<u>RESPONSE</u>: The department polled hatcheries and pheasant raisers this spring to see how many would be interested in supplying birds under this program. The 12 facilities that replied to the poll were then contacted and asked for what price were they selling ten-week old standard run pheasants. Prices ranged from $6 to $6.85 for ten-week-old birds.

The department intends to expand the program through the use of Block Management Areas and will encourage people to raise and release birds. However, given the resistance of private landowners to allow public hunting in good pheasant habitat and the propensity for more and more of that habitat to be leased for pheasant hunting, the department does not believe there will be enough interest in a raise and release program that can meet the spending requirements of the statute. Therefore if this program is going to be expanded beyond the northeast corner of the state, a ready market for purchasing birds must be available to the department and a fair market price will need to be paid.

<u>COMMENT 28</u>: One individual submitted specific language which the individual recommended that the department add to ARM 12.9.704. The language called for the department to produce an annual report and delineated what should be in that report. The individual wanted to assure the program was fully evaluated and hunters, landowners and program participants all benefited from it.

<u>RESPONSE</u>: The department agrees that an annual summary of program activities would be beneficial to both the management of the program and persons interested in activities undertaken by the programs. The department will produce such a summary and added language to ARM 12.9.704 to require the department to produce an annual summary. The language also addresses what information will be included in the summary.

<u>COMMENT 29</u>: An individual noted that there seems to be a contradiction in the payment allocation for the Upland Game Bird Habitat Enhancement Program. In ARM 12.9.705(1), the payment is stated to be set forth in a contract and the department share would be negotiated on an individual project basis for cost-sharing. In ARM 12.9.705(4), it is stated the department may cover up to 100% of the cost of materials plus up to 10% of the cost for development and implementation of the project. In ARM 12.9.705(5)(d), it states that the department will cover no more than 75% of the total cost of any Upland Game Bird Habitat Enhancement project. This needs to be clarified.

<u>RESPONSE</u>: The department recognizes that this may be confusing and has made changes to the rule to alleviate confusion.

COMMENT 30: One individual commented that FWP should not be buying land and the reference to buying lands should be dropped from ARM 12.9.705(5)(b).

RESPONSE: The department does not have authority to purchase land under this program and therefore, will delete the reference to 'land' in the proposed rule. ARM 12.9.705 will reflect this change.

COMMENT 31: One individual commented that ARM 12.9.706 should have been included in the rule notice.

RESPONSE: Because no changes were proposed for ARM 12.9.706, it was not included with the proposed changes to the ARM rules and is slated to remain as it currently appears in the rules.

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/s/ Rebecca Dockter Engstrom	/s/ M. Jeff Hagener
Rebecca Dockter Engstrom Rule Reviewer	M. Jeff Hagener Director Department of Fish, Wildlife and Parks

Certified to the Secretary of State August 27, 2001

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

In the matter of the amendment of ARM 8.52.602, 8.52.604, 8.52.606, 8.52.608 and 8.52.616 pertaining to non-resident psychological services, application procedures, required supervised experience, examination and fees and the adoption of new rules pertaining to parenting plan evaluations	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On May 10, 2001, the Board of Psychologists published a notice of proposed amendment and adoption of the above-stated rules at page 744, 2001 Montana Administrative Register, Issue Number 9. The hearing was held on June 15, 2001.

2. The Board has amended ARM 8.52.602, 8.52.604, 8.52.606, 8.52.608, 8.52.616 and adopted new rule I (8.52.901), new rule II (8.52.902), new rule III (8.52.903), new rule IV (8.52.904), new rule V (8.52.905), new rule VI (8.52.906), new rule VII (8.52.907) and new rule VIII (8.52.908) exactly as proposed.

3. The Board received 5 written comments and no one appeared at the hearing. The comments received and the Board's responses are as follows:

COMMENT NO. 1: Three commentors addressed the preclusion of a psychologist from serving in the dual role of evaluator under the parenting plan evaluation and serving as therapist for the child or the child's immediate family and the impact on rural settings due to limited availability of mental health professionals. The comments addressed the problem in rural Montana with limited availability of psychologists. One comment suggested striking that provision or placing a time limitation upon counseling the child or family after preparation of the plan of 3 months.

RESPONSE: The Board has considered this comment and responds that it is the Board's intent in this rule to keep the roles of evaluator and therapist separate to avoid the conflict of interest which it has seen arise in many situations. While the Board recognizes the limited availability of psychologists in rural Montana, the Board believes that the necessity for impartiality in the development of the parenting plan evaluation outweighs the drawbacks the rule encounters in rural Montana. The Board further believes that therapeutic counseling or the preparation of parenting plans may also be done for these

patients in rural areas through other local mental health professionals. The Board believes that the psychologist should make the election to either participate in the case as evaluator or therapist, but not as both.

COMMENT NO. 2: Two commentors stated that the section on competency should be stricken as unnecessary as psychologists are aware of their ethical and professional standards.

RESPONSE: While the Board hopes it is the case that all psychologists are aware of their ethical and professional standards, many of the complaints received by the Board regarding disciplinary matters indicate to the Board that this is not the case in reality. The Board feels it is necessary to reiterate these requirements in the rule.

COMMENT NO. 3: The commentor felt the requirement that psychologists must take reasonable precautions in their handling of children's disclosure of child abuse lacked substance and requested the Board define "reasonable".

RESPONSE: The Board sees a wide range of potential situations which could require the interpretation of whether or not a psychologist has acted reasonably. Defining "reasonable" would be too limiting under these circumstances. The Board believes the word "reasonable" implies the need to use professional judgment in addressing the specific situation and circumstances. The Board also sees a need to focus on the need to evaluate the situation thoroughly before acting.

COMMENT NO. 4: The commentor feels that it is unnecessary to have a rule requiring psychologists to provide information regarding appropriate community resources for victims of domestic abuse, and wishes to see the language stricken from the proposed rule or wishes to see the word "appropriate" operationalized.

RESPONSE: The rule was derived from discussions regarding the obligation of a psychologist to make recommendations as to appropriate treatment resources. The Board feels it is necessary to include the rule to address the fact the complaints received by the Board do not indicate this is being done in some cases.

COMMENT NO. 5: The commentor suggested the substitution of the word "shall" for "must". The intent behind the comment was to make the requirement more mandatory.

RESPONSE: The use of the word "must" implies the imperative and therefore the Board believes its use is appropriate. The word "must" also complies with directives from the Legislative Council in bill drafting to use the word "must" as opposed to "shall". Therefore, the Board believes it is best to use the word "must".

COMMENT NO. 6: One commentor expressed concern about the use of the specialized educational training and experience requirements prior to conducting parenting plan evaluations and the potential impact on the psychologist who may elect not to complete that educational requirement.

RESPONSE: The Board feels the criteria are general educational requirements for most psychologists and are necessary to perform such evaluations. The Board believes these requirements are generally included as a part of the doctoral training education for psychologists and can be augmented by widely available continuing education on this subject. The Board does not feel this would be cumbersome or difficult to achieve.

COMMENT NO. 7: One commentor recommended mandatory use of 3 specific tests.

RESPONSE: The Board feels that limiting an evaluation to, or requiring three specific tests would not be appropriate for all circumstances and the selection of tests should be performed by the psychologist using his/her best professional judgment.

COMMENT NO. 8: One commentor addressed the issue of limits on confidentiality in light of an unidentified Billings District Court case in which the commentor stated that any court-ordered parenting plan evaluation may be used in any legal hearing without the parties permission. Another commentor stated that the confidentiality rule is redundant because it is part of the everyday practice of psychology.

RESPONSE: The Board believes the language currently used in the limits of confidentiality rule covers the situation addressed by the first comment. In addition, while the Board recognizes that psychologists routinely deal with confidentiality issues as part of their practice, because of complaints received and the special confidentiality issues involved in parenting plan evaluations, the Board feels it is necessary to include these requirements in the rule.

COMMENT NO. 9: One commentor questioned whether the Board was micro-managing the profession and infringing on a psychologist's right to determine or develop his/her own practice.

RESPONSE: The Board rules are the first by any profession in Montana to address standards for parenting plan evaluations. Complaints received by the Board from the public indicate continuing problems in this area of practice. The Board in conjunction with representatives from the Montana Psychological Association developed these regulations to respond to public requests for uniformity and a level of professionalism in preparing parenting plan evaluations. Further, these rules do not impact the public=s right to choose their practitioner, unless that practitioner is already involved in the case in a separate capacity. In that situation, the Board believes

professional standards require a separation of the roles. Nothing in these rules will prohibit a psychologist in rural areas from performing parenting plan evaluations, unless they have that conflict of interest or do not have the minimal education or training to prepare the plans.

COMMENT NO. 10: One commentor commented on the "fit" with the child in relation to the best interests of the child standard.

RESPONSE: The Board feels it is important to enunciate the necessity to relate any diagnoses found in the family members to the "fit" between each child and the parents; i.e. how do the diagnoses affect the quality of parenting and the relationship between parent and child. In addition, the Board felt it necessary to include explanatory material regarding issues that may be encountered during parenting plan evaluations.

COMMENT NO. 11: One commentor questioned the need for impartiality and indicated that the psychologist may make a professional choice to be an advocate for a patient.

RESPONSE: The purpose of the parenting plan evaluation is to provide a court and the parties with an impartial evaluation of the parents and the child(ren) to determine the best parenting arrangement. A psychologist advocating for a patient cannot provide an objective parenting plan assessment of all parties. This rule does not preclude a psychologist from testifying on behalf of a patient as an advocate.

COMMENT NO. 12: One commentor questioned the Board's role in directing communication between the psychologist and others in discussing information gathered during the parenting plan evaluation.

RESPONSE: The parenting plan evaluation and the information gathered in preparing the evaluation are intended for use in legal proceedings and as such must be equally available to all parties and the court, however, discussion of the evaluation beyond the parties and the court should require appropriate releases.

COMMENT NO. 13: Two commentors questioned the necessity of avoiding "significant involvements" with parties as precluding a psychologist from conducting a parenting plan evaluation.

RESPONSE: Because of the necessity to prepare an impartial and objective parenting plan evaluation for the court and the parties' consideration, the professional should avoid involvement in cases which raise the question of impartiality or favoritism due to therapeutic or dual relationships. Further, when testifying in court in the role of therapist and not as a parenting plan evaluator, the psychologist should be restricted to matters and facts of which the psychologist has professional knowledge as a therapist.

COMMENT NO. 14: One commentor contended that it is not the Board's purview to delineate what data are collected and what documentation is maintained.

RESPONSE: It is not the Board's intent to layout requirements of what is collected but to maintain minimal levels of verification of the data that is collected to ensure accuracy and to require documentation of what is collected and how it is collected. This is necessary to allow the parties and the court relying upon the parenting plan evaluations to ensure accuracy and to allow the practitioner to support his/her findings should the findings be challenged.

BOARD OF PSYCHOLOGISTS
MARIAN MARTIN, PHD
CHAIRMAN

By: /s/ MIKE FOSTER
Commissioner
Department of Labor and Industry

By: /s/ KEVIN BRAUN
Rule Reviewer

Certified to the Secretary of State: August 27, 2001.

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

In the matter of the amendment of ARM 37.89.114 pertaining to mental health services plan, covered services	)))))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On June 21, 2001, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rule at page 1040 of the 2001 Montana Administrative Register, issue number 12.

2. The Department has amended ARM 37.89.114 as proposed.

3. No comments or testimony were received.

/s/ Dawn Sliva	/s/ Gail Gray
Rule Reviewer	Director, Public Health and Human Services

Certified to the Secretary of State August 27, 2001.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the adoption of new rules regarding fees for records management microfilming, imaging and storage services	)	CORRECTED NOTICE OF ADOPTION

TO: All Concerned Persons

1. On July 5, 2001, the Office of the Secretary of State published a notice at page 1186, of the 2001 Montana Administrative Register, Issue 13, of the adoption new rules regarding fees for records management microfilming, imaging and storage services.

2. The reason for the correction is that item (1)(i) tape storage in vault (per inch) in Rule X (44.14.310), Fees for Records Center Services is shown incorrectly as 0.055. The corrected rule amendment reads as follows:

RULE X FEES FOR RECORDS CENTER SERVICES (1) The following fees shall be charged for services provided for records housed in the state records center:

(a) through (h) remain the same.

(i) tape storage in vault (per inch) ~~0.055~~ 0.55

AUTH: 2-6-103, MCA
IMP: 2-6-201, 2-6-202, 2-6-203 and 2-6-206, MCA

3. Replacement pages for the corrected notice of adoption will be submitted to the Secretary of State on September 30, 2001.

/s/ Bob Brown
BOB BROWN
Secretary of State

/s/ Janice Doggett
JANICE DOGGETT
Rule Reviewer

Dated this 27th Day of August, 2001

VOLUME NO. 49 OPINION NO. 4

COUNTIES - Ability to levy additional mills to make up shortfall in state reimbursement for light vehicle registration fees;
LOCAL GOVERNMENT - Ability to levy additional mills under Mont. Code Ann. § 15-10-420 to raise amount assessed in property taxes in prior year;
MOTOR VEHICLES - Treatment of light vehicle registration fees under statute providing additional mill authority to raise amount of property taxes assessed in prior year;
TAXATION AND REVENUE - Ability to levy additional mills to make up shortfall in state reimbursement for light vehicle registration fees;
MONTANA CODE ANNOTATED - Sections 7-6-2201, 15-10-420, 61-3-509;
MONTANA LAWS OF 1999 - Chapter 584, section 168;
OPINIONS OF THE ATTORNEY GENERAL - 48 Op. Att'y Gen. No. 24 (2000).

HELD: A local government may levy additional mills pursuant to Mont. Code Ann. § 15-10-420(1) (2001) sufficient to make up the difference between the amount reimbursed by the state for light vehicle fees and taxes pursuant to House Bill 124, section 1, and the amount of fees and taxes assessed by the local government for FY 2001.

July 31, 2001

Mr. Leo Gallagher
Lewis and Clark County Attorney
County Courthouse
228 Broadway
Helena, MT 59601

Dear Mr. Gallagher:

You have requested my opinion on the following question:

> Pursuant to Mont. Code Ann. § 15-10-420 (2001), may a county include within its mill levy cap provided by Mont. Code Ann. § 15-10-420(1) (2001) a sufficient number of mills to account for the difference between the amount distributed to the counties pursuant to HB 124, § 1, as reimbursement for light vehicle fees collected by the county, and the amount the counties actually assessed in ad valorem light vehicle taxes during FY 2001?

Your question arises from the decision by the 1999 Montana legislature to submit to the voters a referendum on the question of whether the State should change from a system of ad valorem

property taxes on light motor vehicles to a flat fee system. 1999 Mont. Laws, ch. 515; see 48 Op. Att'y Gen. No. 24 (2000) (holding that the flat motor vehicle fee is to be considered a tax for federal Indian law purposes). In the November 2000 election, the voters approved the referendum, which provided that the change from property tax to flat fee would take effect January 1, 2001. Since the local government fiscal year runs from July 1 through June 30, Mont. Code Ann. § 7-6-2201, this meant that counties would receive property tax revenue from light motor vehicles for one half of FY 2001 and flat fees for the other half.

In 2001, the legislature enacted a comprehensive restructuring of the laws relating to county budgets and particularly the disposition of revenues collected by the counties. 2001 Mont. Laws, ch. 574, commonly known as HB 124, adopted a general approach of requiring certain funds collected by the counties to be remitted to the state general fund, with the counties to be reimbursed by allocations from the general fund for the lost revenue. In accordance with this general approach, section 173 of HB 124 amended Mont. Code Ann. § 61-3-509 to reallocate the light vehicle registration fee from the county motor vehicle suspense fund to the state general fund.

In addressing the reimbursement due the counties for the vehicle taxes allocated to the state general fund, HB 124 directed the Department of Revenue to calculate the base reimbursement amount due the counties as though the light vehicle registration fee, rather than the ad valorem property tax, had been in effect for the entirety of FY 2001. HB 124, § 1(8). As a result, on average the counties will receive as reimbursements for lost light vehicle fee collections about 88% of the revenue they actually received in combined fees and property taxes in FY 2001.

It seems clear from the history, terms, and structure of HB 124 that the legislature intended to simplify the collection and disbursements of county revenue while at the same time attempting to maintain rough revenue neutrality for the counties. HB 124 was an outgrowth of an interim study mandated by the 1999 legislature. 1999 Mont. Laws, ch. 584, § 168. Chapter 584 enacted numerous changes in property tax laws, including reductions in the tax rates applied to several classes of property, and provided a mechanism for reimbursement of counties for a portion of the revenue lost. Ch. 584, § 167. Section 1 of HB 124 contains a detailed formula for the calculation of the amount of state general fund revenue that will be remitted to the counties under the bill. In addition, the bill amended Mont. Code Ann. § 15-10-420 to provide an inflation adjustment to the mill levy cap provided in § 15-10-420(1). Finally, the legislature provided for an increase in the mill levy capacity for "a decrease in reimbursements." Mont. Code Ann. § 15-10-420(7) (2001).

In my opinion, the legislature's intention in enacting HB 124 was to enable local governments to maintain for FY 2002 the amount of revenue collected in FY 2001. That includes, if necessary, the levying of additional mills to cover personal property taxes and fees on light vehicles for which the counties were not reimbursed pursuant to section 1 of HB 124. By including the light vehicle fees in the calculation of the reimbursements due under section (1) of the bill, the legislature provided the local governments with, on average, 88% of the revenue they had previously collected in ad valorem taxes. Mont. Code Ann. § 15-10-420(1), allowing the local governments to levy sufficient mills "to generate the amount of property taxes actually assessed in the prior year," operates to authorize the local government to levy additional mills to ensure that the county is able to match the property taxes assessed in the prior year.

THEREFORE, IT IS MY OPINION:

> A local government may levy additional mills pursuant to Mont. Code Ann. § 15-10-420(1) (2001) sufficient to make up the difference between the amount reimbursed by the state for light vehicle fees and taxes pursuant to House Bill 124, section 1, and the amount of fees and taxes assessed by the local government for FY 2001.

Very truly yours,

/s/ Mike McGrath
MIKE McGRATH
Attorney General

mm/cdt/dm

VOLUME NO. 49 OPINION NO. 5

AIRPORTS - Authority of city to levy property tax for airport purposes;
CITIES AND TOWNS - Authority of city to levy property tax for airport purposes;
MUNICIPAL GOVERNMENT - Authority of city to levy property tax for airport purposes;
TAXATION AND REVENUE - Application of mill levy caps to statutory authority to levy taxes for airport purposes;
TAXATION AND REVENUE - Application of new "carry forward" mill levy authority to property tax levies set in 2001;
TAXATION AND REVENUE - Authority of city to levy property tax for airport purposes;
MONTANA CODE ANNOTATED - Sections 1-2-109, 7-6-4407, -4451, 7-34-102, 7-35-2122, 15-10-420 (1999), 15-10-420 (2001), 67-10-402 (1999), 67-10-402 (2001);
MONTANA LAWS OF 2001 - Chapter 574.

HELD: 1. The mill levy cap provided in Mont. Code Ann. § 15-10-420(1)(a) (2001), as amended by HB 124, is calculated with reference to the total property tax assessed in the previous year, and not by reference to the amount levied for any particular purpose in any prior year.

2. Local governments may not derive "carry forward" authority under Mont. Code Ann. § 15-10-420(1)(b) (2001) based on the difference between the mill levy set in 2000 and the amount the local government would have been authorized to levy under Mont. Code Ann. § 15-10-420(1) (1999).

3. The "carry forward" authority provided in Mont. Code Ann. § 15-10-420(1)(b) (2001), as amended by HB 124, will be available whenever the local government levies fewer mills than would be authorized to reach the mill levy cap provided in subsection (1)(a), and is measured by the difference between the number of mills actually levied and the number of mills the local government would have been allowed to levy to reach the cap.

4. The "carry forward" mills may be levied in a future year and expended by the local government for any lawful purpose it chooses.

August 7, 2001

Mr. David Gliko
Great Falls City Attorney
P.O. Box 5021
Great Falls, MT 59403-5021

Dear Mr. Gliko:

You have requested my opinion on the following questions:

1. Under then-existing law, did the City of Great Falls have authority to levy an additional two mills for airport purposes under Mont. Code Ann. § 67-10-402 (1999), in light of the fact that the city had not levied any mills under § 67-10-402 in 1998?

2. Do the 2001 amendments to Mont. Code Ann. § 15-10-420(1)(b) authorize the city to "carry forward" authority to levy an additional two mills for airport purposes, in light of the fact that no revenue from such mills was included in the city's property tax revenues for the past three years?

Your questions arise from the provisions of HB 124 (2001 Mont. Laws, ch. 574), which was enacted by the 2001 legislature and signed into law by the Governor on May 5, 2001. HB 124 substantially revised the laws relating to the levy and budgeting of property taxes for the support of local government services. Since the answer to your second question renders question 1 moot, I will proceed to it first.

HB 124 made a number of fundamental changes in the financial operation of local governments and in the financial relationship between the local governments and the state government. Most pertinent to your inquiry is the new approach taken under HB 124 with respect to funding certain specific local government programs, such as airport facilities. Prior to the enactment of HB 124, as you note, a municipality was authorized to levy a tax of up to two mills on the taxable value of property within its jurisdiction for the support of airports and landing fields. Mont. Code Ann. § 67-10-402(1) (1999). Numerous similar provisions existed in the code for specific mill levies for specific local government purposes. See, e.g., Mont. Code Ann. § 7-34-102 (1999) (allowing counties, cities, and towns to levy one mill for ambulance services); § 7-35-2122 (1999) (allowing counties to levy up to four mills for cemetery purposes). HB 124 adopted a general approach of deleting numeric limits on the number of mills a local government would be allowed to levy for any specific purpose. Thus, under the bill, Mont. Code Ann. § 67-10-402 was amended to provide:

> (1) Subject to 15-10-420 . . . the city or town council may levy, in addition to the annual levy for administrative purposes or the all purpose mill levy authorized by 7-6-4451, a tax on the taxable value of all taxable property in the . . . city or town for airports and landing fields and for ports.

Mont. Code Ann. § 67-10-402(1) (2001), as amended by HB 124, § 183.

Mont. Code Ann. § 15-10-420 contains the remnants of the property tax limitation enacted by the voters through Initiative 105. As amended by HB 124, it places a cap on the number of mills a local government may levy through property taxation:

> (1)(a) Subject to the provisions of this section, a governmental entity that is authorized to impose mills may impose a mill levy sufficient to generate the amount of property taxes actually assessed in the prior year plus one-half of the average rate of inflation for the prior 3 years.
> . . . .
> (b) A governmental entity that does not impose the maximum number of mills authorized under subsection (1)(a) may carry forward the authority to impose the number of mills equal to the difference between the actual number of mills imposed and the maximum number of mills authorized to be imposed. The mill authority carried forward may be imposed in a subsequent tax year.[1]

The combined effect of the elimination of the specific mill levy limits and the mill levy cap is to free a local government to dedicate as much of its annual mill levy as it chooses to any lawful government purposes, as long as the total millage covered by the cap does not exceed the cap measured by the prior year's property tax assessments.

For this reason, your first question is moot. In calculating the City's mill levy for this year, it does not matter whether the City levied two mills, or for that matter any mills, for airport purposes under Mont. Code Ann. § 67-10-402(1) in any prior year. Under HB 124, the City is authorized to levy a property tax for the airport, and as long as the City's total property tax collections covered by the mill levy cap in Mont. Code Ann. § 15-10-420(1)(a) do not exceed those assessed in the prior year, the airport levy is permissible. It is simply not relevant under this statutory scheme whether the City levied a tax under Mont. Code Ann. § 67-10-402(1) in any prior year.

1

HB 124 provides a formula for calculating the mill levy cap and provides certain exceptions to the cap. See § 15-10-420(5), (7), (9) (2001). These exceptions and calculation provisions are not material to your question, and thus they have not been specifically discussed. This intentional omission should not be construed as expressing any opinion as to how these other provisions of Mont. Code Ann. § 15-10-420 (2001) should be interpreted or applied.

The "carry forward" provision found in Mont. Code Ann. § 15-10-420(1)(b) likewise does not depend on how many mills, if any, the City chooses to devote to airport purposes in any year. This subsection allows the City, if it finds itself able to fund its operations without levying the full number of mills allowed by subsection (1)(a), to hold in reserve for future years the authority to levy the difference between the number of mills allowed and the number actually levied. The "carry forward" authority is not calculated on the basis of the amount budgeted or the number of mills needed to finance any specific government function. Rather, it is calculated with reference to the whole amount of funds raised by property taxes, subject to the exceptions provided in the statute, without reference to how the money might actually have been spent in the prior year.

Implicit in your second question is the issue of whether any "carry forward" authority for the upcoming budget year may be derived from the fact that a local government may not have levied the entire amount allowed by the mill levy cap provided by Mont. Code Ann. § 15-10-420(1) (1999). Section 94 of HB 124, which amended Mont. Code Ann. § 15-10-420, became effective July 1, 2001. The legislature is presumed to have enacted the bill with an understanding of the local government budget cycle, which requires municipalities to set their property tax mill levies in August of each year. Mont. Code Ann. § 7-6-4407; see Ross v. City of Great Falls, 1998 MT 276, ¶ 17, 291 Mont. 377, 967 P.2d 1103. Laws operate prospectively unless the contrary intention is clearly stated. Mont. Code Ann. § 1-2-109.

Here, the language of the 2001 amendments to Mont. Code Ann. § 15-10-420(1) suggests that it was not the intention of the legislature to provide "carry forward" authority for a local government based on the fact that it may have levied less than the permissible number of mills in 2000. The "carry forward" authority did not exist when the local mill levies were set in August 2000. Moreover, Mont. Code Ann. § 15-20-420(1)(b) provides the "carry forward" benefit to "a local government that does not impose the maximum number of mills under subsection (1)(a)." The reference to the maximum millage calculated "under subsection (1)(a)" strongly implies that the legislature intended that the "carry forward" authority not be available to local governments based on their 2000 mill levies. "Subsection (1)(a)" did not exist when the 2000 mill levies were set. HB 124 enacted significant changes in the calculation of the mill levy cap by providing a limited form of indexing for inflation which did not previously exist. Thus, in my opinion, it would not be possible to calculate a "carry forward" benefit for local governments in the 2001 budget year, since the basis for the calculation--the mill levy calculated under Mont. Code Ann. § 15-10-420 *as amended by HB 124*--does not exist.

Thus, the answer to your second question is as follows. The City need not have levied any mills for airport purposes, in

2000 or in any other prior year, to be allowed to levy a property tax for airport purposes in 2001. The only requirement is that any airport levy, considered together with all other property tax levies to which Mont. Code Ann. § 15-10-420(1)(a) applies, must be within the mill levy cap provided by that subsection. Any mill levy "carry forward" authority that the City receives from the provisions of Mont. Code Ann. § 15-10-420(1)(b) cannot be derived from the mill levy set in August 2000, but may be applied in the future, initially by reference to the mill levy set in August 2001. In the future, the "carry forward" will be calculated by reference to the total property tax assessments covered by the mill levy cap in subsection (1)(a). The "carry forward" authority may be used by the City in subsequent years for any lawful purpose it chooses, including funding of airport operations, regardless of whether the City has levied taxes for airport purposes in any prior year.

THEREFORE, IT IS MY OPINION:

1. The mill levy cap provided in Mont. Code Ann. § 15-10-420(1)(a) (2001), as amended by HB 124, is calculated with reference to the total property tax assessed in the previous year, and not by reference to the amount levied for any particular purpose in any prior year.

2. Local governments may not derive "carry forward" authority under Mont. Code Ann. § 15-10-420(1)(b) (2001) based on the difference between the mill levy set in 2000 and the amount the local government would have been authorized to levy under Mont. Code Ann. § 15-10-420(1) (1999).

3. The "carry forward" authority provided in Mont. Code Ann. § 15-10-420(1)(b) (2001), as amended by HB 124, will be available whenever the local government levies fewer mills than would be authorized to reach the mill levy cap provided in subsection (1)(a), and is measured by the difference between the number of mills actually levied and the number of mills the local government would have been allowed to levy to reach the cap.

4. The "carry forward" mills may be levied in a future year and expended by the local government for any lawful purpose it chooses.

Very truly yours,

/s/ Mike McGrath
MIKE McGRATH
Attorney General

mm/cdt/dm

VOLUME NO. 49 OPINION NO. 6

STATUTORY CONSTRUCTION - Construing section consistently with its title;
STATUTORY CONSTRUCTION - Express inclusion implying exclusion of matters not mentioned;
STATUTORY CONSTRUCTION - Liberal construction of consumer protection legislation;
STATUTORY CONSTRUCTION - Plain meaning controls;
STATUTORY CONSTRUCTION - Resort to principles of construction when meaning plain;
TELEMARKETING - Application of statutory regulations to telemarketers exempt from registration and bonding requirements;
MONTANA CODE ANNOTATED - Title 30, chapter 14, part 14; sections 30-14-1402, -1403 to -1405, -1408, -1410 to -1412.

HELD: Telemarketers who are exempt from the registration and bonding requirements of the Montana Telemarketing Registration and Fraud Prevention Act are not exempt from other provisions of the Act.

August 9, 2001

Ms. Barbara Ranf
Director
Department of Administration
P.O. Box 200101
Helena, MT 59620-0101

Dear Ms. Ranf:

Peter Blouke, in his capacity as director of the Montana Department of Commerce, requested my opinion on the following question:

> Are sellers and marketers that are statutorily exempted from the bonding and registration requirements of the Montana Telemarketing Registration and Fraud Prevention Act also exempted from the remaining provisions of the Act?

In light of the reorganization which placed the Consumer Protection Division in your department, I am responding to you in his stead.

The Montana Telemarketing Registration and Fraud Prevention Act was enacted by the 1999 legislature and codified at title 30, chapter 14, part 14. The purposes of the Telemarketing Act are "to require telemarketers to register in this state, to establish standards of conduct for telemarketers, and to provide penalties for violation of [the Act]." Mont. Code Ann. § 30-14-1402(1). In enacting the measure, the legislature provided the

Department of Commerce with rule-making authority to implement the law. Mont. Code Ann. § 30-14-1402(3).

The Act has several substantive components, which include:

- registration and bonding requirements, contained in Mont. Code Ann. §§ 30-14-1404 and -1405;
- record-keeping requirements, contained in Mont. Code Ann. § 30-14-1408;
- disclosure and contract requirements, contained in Mont. Code Ann. § 30-14-1410;
- prohibited acts and practices, contained in Mont. Code Ann. § 30-14-1411; and
- abusive acts and practices, contained in Mont. Code Ann. § 30-14-1412.

The Department plans to adopt administrative rules clarifying that sellers and telemarketers who are statutorily exempt from the bonding and registration requirements of the Act must comply with the remaining provisions. Both "seller" and "telemarketer" are defined in the Act, but the definitions do not include any exemptions or other qualifying language. See Mont. Code Ann. §§ 30-14-1403(8), -1403. The Department is concerned that sellers and telemarketers will argue that their exemption from the bonding and registration requirements further constitutes an exemption from the remaining requirements of the Act.

The statutes governing the registration and bonding of sellers and telemarketers provide, in part:

> 30-14-1404. Registration of sellers or telemarketers. (1)(a) Unless exempt under 30-14-1405, a person may not act as a seller or telemarketer without first having registered with the department.
>
> 30-14-1405. Exemptions from registration and bonding. The registration and bonding requirements of 30-14-1404 do not apply to [the following business activities] . . . .

The latter provision is the only part of the Telemarketing Act that excludes or otherwise exempts sellers or telemarketers based upon the type of business they conduct.
It is my opinion that the exemptions contained in Mont. Code Ann. § 30-14-1405 apply only to the registration and bonding requirements of Mont. Code. Ann. § 30-14-1405, and do not provide any relief from the other requirements of the Act. This conclusion is consistent with elemental standards of statutory construction.

First, the plain meaning of section 30-14-1405 clearly limits the exemptions to registration and bonding. As noted above, section 30-14-1405 provides that the "registration and bonding

requirements of 30-14-1404 do not apply." Neither section 30-14-1405 nor any other provision contains language expressly or impliedly exempting these businesses from requirements of the Act other than the bonding and registration requirements. "When the statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is no need to resort to extrinsic means of interpretation." In re Marriage of Christian, 295 Mont. 352, 356, 983 P.2d 966, 968 (1999).

Although resort to principles of statutory construction is unnecessary when the meaning of a statute is plain from the words used, those principles operate to confirm my conclusion as to the meaning of the statute. The title of section 30-14-1405 limits the exemption to registration and bonding. Section 30-14-1405 is entitled, "Exemptions from registration and bonding." It would be inconsistent with both the language of the provision and its title to extend the exemptions to other requirements of the act. "While, in construing a statute, the wording of the body, and not that of the title controls, resort may, nevertheless, be had to the title as an aid to construction." State v. Berger, 259 Mont. 364, 367, 856 P.2d 552, 554 (1997) (citations omitted).

Moreover, the fact that section 30-14-1405 expressly provides that the exemption applies to the registration and bonding requirements for certain businesses leads to the conclusion that the remaining requirements are mandatory for all sellers and marketers. Carbon County v. Union Reserve Coal Co., 271 Mont. 459, 466, 898 P.2d 680, 684 (1995). The maxim *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) is routinely cited in Montana case law. Were the intent to exempt these business activities from all requirements of the Act, the legislature could have done so. Schuff, ex rel. Schuff v. A.T. Klemons & Son, 2000 MT 357, 16 P.3d 1002.

Finally, because the Act seeks to redress wrongs, provide relief and create results that are conducive to the public good, it is a remedial statute. State ex rel. Florence-Carlton School Dist. No. 15-6 v. Board of County Comm'rs, 180 Mont. 285, 291, 590 P.2d 602, 605 (1978). As remedial legislation, the Act must be interpreted expansively rather than narrowly, and liberally construed in favor of protecting consumers. Id. Limiting the exemptions to bonding and registration not only adheres to the plain language of the statute, it also is a proper construction when considering the remedial nature of the Act. Id., quoting 3 Sutherland Statutory Construction § 71.01 n.3 (1974).

THEREFORE, IT IS MY OPINION:

> Telemarketers who are exempt from the registration and bonding requirements of the Montana Telemarketing

Registration and Fraud Prevention Act are not exempt from other provisions of the Act.

Very truly yours,

/s/ Mike McGrath
MIKE McGRATH
Attorney General

mm/cdt/dm

VOLUME NO. 49 OPINION NO. 7

LOCAL GOVERNMENT - Adoption of minimum subdivision regulations;
STATUTORY CONSTRUCTION - Construing plain language of words of statute;
SUBDIVISIONS - Compliance with Montana Subdivision and Platting Act;
SUBDIVISIONS - Compliance with Sanitation in Subdivisions Act;
MONTANA CODE ANNOTATED - Sections 76-3-101, -102(1), -102(4), -103(15), -104, -501, -504, -504(6)(c), -511, -601, -604, -608, -610(2), 76-4-101, -102, -102(13), -103, -104;
MONTANA LAWS OF 1995 - Chapter 471.

HELD: 1. Absent the findings required by Mont. Code Ann. § 76-3-511(2), a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the standards adopted by the Department of Environmental Quality under the Sanitation in Subdivisions Act.

2. Mont. Code Ann. § 76-3-511 grants local governments the authority to incorporate by reference comparable state regulations or guidelines, but local governments retain discretion to determine the best method of adopting minimum requirements.

3. Review of a proposed subdivision for compliance with local subdivision regulations must occur at the preliminary plat stage.

August 17, 2001

Mr. J. Allen Bradshaw
Granite County Attorney
P.O. Box 490
Philipsburg, MT 59858

Dear Mr. Bradshaw:

You have presented the following questions for my opinion:

1. Is a local governing body required to adopt subdivision regulation standards for water supply and sewage and solid waste disposal that are at least as stringent as the standards set forth in the Montana Department of Environmental Quality's regulations?

2. Is a local governing body required to incorporate by reference into its subdivision regulations the standards for water supply and sewage and solid waste disposal adopted by the Montana Department

of Environmental Quality?

3. When must a proposed subdivision undergo review to show compliance with local subdivision regulations?

The Montana Subdivision and Platting Act is found at Mont. Code Ann. §§ 76-3-101 to -625. Its stated purpose is to "promote the public health, safety, and general welfare by regulating the subdivision of land" and to "provide for adequate light, air, water supply, sewage disposal." Mont. Code Ann. § 76-3-102(1), (4). *Subdivision* is defined as "a division of land or land so divided that it creates one or more parcels containing less than 160 acres." Mont. Code Ann. § 76-3-103(15).

Local governments are statutorily required to adopt and provide for enforcement and administration of subdivision regulations which reasonably provide for the orderly development of their jurisdictional areas. See Mont. Code Ann. § 76-3-501. Section 76-3-504 sets forth the minimum requirements for subdivision regulations. Relevant to your question is section 76-3-504(6)(c), which provides:

> 76-3-504. Minimum requirements for subdivision regulations. The subdivision regulations adopted under this chapter must, at a minimum:
> . . . .
> (6) prescribe standards for:
> . . . .
> (c) subject to the provisions of 76-3-511, water supply and sewage and solid waste disposal that, at a minimum, meet the regulations adopted by the Department of Environmental Quality under 76-4-104.

Section 76-3-511 provides that a local governing body may not adopt subdivision rules or regulations that are more stringent than "the comparable state regulations or guidelines that address the same circumstances," unless the local government makes certain specific findings to support the conclusion that more stringent rules are required to protect public health. It also states a local governing body "may incorporate by reference comparable state regulations or guidelines." Mont. Code Ann. § 76-3-511.

Interacting with the Platting Act is the Sanitation in Subdivisions Act found at Mont. Code Ann. §§ 76-4-101 to -135. The stated public policy of the Sanitation Act is to "extend present laws controlling water supply, sewage disposal, and solid waste disposal to include individual wells affected by adjoining sewage disposal and individual sewage systems to protect the quality and potability of water for public water supplies and domestic uses and to protect the quality of water for other beneficial uses, including uses relating to

agriculture, industry, recreation, and wildlife." Mont. Code Ann. § 76-4-101.

Pursuant to the Sanitation Act, the Department of Environmental Quality is charged with adopting reasonable rules and sanitary standards necessary for administration and enforcement of sanitation in subdivisions. Mont. Code Ann. § 76-4-104. *Subdivision* for this purpose means "a division of land or land so divided that creates one or more parcels containing less than 20 acres." Mont. Code Ann. § 76-4-102.

Mont. Code Ann. § 76-3-511 was adopted by the Montana legislature in 1995 as part of a comprehensive attempt to address overlapping regulatory jurisdiction of the federal, state, and local governments. 1995 Mont. Laws, ch. 471. The stated intent of this legislation was to preclude, in those instances where it applied, the imposition of differing standards by federal, state, and local governments where more than one level of government had regulatory jurisdiction. While the bill focused primarily on overlaps between state and federal regulation, it specifically addressed the dual regulatory roles of the state and local governments with respect to subdivisions through the enactment of Mont. Code Ann. § 76-3-511. 1995 Mont. Laws, ch. 471, § 5.

Section 76-3-511 seems clear in stating that the locally adopted regulations can be no "more stringent" than the regulations adopted by the state under the Sanitation Act unless the local government makes specific findings to support the conclusion that more stringent standards are needed to protect public health or the environment. See Mont. Code Ann. § 76-3-511(2). The apparent clarity of this provision is clouded, however, by the fact that the legislature left intact language in Mont. Code Ann. § 76-3-504(6) suggesting that the state standards were viewed as "minimum" standards, implying that the local government could enact more restrictive standards if it chose to do so. The legislature amended § 76-3-504(6) in 1995 Mont. Laws, ch. 471, § 18, by adding the words "subject to the provisions of 76-3-511," but left the words "at a minimum" intact.

A court in construing these statutes would be obligated to attempt to find a construction that gives effect to all of the words used. Mont. Code Ann. § 1-2-101; State v. Butler, 1999 MT 70, ¶ 25, 294 Mont. 17, 26, 977 P.2d 1000, 1006 (1999). While the usage is certainly awkward, I conclude that the only way to read these statutes in a way that does not render some of the language superfluous is to conclude that they require the local government to adopt the state standard, either by reference or in substance, with respect to those matters on which the state adopts rules under Mont. Code Ann. § 76-4-104, unless a more restrictive standard is found to be needed under the exception found in Mont. Code Ann. § 76-3-511(2). See generally Skinner Enterprises Inc. v. Lewis and Clark County, 286 Mont. 256, 950

P.2d 733 (1997) (discussing whether local boards of health may promulgate regulations which differ from comparable state regulations). They do not leave the local government the option of adopting a less stringent standard than the state standard.

You note in your request that the definition of the term "subdivision" in the Platting Act differs from that in the Sanitation Act, since the latter includes only divisions of land of less than 20 acres, while the former includes divisions of land of up to 160 acres. Compare Mont. Code Ann. §§ 76-3-103(15) and -104 with Mont. Code Ann. §§ 76-4-102(13) and -103. It has been suggested that this difference is significant because the Sanitation Act in effect creates no standard for a "subdivision" between 20 and 160 acres in size, and that applying the state rules adopted under the Sanitation Act would therefore necessarily adopt a standard for those "subdivisions" which is "more stringent" than the state standards. I find this argument unconvincing. Mont. Code Ann. § 76-3-504, which applies to subdivisions of less than 160 acres, specifically requires local governments to meet the state standard adopted pursuant to the Sanitation Act. The suggestion that there is no state standard for subdivisions between 20 and 160 acres in size is therefore incorrect.

The differing definitions of the term "subdivision" in the Platting Act and the Sanitation Act are irrelevant to this particular question. Requiring subdivisions as defined by the Platting Act to comply with the *same* sanitation regulations adopted by the Department of Environmental Quality pursuant to the Sanitation Act is not in violation of section 76-3-511; on the contrary, adoption of such regulations is exactly what is mandated by section 76-3-504(6)(c), which requires adoption of regulations which meet those adopted by the Department of Environmental Quality under the Sanitation Act.

When interpreting statutes, I must follow the well-accepted principle of statutory construction that "statutory language must be construed according to its plain meaning and, if the language is clear and unambiguous, no further interpretation is required." Dahl v. Uninsured Employers' Fund, 1999 MT 168, ¶ 16, 295 Mont. 396, 901 P.2d 363. The statutes in the present case are clear: Local government must adopt regulations that conform with those adopted by the Department of Environmental Quality. This requirement results in local government adopting the *same* standard and does not violate the prohibition against adopting a *more stringent* standard.

Thus, in response to your first question, it is my opinion that, absent the findings required by Mont. Code Ann. § 76-3-511(2), a local governing body must adopt subdivision regulation standards for water supply and sewage and solid waste disposal that are as stringent as the standards adopted by the Department of Environmental Quality under the Sanitation Act.

Your second question asks whether a local governing body is required to incorporate by reference into its subdivision regulations the standards for water supply and sewage and solid waste disposal adopted by the Department of Environmental Quality pursuant to the Sanitation Act. While the Platting Act provides that a local governing body may incorporate by reference a comparable state regulation or guideline, there is no mandate that it do so. See Mont. Code Ann. § 76-3-511. The governing statutes clearly require that a local government adopt minimum requirements for subdivision regulations, but it has left the method of adoption up to the discretion of the local government.

Again, applying the rule of statutory construction stated above, I conclude the plain language of section 76-3-511 grants local governments the authority to incorporate by reference comparable state regulations or guidelines, but local governments retain discretion to determine the best method of adopting minimum subdivision regulations.

Your third question asks when a proposed subdivision must undergo review to show compliance with local subdivision regulations. In my opinion such review must take place at the preliminary plat stage. Any other conclusion would render local government review meaningless.

Mont. Code Ann. §§ 76-3-601 to -625 set forth the subdivision review procedure a local government must follow. Section 76-3-601 requires that a subdivider present to the governing body the preliminary plat of the proposed subdivision for local review. Section 76-3-604 governs review of the preliminary plat. It provides:

> 76-3-604. Review of preliminary plat. (1) The governing body or its designated agent or agency shall review the preliminary plat to determine whether it conforms to the local growth policy if one has been adopted pursuant to chapter 1, to the provisions of this chapter, and to rules prescribed or adopted pursuant to this chapter.
>
> (2) The governing body shall approve, conditionally approve, or disapprove the preliminary plat within 60 working days of its presentation unless the subdivider consents to an extension of the review period.
>
> (3) If the governing body disapproves or conditionally approves the preliminary plat, it shall forward one copy of the plat to the subdivider accompanied by a letter over the appropriate signature stating the reason for disapproval or enumerating the conditions that must be met to ensure approval of the final plat.

Title 76, chapter 3, part 6 goes on to outline the process for preliminary plat review and approval. A public hearing must be held on the preliminary plat and local government must follow the criteria set forth in section 76-3-608. Specifically, a proposal must undergo review to show compliance with "the local subdivision regulations provided in part 5 of this chapter." See Mont. Code Ann. § 76-3-608. Part 5, as discussed above, requires that local government adopt subdivision regulations that conform with certain minimum requirements.

Once the preliminary plat is approved "the governing body and its subdivisions may not impose any additional conditions as a prerequisite to final plat approval providing said approval is obtained within the original or extended approval period as provided in subsection (1)." See Mont. Code Ann. § 76-3-610(2). Review for compliance with water supply and sewage and solid waste disposal regulations at the final plat stage would be rendered meaningless because the governing body could not impose additional conditions for compliance at this stage.

I therefore conclude, based on the plain language of section 76-3-608, that review for compliance with local subdivision regulations must occur at the preliminary plat stage.

THEREFORE, IT IS MY OPINION:

1. Absent the findings required by Mont. Code Ann. § 76-3-511(2), a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the standards adopted by the Department of Environmental Quality under the Sanitation in Subdivisions Act.

2. Mont. Code Ann. § 76-3-511 grants local governments the authority to incorporate by reference comparable state regulations or guidelines, but local governments retain discretion to determine the best method of adopting minimum requirements.

3. Review of a proposed subdivision for compliance with local subdivision regulations must occur at the preliminary plat stage.

Very truly yours,

/s/ Mike McGrath
MIKE McGRATH
Attorney General

mm/ans/dm

VOLUME NO. 49 OPINION NO. 8

AIRPORTS - Creation of airport authority;
COUNTY COMMISSIONERS - Authority to appoint and/or remove airport commissioners;
EMPLOYEES, PUBLIC - County commissioners' authority to remove airport commissioners;
LOCAL GOVERNMENT - Creation of airport authority;
MUNICIPAL GOVERNMENT - Creation of airport authority;
MONTANA CODE ANNOTATED - Sections 7-1-201, 67-10-202, -301 to -303, 67-11-102.

HELD: An airport authority commissioner may only be removed for cause during his or her term of appointment. "For cause" means some type of misconduct or neglect of duty. As long as commissioners are exercising powers authorized by law, they are not subject to removal during their term of office.

August 23, 2001

Mr. George H. Corn
Ravalli County Attorney
Courthouse Box 5008
205 Bedford Street
Hamilton, MT 59840

Dear Mr. Corn:

You have requested my opinion concerning the following question:

> Under what circumstances may a local governing body remove a member of an airport authority commission?

The legislative scheme for airport operation gives municipalities the option of running the airport themselves, creating an advisory board, or creating an airport authority. See Mont. Code Ann. §§ 67-10-202, 67-10-301 to -303, 67-11-102. A municipality may exercise any or all powers granted to an airport authority until or unless such powers are conferred upon the airport authority. Mont. Code Ann. § 67-11-102. Municipal airport authorities may be created by resolution by any municipality. Mont. Code Ann. § 67-11-102. For purposes of the above statute, a municipality includes a county. Mont. Code Ann. § 67-1-101(27).

Once created by resolution, a municipal airport authority is governed by not less than five persons appointed as commissioners of the authority. Mont. Code Ann. § 67-11-102. These five commissioners are appointed by the governing body of the municipality. Id.

Though no statute, case, or Attorney General's Opinion

specifically addresses the issue of removal of an appointed commissioner from an airport authority, much case law exists on the subject. The common law rule has long been that in the absence of statutory provisions relating to removal of public officers, a public officer can be removed only "for cause, and he is entitled to notice and a hearing in order that he may have an opportunity to defend." State ex rel. Nagle v. Sullivan, 98 Mont. 425, 431, 40 P.2d 995, 996 (1935) (citations omitted). Montana case law follows the general rule that if there is a definite term of appointment to a public office, as here, the appointee can only be removed "for cause." Id. Further, the statutes governing general county board management contain this rule. Mont. Code Ann. § 7-1-201(15) (members of the boards listed in Mont. Code Ann. § 7-1-202 may only be removed for cause).

In regard to removal of public officials, the Montana Supreme Court has defined "for cause" as meaning "for reasons which the law and sound public policy recognize as sufficient warrant for removal . . . that is legal cause . . . and not merely a cause which the appointing power, in the exercise of discretion, may deem sufficient." Sullivan, 40 P.2d at 998; State ex rel. Howard v. Ireland, 114 Mont. 488, 138 P.2d 569 (1943); State ex rel. Matson v. O'Hern, 104 Mont. 126, 65 P.2d 610 (1937). In general, "for cause" implies some misconduct, neglect of duty, or inefficiency. See 63C Am. Jur. 2d, Public Officers and Employees § 183. The Montana cases cited above involved misconduct (O'Hern) and, in essence, neglect of office (Ireland). To ensure that removal is not arbitrary, when a statute provides for an appointment for a definite term of office, removal may be effected only after notice and an opportunity to be heard. Ireland, 138 P.2d at 573.

This means that "for cause" does not include a discretionary exercise of statutory authority. Merely exercising the powers granted by statute does not constitute cause for removal of an airport commissioner. As long as the exercise of powers is lawful, a disagreement between the municipality and the airport authority over the wisdom of that exercise would not constitute sufficient "cause" for removal. Note that the municipality may exercise its statutory powers until they "have been *conferred upon*" an airport authority. Mont. Code Ann. § 67-11-102 (emphasis added). This unambiguous language makes it clear that, by creating the airport authority, the municipality has given up its powers in this area. Moreover, if municipalities wish to retain absolute authority over airports, they need only select one of the alternative forms of airport operation rather than creating an airport authority.

THEREFORE, IT IS MY OPINION:

An airport authority commissioner may only be removed for cause during his or her term of appointment. "For cause"

means some type of misconduct or neglect of duty. As long as commissioners are exercising powers authorized by law, they are not subject to removal during their term of office.

Very truly yours,

/s/ Mike McGrath
MIKE McGRATH
Attorney General

mm/pdb/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.

Economic Affairs 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 and Local Government 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 and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration, 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	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 June 30, 2001. This table includes those rules adopted during the period July 1, 2001 through September 30, 2001 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 June 30, 2001, 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 2000 and 2001 Montana Administrative Registers.

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