MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 13

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

In the matter of the proposed amendment of rules pertaining to licensure of out-of-state applicants, reactivation of inactive and revoked status, commissions and contingent fees and the adoption of a new rule regarding definitions	) NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT, OF ARM 8.54.415 LICENSURE OF OUT-OF-STATE APPLICANTS, 8.54.418 REACTIVATION OF INACTIVE AND REVOKED STATUS, 8.54.605 COMMISSIONS AND 8.54.606 CONTINGENT FEES AND THE ADOPTION OF NEW RULE I DEFINITIONS

TO: All Concerned Persons

1. On August 17, 2000 at 9:00 a.m., a public hearing will be held in the conference room, Fourth Floor, Federal Building, 301 South Park, Helena, Montana to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Commerce will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing and 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 August 5, 2000 to advise us of the nature of the accommodation that you need. Please contact Sue Criswell, Board of Public Accountants, 111 N. Jackson (prior to July 28, 2000) or 301 South Park (after August 1, 2000), P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 444-7765 (prior to July 28, 2000) or 841-2389 (after August 1, 2000); Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 444-1667; e-mail compolpac@state.mt.us.

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

8.54.415 LICENSURE OF OUT-OF-STATE APPLICANTS

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

(c) meeting the requirements established under 37-50-314~~(3)~~, MCA, and the regulations established thereunder.

(2) through (3) will remain the same.

Auth: Sec. 37-50-203, MCA
IMP: Sec. 37-50-203, 37-50-314, MCA

REASON: The Board is proposing this amendment to eliminate the reference to subparagraph (3) of 37-50-314, MCA that does not exist.

8.54.418 REACTIVATION OF INACTIVE AND REVOKED STATUS

(1) through (4)(c) will remain the same.

(5) Certificate or license holders who are fully retired from active employment will be exempt from paying annual renewal fees upon submitting ~~an inactive~~ a retired status request form to the board and receiving approval.

Auth: 37-50-203, MCA
IMP: 37-50-203, MCA

REASON: The board is proposing this amendment to replace the word "inactive" with "retired" to more appropriately refer to the status request form for certificate or license holders who are fully retired from active employment.

8.54.605 COMMISSIONS (1) A firm or permit holder shall not pay a commission to obtain a client, nor accept a commission for a referral to a client of products or services of others when the firm or permit holder also performs for that client any services for which professional standards require independence. This prohibition applies during the period in which the firm or permit holder is engaged to perform any services requiring independence and the period covered by those services.

(2) A firm or permit holder who is not prohibited by this rule from performing services for or receiving a commission and who is paid or expects to be paid a commission shall disclose that fact in writing to any person or entity to whom the firm or permit holder recommends or refers a product or service to which the commission relates. Written acknowledgment of such disclosure shall be obtained.

(3) Any firm or permit holder who accepts a referral fee for recommending or referring any service of a firm or permit holder to any person or entity or who pays a referral fee to obtain a client shall disclose such acceptance or payment in writing to the client and obtain written acknowledgment of such disclosure.

(4) This rule shall not prohibit payments for the purchase of an accounting practice or retirement payments to individuals formerly engaged in the practice of public accountancy, or payments to their heirs or estates.

Auth: 37-50-203, MCA
IMP: 37-50-203, MCA

REASON: The Board is proposing this amendment to enable firms and permit holders to accept commissions and contingent fees that are disclosed to clients, except in situations requiring independence. The trend in recent years has been a move by states to permit these fee arrangements and over 40 of the 54 jurisdictions allow firms and permit holders to accept these types of fees on some basis. These modifications would bring the Board's Professional Conduct Rules more in line with the American Institute of Certified Public Accountants' Code of Professional Conduct rules and allow Montana firms and permit holders to be competitive with their peers.

8.54.606 CONTINGENT FEES (1) A firm or permit holder shall not offer or perform professional services for a fee which is contingent upon the findings or results of such services, ~~; provided however, that this rule does not apply to professional services involving federal, state, or other taxes in which the findings are those of the tax authorities and not those of the firm or permit holder, nor does it apply to professional services which are therefore indeterminate in amount at the time the professional services are undertaken.~~ when the firm or permit holder also performs for that client any services for which professional standards require independence. This prohibition applies during the period in which the firm or permit holder is engaged to perform any services for which professional standards require independence and the period covered by those services.

(2) A firm or permit holder who is not prohibited by this rule from performing professional services for a contingent fee shall disclose that fact in writing to any person or entity to whom the services are to be provided. Written acknowledgment of such disclosure shall be obtained.

(3) A firm or permit holder shall not offer to prepare an original or amended tax return or claim for a tax refund for a contingent fee for any client.

Auth: 37-50-203, MCA
IMP: 37-50-203, MCA

REASON: The Board is proposing this amendment to enable firms and permit holders to accept commissions and contingent fees that are disclosed to clients, except in situations requiring independence. The trend in recent years has been a move by states to permit these fee arrangements and over 40 of the 54 jurisdictions allow firms and permit holders to accept these types of fees on some basis. These modifications would bring the Board's Professional Conduct Rules more in line with the American Institute of Certified Public Accountants' Code of Professional Conduct rules and allow Montana firms and permit holders to be competitive with their peers.

4. The proposed new rule provides as follows:

NEW RULE I DEFINITIONS (1) "Commission" means compensation for recommending or referring any product or services to be supplied by another person or entity.

(2) "Contingent fee" means a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service. Solely for purposes of this rule, fees are not regarded as being contingent if fixed by courts or other public authorities, or, in tax matters, if determined based on the result of judicial proceeding or the finding of governmental agencies. A firm's

or permit holder's fees may vary depending, for example, on the complexity of services.

Auth: 37-50-203, MCA
IMP: 37-50-203, MCA

REASON: The Board is proposing this rule to clarify the terms "commission" and "contingent fee" in reference to the rule modifications being proposed in ARM 8.54.605 and 8.54.606.

5. 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, 111 North Jackson, (prior to July 28, 2000) or 301 South Park, (after August 1, 2000) P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 444-1667, or by e-mail to compolpac@state.mt.us and must be received no later than 5:00 p.m. on August 17, 2000.

6. Edward L. Myers, III, attorney, has been designated to preside over and conduct this hearing.

7. 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 to the board 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 or other administrative proceedings. Such written request may be mailed or delivered to the Board of Public Accountants, 111 North Jackson, (prior to July 28, 2000) or 301 South Park (after August 1, 2000) P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 444-1667, e-mailed to compolpac@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

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

BOARD OF PUBLIC ACCOUNTANTS
BERYL STOVER, BOARD CHAIR

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

BY: /s/ Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, July 3, 2000

BEFORE THE ECONOMIC DEVELOPMENT DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed adoption of rules pertaining to Advanced Telecommunications Infrastructure Tax Credit	)	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF RULES PERTAINING TO THE ADVANCED TELECOMMUNICATIONS INFRASTRUCTURE TAX CREDIT

TO: All Concerned Persons

1. On August 15, 2000, at 10:00 a.m., a public hearing will be held at the Department of Commerce, Upstairs Conference Room, 1424 Ninth Avenue, Helena, Montana, to consider the proposed adoption of rules pertaining to the Advanced Telecommunications Infrastructure Tax Credit.

2. The Economic Development Division will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you wish to request an accommodation, contact the Economic Development Division no later than 5:00 p.m., August 10, 2000, to advise us of the nature of the accommodation that you need. Please contact Peter Ohman, Department of Commerce, 1424 Ninth Avenue, P.O. Box 200501, Helena, Montana; telephone (406)444-3553; e-mail peohman@state.mt.us; Montana Relay 1-800-253-4091; TDD (406)444-2978; facsimile (406)444-2903. Persons with disabilities who need an alternative accessible format of this document in order to participate in this rule-making process should contact Peter Ohman.

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

I DEFINITIONS In addition to the definitions set forth in 15-23-129, MCA, the following definitions apply for purposes of these rules:

(1) "Act" means Title 15, chapter 53, part 2, MCA.

(2) "Broadband" means any technology capable of transmitting voice, data and video simultaneously.

(3) "Infrastructure" means facilities, including hardware and software and the installation thereof that make the delivery of telecommunications services possible. It does not include sales, general or administrative expenses, ordinary maintenance or other expenses not directly attributable to the infrastructure improvement.

(4) "Unserved" means Montana businesses, communities, institutions or citizens that do not have access to an advanced telecommunications service.

(5) "Underserved" means Montana businesses, communities, institutions or citizens who have access to an advanced telecommunications service that is not competitive in terms of speed, capability or cost with other customers of the telecommunications services provider.

(6) "Certify, certification and verification" means the attestation in writing of the company official responsible for the overall business operations in the state of Montana.

Auth: Sec. 15-53-203, MCA; IMP, Sec. 15-53-202, 15-53-203, MCA

REASON: Section 15-53-203, MCA, directs the department to establish a policy for granting telecommunications service providers an infrastructure tax credit. The adoption of the foregoing definitions will assist the department and applicants by providing uniformity in the usage of these terms and thereby avoid confusion or uncertainty about the exact meaning of the same.

II APPLICATION FOR TAX CREDITS (1) Telecommunications service providers shall make written application for tax credits to the department. The application shall include the following information:

(a) certification that the proposed advanced telecommunications infrastructure project provides for improved telecommunications services access to a majority of customers in an unserved or underserved area;

(b) a description of how the proposal will achieve the objectives set forth in 15-53-203(3), MCA;

(c) the total cost of the infrastructure project, the amount of requested tax credits and the expected retail telecommunications excise tax liability during the tax year for which the credits are requested;

(d) a description of the advanced telecommunications infrastructure improvement project including:

(i) a narrative description fully describing the proposed infrastructure project;

(ii) a proposed detailed budget and timeline for completing the project;

(iii) partnerships, consortiums and interconnection agreements, if necessary to complete the project;

(iv) the geographic area in which the advanced telecommunications infrastructure improvements are to be installed and the customers who will be served; and

(v) a complete description of the services and charges for those services currently offered to customers compared to the services and charges that will be available to those customers if the telecommunications service provider installs the advanced telecommunications infrastructure.

(2) Verification that the advanced telecommunications infrastructure improvements will contribute to greater access to advanced telecommunications services and enhance existing telecommunications infrastructure. The company official responsible for the overall business operations in the state of Montana must make such verification in writing.

Auth: Sec. 15-53-203, MCA; IMP, Sec. 15-53-202, 15-53-203, MCA

REASON: Section 15-53-203, MCA, directs the department

to establish a policy for granting telecommunications service providers an infrastructure tax credit. The adoption of the foregoing rules will provide notice to applicants of what information they must provide to the department in order to be considered for a tax credit. The rule will also guarantee uniformity in applications for the tax credit, which will assist the department in determining what applications fulfill the requirements of section 15-53-203, MCA, and what telecommunications infrastructure improvements are most likely to achieve the purposes of that section.

III FACTORS THAT ESTABLISH WHETHER ADVANCED TELECOMMUNICATIONS INFRASTRUCTURE PROVIDE IMPROVEMENTS

(1) In the determination of granting telecommunications service providers an infrastructure tax credit, the department will consider whether the advanced telecommunications infrastructure improvements:

(a) significantly advance individual and business access to advanced telecommunications services at an economically reasonable cost;

(b) promote the development and transition to a fully competitive telecommunications marketplace;

(c) improve public and private K-12, university and library access to advanced telecommunications services;

(d) improve connections between communities in the state; or

(e) increase Montana's health care system's access to interactive telecommunications services.

Auth: Sec. 15-53-203, MCA; IMP, Sec. 15-53-203, MCA

REASON: Section 15-53-203, MCA, directs the department to establish a policy for granting telecommunications service providers an infrastructure tax credit. The adoption of the foregoing rule will provide notice to applicants of what information they must provide to the department in order to be considered for a tax credit.

IV DEPARTMENT REVIEW AND DECISION (1) The department will review and consider each application based on the criteria set forth in [Rule II] and the Act, and whether the proposal is competitive with other proposals received during the application based on the criteria set forth in [Rule II] and the Act.

(2) The department will notify each applicant in writing following the appropriate decision deadline of its tax credit allocation if any. The department will set forth the reason(s) for its decision in the notice.

(3) The department will provide to the Montana department of revenue a list of the companies granted tax credits under this program, the amount of the credit granted and the tax year for which the credit is granted.

Auth: Sec. 15-53-203, MCA; IMP, Sec. 15-53-203, MCA

REASON: Section 15-53-203, MCA, directs the department

to adopt rules establishing policies for granting telecommunications providers an infrastructure tax credit. The adoption of the forgoing rule establishes a procedure for the department to follow when accepting or rejecting applications for the tax credit. The adoption of the forgoing rule will operate to provide applicants with specific reasons for the approval or denial of their applications. It will also ensure that the department considers the statutory goals of section 15-53-203(3), MCA, and the additional information required by these proposed rules when considering a telecommunications service provider's application.

V APPLICATION TIMELINES (1) During the calendar year 2000, applications must be submitted by September 15, 2000, to the department at the following address, Department of Commerce, Economic Development Division, 1424 Ninth Avenue, P.O. Box 200501, Helena, MT 59620-0501. The department will evaluate the applications and notify applicants by October 15, 2000, of the amount, if any, of tax credit that the proposed project has been awarded. For calendar years 2001 through 2004, the application deadline will be October 1st of the preceding calendar year. The department will evaluate the applications and notify applicants within 60 days of the application deadline of the amount, if any, of tax credit that the proposed project has been awarded.

Auth: Sec. 15-53-203, MCA; IMP, Sec. 15-53-203, MCA

REASON: The adoption of the forgoing rule will establish a timeline for applications for the tax credits and decisions on those applications by the department. The rule creates uniformity in the application process and provides applicants, the Department of Commerce and the Department of Revenue with certain dates on when various decisions will be made concerning the acceptance or rejection of the applications.

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 Department of Commerce, Economic Development Division, 1424 Ninth Avenue, P.O. Box 200501, Helena, MT 59620-0501, by e-mail to peohman@state.mt.us or by facsimile number (406)444-2903, to be received no later than 5:00 p.m., August 15, 2000.

5. Peter Ohman has been designated to preside over and conduct this hearing.

6. The Economic Development Division maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this Division. 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 Economic Development Division administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Department of Commerce, 1424 Ninth Avenue, P.O. Box

200501, Helena, MT 59620-0501 or by phone at (406)444-3553, or may be made by completing a request form at any rules hearing held by the agency.

7. The notice requirements of 2-4-302, MCA, apply and have been satisfied.

ECONOMIC DEVELOPMENT DIVISION

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

BY: /s/ Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, July 3, 2000.

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

In the matter of the adoption of new rules in the western fishing district limiting watercraft to no wake speed for lakes 35 acres or less and instituting a no wake zone contiguous to the shoreline on lakes greater than 35 acres	)	NOTICE OF PUBLIC HEARINGS ON PROPOSED ADOPTION

TO: All Concerned Persons

1. The Montana Fish, Wildlife and Parks Commission (commission) will hold public hearings to consider new rules in the western fishing district restricting watercraft to no wake speed on lakes 35 acres or less and instituting a no wake zone contiguous to the shoreline on lakes greater than 35 acres. The hearing dates and places are as follows:

August 3, 2000, 6:00 p.m.
Fish, Wildlife and Parks
Region 2 Headquarters
3201 Spurgin Road
Missoula, Montana

August 8, 2000, 7:00 p.m.
First National Bank
504 Mineral Avenue
Libby, Montana

August 8, 2000, 7:00 p.m.
DNRC Headquaters
124 Airport Road
Plains, Montana

August 12, 2000, 9:00 a.m.
Fish, Wildlife and Parks
Region 1 Headquarters
490 North Meridian Road
Kalispell, Montana

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in these public hearings or need an alternative accessible format of this notice. If you request an accommodation, contact the department no later than 5:00 p.m. on July 21, 2000, to advise us of the nature of the accommodation that you need. For the Kalispell, Libby or Plains hearings please contact Noemi Barta, Region 1 Department of Fish, Wildlife and Parks, 490 North Meridian, Kalispell, MT 59901; telephone (406) 752-5501, fax (406) 257-0349. For the Missoula hearing please contact Virginia

Schmautz, Region 2 Department of Fish, Wildlife and Parks, 3201 Spurgin Road, Missoula, MT 59804, telephone (406) 542-5500, fax (406) 542-5529.

3. The proposed new rules provide as follows:

NEW RULE I DEFINITIONS The following definitions apply to this subchapter:

(1) "No wake" means a speed whereby there is no "white" water in the track or path of the vessel or in created waves immediate to the vessel.

(2) "Public lakes and public reservoirs" means lakes and reservoirs that are legally accessible to the public.

(3) "Western fishing district" means all waters in the state west of the continental divide. A map of the western fishing district is found in the booklet entitled Montana Fishing Regulations published by the department.

AUTH: 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-106, 23-2-501, 87-1-303, MCA

NEW RULE II NO WAKE RESTRICTIONS (1) Persons traveling faster than no wake speed in areas restricted to no wake speed shall be in violation of the rule unless one of the following circumstances apply:

(a) official patrol and search and rescue operations; or

(b) scientific purposes or special events with the director's prior written approval.

AUTH: 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-106, 23-2-501, 87-1-303, MCA

NEW RULE III WESTERN FISHING DISTRICT LAKES 35 ACRES OR LESS (1) All watercraft operating on public lakes and public reservoirs in the western fishing district which contain 35 acres or less of surface water are limited to a controlled no wake speed as defined in [NEW RULE I].

(a) The department shall determine lake size by means of the 1:100,000 scale hydrography layer within the department's geographic information system (GIS).

(b) The department shall determine landownership by means of the 1:100,000 scale landownership layer within the department's GIS and any other methods available to the department.

(2) An alphabetical list of the waters determined by the department pursuant to (1)(a) and (1)(b) of this rule to be restricted by this rule is found in the department's publication entitled Montana Boating Laws (May 2001 ed.), and this list is incorporated by reference as part of this rule. Montana Boating Laws may be obtained by contacting the nearest department regional office or by telephoning the request to (406) 444-4041 or by sending a written request to Department of Fish, Wildlife and Parks, Conservation Education, 1420 East 6th Avenue, P.O. Box 200701, Helena, MT 59620-0701.

(3) Any more specific regulations adopted by the commission pertaining to bodies of water affected by this rule are controlling.

(4) This rule is effective May 15, 2001.

AUTH: 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-106, 23-2-501, 87-1-303, MCA

NEW RULE IV NO WAKE ZONES FOR LAKES GREATER THAN 35 ACRES IN THE WESTERN FISHING DISTRICT (1) This rule applies to any public lake or reservoir in the western fishing district greater than 35 acres and therefore not regulated in [NEW RULE III].

(2) All watercraft on public lakes or reservoirs greater than 35 surface acres within the western fishing district are limited to a controlled no wake speed as defined in [NEW RULE I] from shoreline to 200 feet from the shoreline. The following are exceptions under this rule:

(a) personal watercraft which must maintain a certain minimum operating speed to remain upright and maneuver in the water may travel at that minimum operating speed following the most direct route through the no wake zone to and from shore; and

(b) motorized watercraft towing a water skier from or to a dock or the shore.

(3) Any more specific regulations adopted by the commission pertaining to bodies of water affected by this rule are controlling.

(4) This rule is effective May 15, 2001.

AUTH: 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-106, 23-2-501, 87-1-303, MCA

NEW RULE V PROCEDURE F0R CHANGING WATER SAFETY RESTRICTIONS

(1) Except when emergency situations arise as defined in 2-4-303, MCA water safety rules shall be reviewed annually for consideration of any changes through the repeal, amendment or adoption of new rules. Any individual or entity requesting new water safety regulation or changes to an existing water safety regulation shall postmark or hand deliver their written request and petition to the commission secretary no later than September 30.

(2) An individual or entity may petition the commission to remove or amend the no wake change restrictions or other water safety regulations on a body of water affected by [NEW RULE III] and [NEW RULE IV] by doing the following:

(a) completing a petition requesting the change on forms provided by the department or by using sample form 3 found in the Administrative Rules of Montana, Title 1, chapter 3, Model Rules; and

(b) submitting to the commission secretary, no earlier than August 1 and no later than September 30 of each year, the petition referred to in (a) with a written request to have the proposed rule change included on the commission agenda.

(3) The commission may remove, amend or adopt restrictions

on the body of water specified by the petition.

(4) The department and commission recognize that under 2-4-315, MCA, a response to a rulemaking petition must be made within 60 days after submission of a petition by initiating rulemaking proceedings or denying the petition. This rule constitutes the manner in which the commission will respond to petitions for rulemaking:

(a) except when emergency situations arise as defined in 2-4-303, MCA the commission will respond to all water safety petitions received on or after August 1 or on or before September 30 by beginning rulemaking proceedings or issuing a written denial of the petition; and

(b) except when emergency situations arise as defined in 2-4-303, MCA the commission will respond to all water safety petitions received before August 1 or after September 30 by issuing a written denial but informing the petitioner that the issue will be placed on the commission agenda for discussion at the next commission meeting. If the commission deems it appropriate, rulemaking on the issue may begin after September 30.

AUTH: 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-106, 23-2-501, 87-1-303, MCA

4. The commission is proposing these rules in response to public concern and comment. Since the fall of 1993, when the commission received over 500 comments on a proposed management plan for the Thompson Chain of Lakes, it has been evident that recreationists and homeowners alike saw a need for more uniform boating regulations and new boating regulations. Advancing technology which created watercraft with fewer limitations and greater speed and maneuvering capabilities has raised Montana citizen’s concern regarding public safety, conflicts among different types of recreational users and protection of public waters and wildlife resources on Montana’s lakes. After hearing the public express grave concerns during the Thompson Chain of Lake management plan hearings, the commission invited citizens in the western fishing district (comprised of waters located on the west side of the continental divide) to participate on citizen’s advisory committees. From 1993 through 1995 these committees worked many hours in an effort to assess what the public’s major concerns were and how these concerns could be addressed. The commission held no fewer than 25 public meetings in this endeavor. Also, the 1999 Montana Legislature gave the commission wider authority to regulate boating activities on Montana's waters.

During the recent public scoping process in February of 2000, the commission received hundreds of comments. Of these comments, 75% favored new regulations on public waters in the western fishing district. After a complete review of the suggestions made by the public and department staff, the commission decided that the regulations proposed in this rule notice provided the best and fairest method by which public safety issues, conflicts

among users, and resource protection issues in the western fishing district could be resolved.

5. Concerned persons may present their data, views or arguments, either orally or in writing at the hearings. Written data, views or arguments may also be submitted to Dan Vincent, Fish, Wildlife and Parks, 490 North Meridian Road, Kalispell, MT 59901, or email to davincent@state.mt.us no later than August 22, 2000.

6. The department of Fish, Wildlife and Parks maintains a list of persons interested in both department and commission rulemaking proceedings. Any person wishing to be on the list must make a written request to the department, providing name, address and description of the subject or subjects of interest. Direct the request to Montana Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, Helena, MT 59620-0701.

7. A hearing examiner designated by the department will preside over and conduct the hearings.

By: /s/ Patrick J. Graham
PATRICK J. GRAHAM
Commission Secretary

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

Certified to the Secretary of State July 3, 2000

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

In the matter of the proposed amendment of ARM 24.29.205, 24.29.206, 24.29.207, 24.29.601, 24.29.610, 24.29.627, 24.29.804, 24.29.1733, 24.29.4301, 24.29.4303, 24.29.4314, and 24.29.4321, and the proposed repeal of ARM 24.29.3201 and 24.29.4001, all relating to workers' compensation matters	)	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF 12 EXISTING RULES AND THE REPEAL OF TWO RULES

TO: All Concerned Persons

1. On August 4, 2000, at 10:00 a.m. a public hearing will be held in room 104 of the Walt Sullivan Building (Department of Labor and Industry Building), 1327 Lockey, Helena, Montana, to consider the proposed amendment of 12 existing rules and the repeal of two rules, all related to workers' compensation matters.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing. If you request an accommodation, contact the Department by not later than 5:00 p.m., July 31, 2000, to advise us of the nature of the accommodation that you need. Please contact the Employment Relations Division, Attn: Ms. Linda Wilson, P.O. Box 8011, Helena, MT 59604-8011; telephone (406) 444-6531; TTY (406) 444-5549; fax (406) 444-4140; or e-mail liwilson@state.mt.us. Persons with disabilities who need an alternative accessible format of this document in order to participate in this rule-making process should contact Ms. Wilson.

3. The Department of Labor and Industry proposes to amend the rules as follows: (new matter underlined, deleted matter stricken)

24.29.205 ISSUING ORDERS (1) All orders issued ~~pursuant to 39-71-116, MCA,~~ by the department must be in writing and signed by a department employee.

(2) An order may be issued without a hearing:

(a) as a result of action initiated by the department;

(b) as part of the department's response to inquiries from the public and which leads to a department investigation;

(c) as a result of department investigation, mandated statutorily; or

(d) ~~upon~~ as a result of the receipt of a petition requesting an order.

(3) Any department order issued pursuant to this rule without a hearing may be appealed in the manner provided by law. ~~for administrative review (see ARM 24.29.206), or if required statutorily, as a contested case (see ARM 24.29.207) or considered as a mediation case (see ARM 24.28.101).~~ Appeals can be made to the workers' compensation court after prior statutory remedies have been exhausted (see ARM 24.5.101). ~~However, any party may first seek administrative review of an order, prior to a contested case hearing without affecting that party's statutory remedies.~~

(a) Before a party may request a contested case hearing on an order which is issued by ~~either~~ the uninsured employers' fund without a hearing ~~or the underinsured employers' fund~~ and establishes only the amount of penalty owed and no other issue, the party must first obtain an administrative review of that order pursuant to ARM 24.29.206.

(b) Department determinations rendered by the independent contractor central unit regarding employment status issues are not considered department orders for purposes of these rules. These determinations are issued pursuant to ARM Title 24, chapter 35, subchapters 2 and 3.

AUTH: 2-4-201, 39-71-203 and 39-72-203, MCA
IMP: 2-4-201, 2-4-202, 39-71-116, 39-71-120, 39-71-415 and 39-72-203, MCA

24.29.206 ADMINISTRATIVE REVIEW (1) The department shall conduct an administrative review of ~~any~~ a department order, ~~other than employment status determinations referenced in ARM 24.29.205(4)~~ requested pursuant to ARM 24.29.205(3)(a), for the purpose of resolving the case and avoiding an unnecessary hearing, upon:

(a) receipt of a petition for administrative review which ~~should~~ must contain:

(i) the name and address of the petitioner;

(ii) a short, plain statement of the petitioner's contentions; and

(iii) a statement of the resolution the petitioner is seeking; or

(b) receipt of a written mutual request by all of the parties to the dispute to agree to waive the formal contested case proceedings until an administrative review is conducted in accordance with 2-4-603, MCA.

(2) through (4) Remain the same.

AUTH: 2-4-201, 39-71-203, and 39-72-202, MCA
IMP: 39-71-204 and 39-72-402, MCA

24.29.207 CONTESTED CASES (1) Parties having a dispute involving legal rights, duties or privileges, other than disputes over benefits available directly to a claimant under Title 39, chapters 71 and 72, MCA, where the dispute is one over which the department has jurisdiction to hold a hearing, must bring the dispute to the department for a contested case hearing. ~~Such disputes include, but are not limited to:~~

~~(a) disputes regarding attorneys' fee agreements~~

~~(39-71-613, MCA);~~

~~(b) disputes regarding applications for exemption of independent contractors and employment status determinations (39-71-401, MCA);~~

~~(c) disputes regarding certification as vocationally handicapped under Title 39, chapter 71, part 9, MCA;~~

~~(d) disputes regarding payment of benefits or liability involving the subsequent injury fund;~~

~~(e) disputes regarding payments to medical providers when benefits available directly to claimants are not an issue (ARM 24.29.1404);~~

~~(f) disputes regarding the waiver of the one year statute of limitations up to an additional 24 months (39-71-601, MCA);~~

~~(g) disputes regarding the medical condition of a claimant when the department has been requested to order an independent evaluation (39-71-605, MCA);~~

~~(h) disputes regarding suspension of payments pending receipt of medical information (39-71-607, MCA);~~

~~(i) disputes regarding requests for orders requiring insurers to pay benefits pending a termination hearing (39-71-610, MCA);~~

~~(j) disputes regarding department orders concerning palliative or maintenance care under 39-71-704, MCA;~~

~~(k) disputes regarding the renewal, revocation or suspension of certification as a managed care organization (39-71-1103 and 39-71-1105, MCA);~~

~~(l) disputes regarding applications to modify a managed care organization plan (39-71-1103 and 39-71-1105, MCA); and~~

~~(m) disputes regarding department orders that determine occupational disease issues (Title 39, chapter 72, part 6, MCA).~~

(2) A contested case concerning employment classifications assigned to an employer by an insurer is administered by the classification review committee in accordance with 33-16-1012, MCA.

(3) A contested case held by the department under Title 39, chapters 71, 72 or 73, MCA, ~~other than of the type referenced in ARM 29.29.207(2),~~ is administered by the department in accordance with ARM 24.2.101 and 24.29.201(2).

~~(4) The workers' compensation court is an appeal court for final orders, other than employment status decisions, made by the department pursuant to ARM 24.29.207(1), (2) and (3). Final decisions regarding employment status issues pursuant to ARM 24.29.207(1)(c), and ARM Title 24, chapter 35, subchapters 2 and 3 are appealable to the board of labor appeals pursuant to ARM 24.35.213.~~

AUTH: 2-4-201, 39-71-203 and 39-72-203, MCA
IMP: Title 2, chapter 6, part 6, 39-71-204, 39-71-415, 39-71-2905, 39-72-611 and 39-72-612, MCA

24.29.601 DEFINITIONS For the purposes of ARM Title 24, chapter 29, subchapter 6, the following definitions apply:

(1) through (6) Remain the same.

(7) "Employer" means an "employer" as defined in 39-71-117(1), MCA, except ~~that~~ those state agencies that are

excluded from the definition pursuant to 39-71-403, MCA.
(8) through (11) Remain the same.
AUTH: 39-71-203, MCA
IMP: 39-71-403 and 39-71-2101 through 39-71-2108, MCA

24.29.610 WHEN SECURITY REQUIRED (1) through (3) Remain the same.

(4) A security deposit for pre-guaranty fund workers' compensation liabilities must be deposited with the department by the applicant, when ordered by the department. No concurrence of the guaranty fund is required.
AUTH: 39-71-203 and 39-71-2106, MCA
IMP: 39-71-403 and 39-71-2106, MCA

24.29.627 RIGHT TO REVIEW (1) If the application to self-insure is denied, the applicant may request an administrative review in accordance with ARM 24.29.206. If the applicant does not agree with the department's decision after completion of administrative review procedures, ~~it~~ the applicant may request a contested case hearing ~~procedures in accordance with ARM 24.29.207~~.
AUTH: 39-71-203, MCA
IMP: 39-71-403, 39-71-2101 through 39-71-2108, and 39-71-2905, MCA

24.29.804 ADJUSTERS IN MONTANA (1) ~~Every insurer is required to designate at least one adjuster, maintaining an office in Montana, which shall pay compensation when due and which shall have authority to settle claims.~~ All workers' compensation and occupational disease claims filed pursuant to the Montana Workers' Compensation and Occupational Disease Acts must be adjusted by a person in Montana. For the purposes of this rule, a claim is deemed to be "adjusted by a person in Montana" if the person who can determine entitlement to benefits, authorize payment of all benefits due, manage the claim and has authority to settle the claim, maintains an office that is located in Montana and adjusts Montana claims from that office. The use of a mail box or mail drop located in Montana does not constitute maintaining an office in Montana.

(2) An insurer must maintain the documents related to each claim filed with the insurer under the Montana Workers' Compensation or Occupational Disease Acts at the office of the person adjusting the claim in Montana. The documents may either be original documents or duplicates of the original documents, and must be maintained in a manner which allows the documents to be retrieved from that office and copied at the request of the claimant or the department. Electronic or optically imaged documents are permitted by this rule.
AUTH: 39-71-203, MCA
IMP: 39-71-105, 39-71-107 and 39-71-203, MCA

24.29.1733 DISALLOWED REHABILITATION EXPENSES (1) The department will not authorize the use of trust funds for any of the following items:

~~(a) travel or living expenses;~~
(b) and (c) Remain the same, but are renumbered (a) and (b).
(2) Remains the same.
AUTH: 39-71-203, MCA
IMP: Title 39, chap. 71, part 10, MCA

24.29.4301 PURPOSE (1) and (2) Remain the same.
(3) The department anticipates that over time it will receive a majority of the reports required by these rules via electronic reporting. ~~Although electronic reporting presently is voluntary, reporting parties should consider the likelihood of a future requirement for mandatory electronic reporting when planning their future information systems needs.~~
AUTH: 39-71-203, MCA
IMP: 39-71-225, MCA

24.29.4303 DEFINITIONS For the purpose of this subchapter, the following definitions apply, unless the context of the rule clearly indicates otherwise:
(1) "ANSI" means the American national standards institute, which serves as administrator and coordinator of the United States private sector voluntary standardization system.
(1) through (3) Remain the same, but are renumbered (2) through (4).
~~(4)~~ (5) "Data base system" means the electronic repository for workers' compensation data ~~base system~~ established by 39-71-225, MCA.
(5) and (6) Remain the same, but are renumbered (6) and (7).
(8) "Electronic data interchange" means the intercompany exchange of standard business documents in a machine readable and standardized form.
(7) Remains the same, but is renumbered (9).
(10) "IAIABC" means the international association of industrial accident boards and commissions, which is an international association of workers' compensation administrators that establishes standards on reporting industrial accidents.
(8) through (10) Remain the same but are renumbered (11) through (13).
(14) "Third-party administrator" means an adjuster, contracted to adjust a claim on behalf of the insurer.
(15) "Trading partner" means the entity which actually transmits the data to the department, excluding the intermediary channels that are used to get it to that final point, even if those channels include the legally responsible regulated party.
(11) Remains the same, but is renumbered (16).
AUTH: 39-71-203, MCA
IMP: 39-71-225, MCA

24.29.4314 ELECTRONIC REPORTING (1) and (2) Remain the same.
(3) Electronic reporting for the first report of injury

and the subsequent report ~~may~~ must be done pursuant to ~~either the IAIABC flat file format or the American national standards institute (ANSI)~~ electronic reporting standards X.12 format. The department will not accept electronic reports submitted in any other formats.

(4) Remains the same.

AUTH: 39-71-203, MCA
IMP: 39-71-225, MCA

24.29.4321 INSURER REPORTING REQUIREMENTS--INJURIES AND OCCUPATIONAL DISEASES (1) All insurers and the UEF are required to submit the first report of injury/occupational disease to the department ~~by the designated reporting office~~ within 30 days of the report to the insurer of the accident or of an occupational disease. ~~A first report of injury must be submitted for every accident or occupational disease.~~ The designated reporting office must submit a first report for every claim whenever there is a triggering event. The triggering events for a first report are:

(a) every industrial accident or occupational disease; or

(b) notification by the department that a previously submitted report contains a data error.

(2) All insurers and the UEF are required to submit to the department a subsequent report for every indemnity claim. The designated reporting office shall submit a subsequent report for every indemnity claim ~~whenever there is a triggering event~~ within 14 days of the occurrence of any one of the following triggering events for a subsequent report:

(a) the initial payment of compensation benefits ~~or the reopening of a closed claim~~;

(b) each 6 month anniversary of the injury or occupational disease, while the claim is open;

(c) notification by the department that a previously submitted report contains a data error;

(d) reinstatement of benefits on a previously closed claim;

(c) and (d) Remain the same, but are renumbered (e) and (f).

(3) ~~Subsequent reports are to be submitted within 10 days following the triggering event.~~ An insurer or a third-party administrator that submitted 50 or more first reports of injury/occupational disease to the department in the preceding calendar year must submit medical bill data electronically to the department. Beginning July 1, 2001, medical bill data specified in the trading partner agreement resulting from an injury or occupational disease claim paid on or after July 1, 2000, must be submitted to the department within 30 days of the end of the preceding calendar quarter.

(4) ~~Although this rule becomes effective October 1, 1994, in order that insurers have adequate time to prepare for compliance with these rules, reporting is not required until January 1, 1995.~~ The department will identify transmission errors and notify the trading partner via the electronic acknowledgment record. The trading partner must correct the

identified errors and resubmit the record within 14 days of receiving the acknowledgment record.

(5) The department may impose penalties as specified in 39-71-307, MCA, upon insurers that fail to comply with these reporting requirements.

AUTH: 39-71-203, MCA
IMP: 39-71-225, MCA

REASON: There is reasonable necessity to amend ARM 24.29.205, 24.29.206 and 24.29.207 in order to distinguish between matters that are heard by the Department and those heard by the Workers' Compensation Court, to conform the Department's rules regarding administrative hearings to jurisdictional changes enacted in Chapter 442, L. of 1999 (House Bill 592), and to remove outdated references to programs or functions that no longer exist. Because some cases pending before the Department's hearing process were subject to an election of forum pursuant to Chapter 442, the rules were not proposed for amendment until now so as not to confuse parties that elected to stay in Department contested cases. Most, if not all of those cases have made the election, and therefore the amendments are proposed to eliminate confusion regarding newly arising claims and rights.

There is reasonable necessity to amend ARM 24.29.601, 24.29.610, and 24.29.627 to clarify matters involving self-insurers. In particular, the amendment to ARM 24.29.601 recognizes that the state university system may elect coverage other than through the State Compensation Insurance Fund effective July 1, 2000. The amendment to ARM 24.29.610 clarifies the Department's ability to obtain additional security when a Plan No. 1 self-insured employer has pre-guaranty fund claim liability, which may be applicable as the Montana Power Company leaves the power generation and distribution business, sells those assets, and distributes the proceeds to its shareholders. The amendments to ARM 24.29.627 are technical wording changes for style purposes.

There is reasonable necessity to amend ARM 24.29.804 in order to further clarify the obligations of insurers to have Montana-based adjusters handle Montana workers' compensation and occupational disease claims. The Department has recently noted a marked increase in claim handling problems that appear linked to out-of-state adjusters' lack of familiarity with the requirements of Montana law.

There is reasonable necessity to amend ARM 24.29.1733 in order to allow certain payments to be made using the rehabilitation fund, based on insurer's requests to authorize such use.

There is reasonable necessity to amend ARM 24.29.4301, 24.29.4303, 24.29.4314 and 24.29.4321 in order to ensure that Montana standards for electronic submission of claim information are compatible with the emerging national trends regarding standardization of format and submission protocols. Numerous insurers and vendors have requested that Montana data submission

requirements use national standard compatible format and elements in the operation of the data base system.

4. The Department proposes to repeal the following rules:

<u>24.29.705 CORPORATE OFFICER EXEMPTION</u>
AUTH: 39-71-410, MCA
IMP: 39-71-410, MCA
ARM page 24-2095

<u>24.29.4001 SECURITY DEPOSITS FOR PLAN NUMBER TWO INSURERS</u>
AUTH: 39-71-203, MCA
IMP: 39-71-2206, MCA
ARM page 24-2375

<u>REASON</u>: There is reasonable necessity to repeal ARM 24.29.3201 because the provisions of 39-71-401 (1)(q), MCA, now provide that certain corporate officers are automatically excluded from the coverage requirements of the Workers' Compensation Act. Likewise, there is reasonable necessity to repeal ARM 24.29.4001 because the section implemented, 39-71-2306, MCA, was repealed and all deposits held by the Department pursuant to the rule and statute have been returned to the insurers.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to:

Keith Messmer
Workers' Compensation Regulations Bureau
Employment Relations Division
Department of Labor and Industry
P.O. Box 8011
Helena, Montana 59604-8011

and must be received by no later than 5:00 p.m., August 11, 2000. Comments may also be submitted electronically as noted in the following paragraph.

6. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://dli.state.mt.us/calendar.htm, under the Calendar of Events, Administrative Rule Hearings section. Interested persons may make comments on the proposed rules via the comment forum, http://forums.dli.state.mt.us, linked to the Notice of Public Hearing, but those comments must be posted to the comment forum by 5:00 p.m., August 11, 2000. The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or

technical problems, and that a person's technical difficulties in accessing or posting to the comment forum does not excuse late submission of comments.

7. The Department maintains a list of interested persons who wish to receive notices of rule-making actions proposed by this agency. 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 any specific topic or topics over which the Department has rule-making authority. Such written request may be delivered to Mark Cadwallader, 1327 Lockey St., room 412, Helena, Montana, mailed to Mark Cadwallader, P.O. Box 1728, Helena, MT 59624-1728, faxed to the office at (406) 444-1394, or made by completing a request form at any rules hearing held by the Department.

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

9. The Department proposes to make the amendments and repeals effective October 1, 2000. The Department reserves the right to adopt only portions of the proposed amendments, or to adopt some or all of the proposed amendments at a later date.

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

/s/ KEVIN BRAUN	/s/ KEVIN BRAUN
Kevin Braun	Kevin Braun for the Commissioner
Rule Reviewer	DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: July 3, 2000.

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

In the matter of the amendment of ARM 37.108.229 pertaining to continuity of care and transitional care provided by managed care plans	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Interested Persons

1. On August 2, 2000, at 10:00 a.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed amendment of the above-stated rule.

The Department of Public Health and Human Services will make reasonable accommodations at the public hearing 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 department no later than 5:00 p.m. on July 24, 2000, 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 rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.108.229 CONTINUITY OF CARE AND TRANSITIONAL CARE

(1) A health carrier must allow the following new enrollees to continue to receive services from their previous providers for the time periods noted below, so long as those providers agree to abide by the payment rates, credentialing, referral process, quality-of-care standards and protocols, and reporting standards that apply to comparable participating providers:

(a) a new enrollee with a life-threatening, disabling or degenerative condition may obtain care from their previous provider for a period of 60 days, beginning the date of the enrollee’s enrollment with the health carrier;

(b) a new enrollee who has received a diagnosis of terminal illness with life expectancy of less than 6 months, may continue to obtain care from their previous provider until death if it occurs prior to the end of the 6 month period, or, if it does not, for a period of 6 months from the date of the enrollee's enrollment with the health carrier, unless the period is extended after the enrollee's medical needs and the appropriateness of requiring a transition to a participating

provider are reassessed. Such a reassessment must be conducted at or before the end of the 6 month period by the health carrier for such a terminally ill enrollee; and

(c) a new enrollee in the second or third trimester of pregnancy may obtain care from their previous provider through the completion of postpartum care.

(2) A health carrier must allow enrollees ~~in the categories~~ with the medical conditions described in (1)(a) through (1)(c) above to continue to receive services from their existing providers when their provider's contract is terminated by the carrier without cause or when the provider voluntarily terminates their contract with the carrier, so long as those providers agree to abide by the payment rates, credentialing, referral process, quality-of-care standards and protocols, and reporting standards which apply to comparable participating providers. The time periods during which such continued services are allowed are the same as those specified in (1)(a) through (1)(c) above, with the exception that, for the conditions described in (1)(a) and (1)(b), the time period begins on the date the provider's contract is terminated, rather than the date of the enrollee's enrollment with the health carrier.

(3) A health carrier may not hold an enrollee covered by this rule responsible for any additional payments, copayments, co-insurance or deductibles beyond what would be required if the services were provided by a participating provider.

AUTH: Sec. 33-36-105, MCA
IMP: Sec. 33-36-105 and 33-36-201, MCA

3. The above proposed changes are necessary for the following reasons.

The purpose of the network adequacy rules of which ARM 37.108.229 is a part is to establish standards for the creation and maintenance of networks by health carriers offering managed care plans and to ensure the adequacy, accessibility, and quality of health care services offered under a managed care plan. ARM 37.108.229 is intended to ensure that an enrollee with one of the specified health conditions particularly requiring continuity of care by their provider but whose provider is not participating in the plan may continue to utilize that provider for specified periods of time so long as the provider meets certain conditions. The proposed amendments are intended to eliminate discrepancies in the standards that were not intended but inadvertent.

Subsection (1) sets standards that must be met in order for the non-participating providers of new enrollees with certain conditions to continue to provide services to those enrollees; subsection (2) is intended to set parallel standards for the continuation of services by a provider to an existing rather than new enrollee when the provider leaves the plan. However, while subsection (1) requires a non-participating provider to

meet the plan's credentialing and referral standards, subsection (2) inadvertently does not, a result that was not intentional or logical. Since there is no good reason for the distinction, subsection (2) is amended to require non-participating providers to meet the plan's credentialing and referral standards, as well as the plan's payment rates, quality-of-care standards, protocols, and reporting standards, the latter of which are already required.

Again, subsection (2) is amended to clarify that it applies to enrollees with the medical conditions described in subsection (1), which the reference to "categories" does not clearly do. The change is strictly to add clarity and is not a substantive change.

Subsection (2) is also amended to incorporate the time limits cited in subsection (1). As the language now stands, existing enrollees whose providers leave the plan would be able to continue with that provider indefinitely, unlike new enrollees, for whom time limits are specified. There is no reason to distinguish in that manner between the two groups of enrollees, and allowing both to continue with their original but non-participating providers indefinitely would unreasonably provide a disincentive for providers to join the plan.

Finally, subsection (2) is amended to also cover the circumstance when an otherwise qualifying provider voluntarily exits the plan. The provision already covers the circumstance when a provider's plan contract is terminated without cause, and should be amended to include the parallel circumstance when a provider voluntarily leaves the plan on his or her own volition. In either case, without the protection this rule is intended to provide, the enrollee may be left without their provider while particularly needing the services of that provider due to the existence of one of the conditions listed in subsection (1). Therefore, the amendment is advisable to provide enrollees with needed protection when their providers leave the plan.

Other options were not considered because the primary purpose of the amendments is to clarify and add what was inadvertently omitted from the original adopted rule and because, otherwise, the department would not be providing equal protection to both new and current enrollees of a managed care plan.

4. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Kathy Munson, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than 5:00 p.m. on August 10, 2000. 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.

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

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

Certified to the Secretary of State July 3, 2000.

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

In the matter of the adoption of a rule for the administration of the 2000 Federal Community Development Block Grant Program	)	NOTICE OF ADOPTION OF A RULE (8.94.3716) PERTAINING TO THE ADMINISTRATION OF THE 2000 FEDERAL COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM

TO: All Concerned Persons

1. On January 27, 2000, the Local Government Assistance Division published notice of a public hearing on the proposed adoption of the above-stated rule at page 126, 2000 Montana Administrative Register, issue number 2. The Local Government Assistance Division convened the hearing on February 16, 2000. Written comments were accepted until 5:00 p.m., February 24, 2000.

2. The Local Government Assistance Division has adopted 8.94.3716 exactly as proposed. However, in response to comments received during the public comment period, the Department has made several changes in the application guidelines.

3. No members of the public attended or testified at the hearing, but a number of persons attended and testified at an earlier, informational hearing held on February 3, 2000, and the Department received several written comments during the public comment period provided for by the Administrative Procedure Act. Except as noted below, these comments supported the changes proposed by the Department. A summary of the negative comments, and the Department's responses to them follows:

COMMENT NO. 1: The Department has proposed to increase the grant ceiling for both Housing and Community Revitalization projects and Public Facility projects from the current $400,000 to $500,000. This proposal is undesirable because it would result in fewer projects being funded than have been in the past.

RESPONSE: Only one commentor objected to the proposed increase, while numerous commentors supported it. The grant ceiling has been $400,000 since 1979 when the Department first assumed responsibility for administering the program from HUD, and the higher amount simply reflects the increase in the cost of projects over the past 20 years.

The higher ceiling should be viewed as a maximum, not a minimum, amount which the Department believes will allow it to respond more appropriately to current project costs. The Department has adopted the $500,000 grant ceiling for Housing and Community Revitalization and Public Facilities projects for the 2000 CDBG program.

COMMENT NO. 2: The Department has proposed three new policies to encourage grant recipients to expend grant funds more quickly and complete projects faster. Two of these policies relating to the number of grants a jurisdiction can receive and conditions that must be met before a past grantee can apply for a new grant will unduly limit the ability of local governments to obtain needed funding.

RESPONSE: Because Congress and HUD have been placing increased pressure on the states to expend federal funds in a more timely manner. Under the 1999 program guidelines, a local government was eligible to receive two CDBG grants per year, one for Public Facilities and one for Housing and Community Revitalization. To encourage grant recipients to complete their current projects as soon as possible, the Department had proposed to provide that during any program year a local government would be eligible to receive only one grant from either the Public Facilities or the Housing and Community Revitalization category.

The Department has withdrawn this proposal. For the 2000 program year local governments will continue to be eligible to apply for and receive two CDBG grants per year, one for Public Facilities and one for Housing and Community Revitalization.

For many years, the Department's CDBG guidelines have specified that, if an applicant has an open CDBG grant project, the older the earlier grant award, the higher the percentage of funds that must have been expended in order to be eligible to reapply. This system provided an additional incentive for CDBG recipients to complete their current projects as expeditiously as possible.

For 2000, the Department had proposed to modify this policy to provide that a recipient of a previous CDBG award under either the Housing and Community Revitalization or Public Facility category would not be eligible to reapply for CDBG funding until the following draw-down conditions had been met:

FY 1999 grantees -- 75 percent of CDBG non-administrative funds must be drawn or activities completed by the date of application.

FY 1998 grantees -- 90 percent of CDBG non-administrative funds drawn or activities completed by the date of application.

FY 1997 grantees -- 100 percent of CDBG non-administrative funds drawn and expended, project completion report submitted, and audit scheduled by the date of application.

FY 1996 grantees and all earlier years -- Project closed out (conditional or final) by the date of application.

The Department has withdrawn its proposal to link draw-down requirements on past Housing and Community Revitalization and Public Facility projects to new applications for either category. Accordingly, the draw-down percentage requirements will continue to apply only to past grants in the category being applied for.

However, to provide a stronger incentive for local governments to complete current projects before they apply for another grant, the Department has increased the completion requirement from 75 to 90 percent for one-year-old (FY 1999) projects and from 90 to 100 percent for two-year-old (FY 1998) projects. Applicants with three-year-old (FY 1997) and older projects will be required to have their project closed out by the date of application.

COMMENT NO. 3: The Department's proposed new utility target rates are not "reasonably affordable," since they represent an increase of about 35 percent over the previous target rates.

RESPONSE: A key goal of CDBG assistance for Public Facilities projects is to help ensure that infrastructure projects are kept reasonably affordable for communities to construct. Target rates are used by the Department to help ensure that applicants' residents are contributing their fair share towards a proposed project. Based on the results of a recent survey of the water and wastewater user rates paid by Montana communities, the Department had originally proposed to increase the target rates contained in the 2000 Application Guidelines over those contained in the 1999 guidelines from 1.4 to 1.8 percent of Median Household Income (MHI) for communities with only a water system, from .8 to 1.2 percent MHI for communities with only a wastewater system, or from 2.2 percent to 3 percent of MHI for communities with both water and wastewater systems.

The Department has withdrawn the proposed increase in target rates and the rates in the 2000 guidelines will remain as they were in the 1999 guidelines.

COMMENT NO. 4: The scoring system contained in the 2000 Guidelines should place greater emphasis on the community's need for the proposed project and less on the thoroughness of the applicant's planning and needs assessment efforts than did the 1999 Guidelines. Although community planning and needs assessment are important, they should not "over-shadow" the fundamental "Need for Project" criterion which typically is linked to a serious public health or safety problem.

RESPONSE: This proposal received universal support from the constituents of the CDBG program, and the Department concurs. For the 2000 CDBG program the Department has shifted 25 ranking points from the "Community Planning and Needs Assessment" ranking criteria to the "Need for Project" criteria.

COMMENT NO. 5: The Department proposed that for the 2000 program year employee training would be an eligible use of CDBG Economic Development funds. The concept is an interesting one, but there are many questions as to how it would be implemented. For example, could the grant funds be considered

to be part of the owner's capital requirement, and would it require local match? This proposal should be clarified and resubmitted for public review before it is finally adopted.

A well-documented, well-designed, job training program that can capitalize on the skills of Montana workers would certainly be desirable, but the following questions and concerns should be addressed before the proposal is adopted:

1. Absent a job ladder, upon which workers can advance, and which many Montana small businesses cannot provide, development of a significant job training program does not make much sense.

2. "Job training" in the form of grant assistance which trains employees to answer the telephone but does not add any high-value skills to Montana workers is really just a public equity injection that underwrites start-up costs for a business.

3. If the Department is going to offer CDBG funds as an incentive for companies to locate in Montana, this should be a conscious decision, and the benefits of using CDBG funds in this way should be carefully weighed.

4. This proposed use of CDBG may not represent the desires or interests of the entire state.

5. How will the Department assure equity for all businesses across the state if it begins participating in incentive recruitment efforts?

6. What areas of training warrant public subsidy?

7. What results in terms of wage rates, benefits, etc., should be expected?

8. Who should provide the training?

9. What about assisting existing companies that technologically upgrade their manufacturing processes to create a higher-paying job?

10. How can we upgrade job quality for Montanans beyond entry-level, when the disparity between those in Montana and in other parts of the country is so extreme?

11. We need to coordinate any proposed job training with the existing job training system.

<u>RESPONSE</u>: The Department has developed funding criteria to address each of the points laid out in the memorandum issued February 17, 2000, by the administrator of the Department's CDBG Economic Development program. These criteria respond to the comments summarized above and have been incorporated into the 2000 program year guidelines.

The purpose of the new funding activity is to assist new or expanding businesses in improving job-skill training and providing better-paying jobs for their workers. The Department has developed criteria that will favor applications that meet the purpose of this new funding activity. Under these criteria a proposed hiring and training plan will be acceptable only if it provides that:

1. After they receive training employees will be paid 150 percent of the federal poverty level for an individual, which is currently $7.03 per hour. Job benefits paid in

addition to the hourly wage would be expected but not required.

2. The grant funds will have to be returned to the local government applicant if this higher pay level required is not achieved.

3. If the company ceases operations, the grant funds for training will have to be reimbursed to the local government applicant.

4. Training costs will have to be documented and will be reimbursed only when deemed appropriate.

5. Training will be customized.

The proposed labor-training component of the CDBG program will allow low- and moderate-income employees, not specifically targeted by an existing program, to enhance their skills and income earning potential while contributing to the local economy. The absence of this component may impede much-needed business expansion and development.

COMMENT NO. 6: Currently there are millions of dollars available to the state for employee training through various programs. Scarce CDBG dollars should not be diverted from use as direct loans to businesses when there are other programs in place to meet employee-training needs.

RESPONSE: Although it is true that several programs provide funds for job training, most of these focus on special-needs client groups and are not available to support the more generalized employee-training efforts associated with new and expanding businesses.

COMMENT NO. 7: The Department has proposed to eliminate the creation of multi-project, revolving loan funds as eligible CDBG projects. This is a mistake because in southeastern Montana economic development opportunities lie principally with smaller projects that can benefit most from these funds. Futhermore, these smaller projects help to diversify the risk of the organizations that administer economic development programs in this region of the State. These organizations will be unable to compete successfully for statewide funding with larger organizations that serve the more populous areas of the state.

RESPONSE: Multi-project revolving loan fund programs both in southeastern Montana and across the state, have generally been slow to identify projects and spend the CDBG funds that have been made available to them within the two-year contract period. In addition, this method of distributing funds has required a much greater administrative effort for the state and local governments than have larger, stand-alone, projects that were ready to proceed upon approval of funding. Consequently, a relatively high percentage of CDBG funds were spent on administrative costs rather than actual loans.

Communities may still apply for more than one business each program year. The Department has consistently funded projects in rural areas throughout the State of Montana, and will continue to do so.

4. No other testimony or comments were received.

LOCAL GOVERNMENT ASSISTANCE DIVISION
DEPARTMENT OF COMMERCE

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

BY: /s/ Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, July 3, 2000.

BEFORE THE PETROLEUM TANK RELEASE COMPENSATION BOARD
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.58.311 pertaining to definitions	)	NOTICE OF ADOPTION (PETROLEUM BOARD)

TO: All Concerned Persons

1. On May 25, 2000, the Petroleum Tank Release Compensation Board published notice of the proposed amendment to ARM 17.58.311 pertaining to definitions at page 1278 of the 2000 Montana Administrative Register, Issue No. 10.

2. The Board has amended ARM 17.58.311 as proposed.

3. No comments were received.

PETROLEUM TANK RELEASE COMPENSATION BOARD

by: *Tim Hornbacher*
TIM HORNBACHER, Chair

Reviewed by:

David Rusoff
David Rusoff, Rule Reviewer

Certified to the Secretary of State July 3, 2000.

BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA

In the matter of amendment of ARM 32.24.301 regarding the pricing of producer milk; and the repeal of ARM 32.24.521 and 32.24.522 and amendment of ARM 32.24.523 in regards to utilization, procedures to purchase and marketing of surplus milk	)	CORRECTED NOTICE OF AMENDMENT AND REPEAL DOCKET NO. 1-00

To: All Concerned Persons

1. On May 25, 2000, the Montana board of milk control published a notice of the amendment and repeal of the above-captioned rules at page 1336 of the 2000 Montana Administrative Register, Issue No. 10. On June 29, 2000, the Montana board of milk control published a corrected notice of amendment and repeal at page 1652 of the 2000 Montana Administrative Register, Issue No. 12.

2. The reason for the correction is because of scheduling conflicts among the board of milk control members and counsel which has delayed finalization and issuance of the board's findings of fact, conclusions of law, and order concerning implementation of a flexible floor price. The board has extended the effective date to be September 1, 2000, rather than August 1, 2000.

DEPARTMENT OF LIVESTOCK

By: /s/ Marc Bridges
Marc Bridges, Exec. Officer,
Board of Livestock
Department of Livestock

By: /s/ Bernard A. Jacobs
Bernard A. Jacobs, Rule Reviewer
Livestock Chief Legal Counsel

Certified to the Secretary of State July 3, 2000.

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

In the matter of the adoption of Rule I and the amendment of ARM 37.40.307, 37.40.308, 37.40.326 and 37.40.361 pertaining to nursing facility reimbursement	))))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Interested Persons

1. On May 11, 2000, the Department of Public Health and Human Services published notice of the proposed adoption and amendment of the above-stated rules at page 1208 of the 2000 Montana Administrative Register, issue number 9.

2. The Department has amended rules 37.40.307, 37.40.308, 37.40.326 and 37.40.361 as proposed.

3. The Department has adopted the rule I (37.40.311) as proposed.

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

COMMENT #1: The Department has responsibility under federal law and regulations to set Medicaid reimbursement rates for nursing facilities that are consistent with efficiency, economy and quality of care. The rates generated under the proposed rules are about $9 per resident per day below the average cost of providing care. Sixty-two of the ninety-seven facilities for which the Department calculated proposed rates (64%) will receive rates that are less than their actual allowable cost of providing care. Fifty-eight facilities (60%) would receive rates under the proposal that are less than their actual cost for nursing staff. Sixty-five facilities (67%) would receive an operating rate under the proposal that is less than their actual operating costs.

Federal policy once mandated adequate payments, but the issue did not disappear with repeal of the Boren Amendment. The Department remains responsible for setting reimbursement payments that provide Medicaid beneficiaries access to high quality nursing facility care. The rates should be reasonably reflective of the cost of caring for Medicaid nursing facility residents in a manner consistent with quality of care mandates established by federal law and regulation.

RESPONSE: The Department does not agree that federal law or regulations require Medicaid rates to cover all of the actual costs incurred by nursing facility providers. This has not been

the standard by which the legal adequacy of rates has been measured in the past nor is it a standard likely to be adopted in the foreseeable future. The Department's proposed rates are reasonable and adequate and in compliance with all requirements.

The Department plans to make changes to its system of Medicaid reimbursement for nursing facility providers during fiscal years 2002/2003. The anticipated changes would move toward a system of Medicaid reimbursement with a narrower range of rates paid to nursing facilities and with more stability in the levels of reimbursement paid to all facilities. The anticipated rates would offer better recognition of the increasing levels of acuity of residents being admitted to nursing homes. They would also serve to lessen the volatility of the rate setting process, which historically has resulted in dramatic rate increases and decreases in years that updated cost information was recognized in the system of reimbursement. The Department plans to mitigate volatility by decoupling the system of reimbursement from the facility specific costs being incurred by each nursing facility. Instead, the Department would move to a system of reimbursement based on an established price for nursing facility services.

For fiscal year 2001, all providers will receive a $.50 increase in their per diem rate in effect on June 30, 2000. In addition, they will receive $2.23 in a direct-care wage add-on for a total increase of $2.73. Facilities below the statewide median will receive additional rate increases to bring their rate of reimbursement closer to the statewide median rate as part of a transition to the new price-based methodology. The increase in the statewide average rate from fiscal year 2000 to fiscal year 2001 will be $3.15 per day. On average, Medicaid rates would increase 3.34% for fiscal year 2001, an amount comparable to the rate of inflation for skilled nursing facilities. No facilities will experience a rate decrease during fiscal year 2001.

COMMENT #2: Rates are set based on legislatively appropriated bed days which envisioned a one-half percent increase in bed days. Nursing facility occupancy and Medicaid days has been trending downward for several years. Thus, additional funding should be available to increase rates above what is being proposed. Discussions with the Department indicate that, as of the time of the proposed rules, all available funding included in the Medicaid appropriation for nursing facilities is expected to be spent under the proposal. The Department should review its estimates before January 1, 2001 and propose rate increases retroactive to July 1, 2000 if it finds that bed days are following the trend downward and if funds are available within the nursing facility appropriation.

RESPONSE: Under the Department's proposed rate setting approach, all appropriated state funding for nursing facility reimbursement will be spent in fiscal year 2001. The FY 2001 Medicaid rates for each facility multiplied by the Medicaid

annualized bed days for each facility would equal the total appropriated funding for Fiscal Year 2001. The Department will continue to analyze and monitor its budget projections and bed day usage during the first six months of fiscal year 2001. The Department will use staffing report information as a leading indicator for nursing home bed day utilization during the next fiscal year to determine if there will be any unspent funding based on declining bed day utilization. The Department will reassess its projections in December and will determine if any funding is available for redistribution to nursing facility providers. The Department will invite nursing home association representatives to participate in a discussion of how unspent funding would be distributed should any become available.

COMMENT #3: The rate proposal does not take into account the level of care required by residents in nursing facilities. Does the Department intend to factor acuity into its new price-based reimbursement system when that is developed? It is important that future reimbursement proposals will recognize differences in resident acuity. The new reimbursement system should recognize high-acuity outliers to assure that facilities can admit and care for unusually heavy care residents for whom access might otherwise be an issue.

RESPONSE: The Department intends to develop a Medicaid nursing facility reimbursement system utilizing Minimum Data Set Information in the development of a Medicaid Case Mix Index to recognize acuity differences in future rate setting periods. The Department, with input from the nursing facility reimbursement work group is discussing the development of a price-based system of reimbursement for nursing facility providers. The anticipated changes would offer better recognition of the increasing levels of acuity of residents being admitted to nursing facilities. They would also serve to lessen the volatility of the rate setting process, which historically has resulted in dramatic rate increases and decreases in years that updated cost information was recognized in the system of reimbursement. In conjunction with the development of an acuity adjustment factor, the Department will look at heavy care or outlier populations to determine the best approach for recognizing them in the rate setting process. The Department invites suggestions from the association representatives and providers about the type of adjustment that would be appropriate to maintain these heavy care residents in a nursing facility setting with adequate Medicaid reimbursement.

COMMENT #4: One Commentor supported the proposal to provide additional per diem rate increases for county facilities whose rates are below the statewide median Medicaid rate by intergovernmental fund transfers. The Commentor urged the Department to grant all county-funded nursing facilities an opportunity to receive unspent federal Medicaid dollars by providing the necessary state match through intergovernmental transfers. The Department's proposal will provide approximately

$400,000 in gross funding to county-funded facilities. The Commentor proposed an alternative that would have provided more than $10 million in gross funding and would provide those dollars to a greater number of facilities. There are additional opportunities to increase funding to additional nursing facilities using intergovernmental transfers, gifts and other creative mechanisms.

The Department should not require the local governments to buy up their per diem rates. The Department should provide that the local dollars provided to the Department will trigger a single cash payment to the facility based upon that facility's historical Medicaid bed days. By not building per diem payments based upon intergovernmental transfers into the Medicaid program, the Department could avoid cutting rates if the federal rules governing the program are amended. The amendment also provides much needed cash assistance to local nursing facilities. If the number of Medicaid bed days falls below their historical level, the local facility loses both the higher Medicaid payments and the local dollars needed to make up the revenue loss. The amendment also insulates the Department from higher-than-expected Medicaid utilization.

The Department's rule should provide that the additional rate adjustment give no facility less than the median Medicaid rate on a net payment basis. Because the facility, the local government or both must put up the required state match, the net per diem payment is lower than the statewide average. The final rule should set the facility rate equal to the statewide median rate after considering the county fund transfer.

RESPONSE: The United States Department of Health and Human Services has initiated efforts to control the use of intergovernmental fund transfers as a mechanism for Medicaid program expansion. The most recent proposal under consideration is to create a separate class of providers that are government owned or operated and allow them to use intergovernmental transfer of funds to match against Medicaid under a separate Medicare upper limit test. Expansive proposals to refinance millions of dollars between the Medicaid rate and the Medicare upper limit are likely to be subject to intense scrutiny by the federal government and are unlikely to be approved in a state plan amendment. The Department and its consultants are studying funding that could be available under the Medicare upper limit under current federal requirements as well as the proposed draft requirements to insure that Montana Medicaid maintains its compliance with federal requirements and has a state plan that can be approved. Because this is a new approach to funding a specific category of provider, it would be appropriate to distribute this funding over the course of the year as an add-on to the payment rate rather than to provide it as a lump sum distribution. The Department will continue to pay the statewide median for every day of Medicaid care, even if the Department underestimated the Medicaid bed days in its original agreement

with the provider. The Department does not agree that this proposal insulates it from higher-than-expected Medicaid utilization. In fact it guarantees each nursing facility that it will be reimbursed at the statewide median for every day of Medicaid care the facility provides.

Several providers have agreed to participate in the moderate proposal outlined in the draft rules to bring their rates up to the statewide median by providing local dollars as matching funds. These facilities are small and rural and are in desperate need of funding to keep their doors open and to provide access to care in their local communities. In the future, the Department will consider the possibility of capturing the total difference between the average Medicaid rate and the Medicare upper limit for the class of government owned or operated facilities (county affiliated). This approach would allow all county affiliated facilities to use local funds as matching dollars for Medicaid rate purposes and would not limit the invitation to those facilities with rates below the statewide median rate.

The Department intends to ask the legislature for a substantial increase in nursing facility funding for each year of the 2002/2003 biennium to insure Medicaid rates are reasonable and adequate and to transition to a uniform price-based reimbursement system over the next two years with the purpose of stabilizing reimbursement to nursing facility providers. Proposals for using intergovernmental fund transfers in a much broader way to fund county affiliated facilities or program expansion will undoubtedly be discussed during the next legislative session. The Department will continue to monitor the federal climate for changes in regulation of intergovernmental fund transfers and will look at the possibility of expanding intergovernmental fund transfers based on the outcome of these federal changes. The Department will continue to discuss with the nursing facility reimbursement work group creative ideas for funding nursing facility providers.

<u>COMMENT #5</u>: One Commentor complemented the Department on the additional payment methodology for the direct care wage and benefits increases appropriated by the legislature. The Commentor offered support for making the direct care funding a permanent part of the Medicaid budget. If those dollars became a permanent part of the funding for Medicaid, the nursing facilities using the funding for direct care staff compensation should continue to receive these funds.

Because the direct care wage add-on funds for both FY 2000 and FY 2001 are based on estimates of bed days, it is likely that the entire appropriation is not being spent on these wage increases. The Department's estimates are based on bed day increases at a time when resident days are decreasing. The Department should reconcile the actual number of bed days it has paid the add-on for each year with the appropriated amount and

any unspent appropriation should be used to provide additional direct care wage add-ons. The Department should add a provision to that effect in ARM 37.40.361 to assure an appropriate accounting of these funds by the Department will take place each year.

RESPONSE: The Department established a reporting process by which nursing facilities must justify that their proposed direct care wage increases for the entire rate year will meet or exceed the projected distribution of their Medicaid bed days multiplied by the direct care wage add-on in order to continue to receive this funding. The Department will require all facilities that cannot document that all of the funding allocated to them was spent for this purpose to return those funds. By this process the Department will assure the legislature that all of the appropriated direct care funding is being used for its intended purpose of providing increases in wages and benefits to direct care staff. Direct care wage funding will be incorporated into the Department's base funding proposal for nursing facility providers. The next legislature will decide whether to continue this funding as a separate add-on. It will determine the necessity of providing additional direct care wage funding for nursing facility providers above the current level and will specify the manner in which funding will be provided.

The Department finds it unnecessary to add a provision to these rules requiring an accounting of the distribution of direct care wage increases in the manner proposed by the Commentor. The Department will monitor the actual bed days it reimburses nursing facilities and will compare the data with the projected Medicaid bed days utilized for rate setting purposes. If the Department determines there is a significant decline in the number of bed days utilized, it will adjust the funding distributed to providers for additional direct care wage increases. While there has been a gradual decline in bed day utilization overall, the Medicaid share of these days remains fairly constant. Recent staffing report data indicates that there has been a stabilization of these days. The Department concludes from the data that there will be little unused funding available from bed day utilization for this or any other purpose during the next fiscal year.

COMMENT #6: The development of a price-based system that reflects the acuity of nursing facility residents and the subsequent staffing needs must be implemented. Nursing facilities are experiencing a staffing crisis, particularly in the area of certified nursing aides (CNA). Nursing homes cannot compete with the wage and benefit structures offered by other health care providers. If nursing homes cannot hire and retain good CNAs they cannot provide care to our residents.

RESPONSE: The Department, with input from the nursing facility reimbursement work group continues to work toward the development of a priced-based system of reimbursement for

nursing facility providers. This system would reflect acuity by incorporating a Medicaid case mix index or adjustment factor. The direct care wage add-on that has been available for each year of the biennium should go a long way toward helping nursing facilities maintain staffing levels and reduce the turnover rate of staff by providing more competitive wage and benefit packages. In addition, lien and estate recovery funds are available to provide one-time benefits such as staff training, education, bonuses or incentives for direct care staff.

COMMENT #7: It is important to note that flaws in the system were not the sole cause of volatility in the current reimbursement system. The major factor causing the volatility is the serious under funding of this program by the legislature. A price-based system alone will not solve the problem of under funding. Support of a price-based system is dependent on the underlying principle that the price is set at a fair and reasonable amount. The Commentor was pleased that the Department acknowledged the need for additional funding for nursing homes and supported the Department's request for significant increases in funding as part of the budgeting process.

RESPONSE: There are many reasons why the current methodology for reimbursing nursing facility providers has evolved into its present state and there are many other reasons why it is in need of change. The Boren Amendment required state Medicaid programs to design their systems of reimbursement to withstand the test of a court challenge. Its repeal allowed states to simplify their reimbursement methodologies. Declining occupancy levels, increased acuity of residents and modest increases in legislative funding over many years have resulted in a system of reimbursement that is clearly in need of a change. The Department has submitted to the Governor for consideration as part of the executive planning process a request for a substantial increase in nursing facility provider funding for the purpose of moving to a price-based system of reimbursement. Such a system would mitigate the volatility of the rate setting process and would narrow the range of Medicaid rates paid for nursing facility services by basing reimbursement on a recognized price for nursing facility services. Provider participation and support will be necessary to convince the legislature that the funding requested by the Department is adequate for reimbursement of nursing facility providers and necessary for the delivery of quality health care to residents.

COMMENT #8: One Commentor expressed support for the Department's transitional rules proposed for Medicaid reimbursement in fiscal year 2001 and the Department's efforts to develop a less volatile reimbursement system for nursing home care during the next biennium. The Commentor worked closely with the Department on reimbursement issues and expressed a belief that the rule changes reflect the general consent of many providers and are in the best interest of everyone involved.

RESPONSE: The Department's Senior and Long Term Care Division welcomes the participation of as many provider and Association representatives as possible in development of the rule changes proposed for fiscal year 2001, as well as in the design of longer term changes anticipated in fiscal year 2002/2003. The Department sponsors ongoing meetings with a nursing facility reimbursement work group to discuss these changes. Provider association representatives have made great efforts to provide information to their members regarding reimbursement and rate proposals. The Department appreciates the participation of providers in the discussion and development of changes to the system of reimbursement for nursing facility providers.

COMMENT #9: More than 60% of nursing facility residents are Medicaid eligible. The remaining residents are covered by a mix of Medicare and private pay. Nursing facilities do not enjoy a wide margin which would allow cost shifting. Nursing homes must have a consistent and fair reimbursement system if they are to continue to provide the quality care that residents deserve.

RESPONSE: The Department is developing its budget request to be considered by the 2001 legislature. As part of its executive planning request, the Department is asking for Medicaid reimbursement increases for nursing facilities. This would allow the Department to move toward a system of reimbursement with a narrower range of rates and would stabilize the levels of reimbursement for all facilities. These changes would better recognize the increasing levels of acuity required for persons being admitted to nursing facilities and would mitigate the volatility of the rate setting process. The anticipated reimbursement system would reimburse providers based on a recognized price for nursing facility services and would narrow the range of Medicaid rates paid for nursing facility services.

/s/ Dawn Sliva
Rule Reviewer

/s/ Laurie Ekanger
Director, Public Health and Human Services

Certified to the Secretary of State July 3, 2000.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.12.101, 42.12.104, 42.12.106, 42.12.114, 42.12.115, 42.12.144, 42.12.209, 42.12.210, 42.12.211, 42.12.302, 42.12.303, 42.12.306, 42.12.401, 42.12.405, 42.12.406, 42.12.408, and adoption of New Rule I (42.12.307), II (42.12.324), III (42.12.117), IV (42.12.118), V (42.13.305), and VI (42.12.109); and repeal of ARM 42.12.121, 42.12.127, 42.12.142, 42.12.304, and 42.12.305 relating to Liquor Licenses)	NOTICE OF AMENDMENT, ADOPTION AND REPEAL

TO: All Concerned Persons

1. On March 30, 2000, the Department published notice of the proposed amendment of ARM 42.12.101, 42.12.104, 42.12.106, 42.12.114, 42.12.115, 42.12.144, 42.12.209, 42.12.210, 42.12.211, 42.12.302, 42.12.303, 42.12.306, 42.12.401, 42.12.405, 42.12.406, and 42.12.408; adoption of new rule I (42.12.307), II (42.12.324), III (42.12.117), IV (42.12.118), V (42.13.305), and VI (42.12.109); and repeal of ARM 42.12.121, 42.12.127, 42.12.142, 42.12.304, and 42.12.305 relating to liquor licenses at page 789 of the 2000 Montana Administrative Register, issue no. 6.

2. A public hearing was held on April 24, 2000, to consider the proposed amendment, adoption, and repeal, where written and oral comments were received.

3. Oral and written comments received during and subsequent to the hearing are summarized as follows along with the response of the Department:

COMMENT NO. 1: The Montana Tavern Association, (MTA) through its attorneys, Mark Staples and Kati Kintli, presented written and oral comments regarding the rules. The association thanked the Department for the opportunity to review the rules during the development stage and present their views and concerns regarding the proposed rules.

RESPONSE NO. 1: The Department always welcomes the input from the Montana Tavern Association with regard to rule development.

COMMENT NO. 2: The MTA indicated a concern with ARM 42.12.106(8). MTA presented three main questions regarding this rule.

a. What constitutes a transfer?

b. Will the transfer of ownership within a licensed entity (i.e., corporation, LLC, or LLP) trigger a new "anniversary date" and thus the payment of another "annual fee"?

c. Will the transfer of location trigger a new "anniversary date?"

RESPONSE NO. 2: The amendment to ARM 42.12.106(8) addresses the licensing anniversary date.

a. A transfer occurs any time one or more new individuals are added to the license who has any control over the license or shares in the profits or liabilities of the license as provided in 16-4-401(2)(b)(iii), MCA.

b. Yes, a transfer of ownership within a licensed entity would be considered a new owner and would trigger a transfer fee but not a license fee.

c. No, the transfer of location without a change of ownership will not transfer a new anniversary date.

COMMENT NO. 3: The MTA indicated they have a problem with the intent of the Department to change the licensing anniversary date to the date the application is received rather than the date the transfer is approved. Often times there are long delays between the time the license application is received by the Department and the time the transfer is finally approved. The delays may be due to difficulty on the part of the applicant in obtaining information by the Department, protestants, by an individual and subsequent appeals, or unforeseeable delays in construction if the license is being transferred to a new location. The applicant would not have the benefit of the license during this time. Furthermore, if the application is denied or if the applicant withdraws the application, what happens to the "annual fee"? There is no provision for a refund to the applicant nor is there any legal authority for the Department to keep this "annual fee".

RESPONSE NO. 3: Section 30-16-303, MCA, allows the department to participate in the one-stop licensing program. The department recognizes the concerns raised by MTA regarding various delays in processing an application. However, in the proposed rules the department did not address what would happen if an application was denied because under the current practice, the processing fee is the only portion that is retained. The remainder is returned to the applicant.

The Department has reviewed the concerns presented and will agree to delay the implementation of a new "anniversary date" as proposed in ARM 42.12.106 at this time. Prior to implementing the proposed changes, the Department will review both Title 16 and 30, MCA for further clarification of the intended process.

COMMENT NO. 4: The MTA stated that they believe the Department's interpretation that the annual license fee is to be paid with every transfer of a license is in conflict with the current statute. The MTA cited 16-4-407 and 16-4-501, MCA in part with specific emphasis on the portions of those statutes that address the "annual license" or "annual renewal" fees.

The MTA stated that it is clear from statute that the Legislature clearly intended this fee to be paid annually. They further stated that they understand that some change is warranted with the advent of the "one-stop" licensing program. However, they believe that the statutes are ambiguous as to whether or not the Legislature intended this "annual fee" to be paid with every transfer of a license.

The MTA requested the Department put this rule on hold pending the next legislative session so that they may get clear direction as to whether or not it was the Legislature's intent to change the law so that these annual fees would be paid more than once a year.

The MTA further stated that if the Department is not willing to wait until such time as the Legislature reconvenes, they would ask that the Department consider prorating the annual license fee on a quarterly basis.

<u>RESPONSE NO. 4:</u> Section 16-4-407, MCA, refers to a "licensee's" anniversary date and the Department believes that since the anniversary date is connected to the licensee, rather than the license, the anniversary date can be changed to comply with 30-16-303, MCA. Additionally, see the second paragraph to Response No. 3 above.

4. The Department has amended the rules with the following changes:

<u>42.12.106 DEFINITIONS</u> The following terms will be used in this sub-chapter.

(1) through (6) remain the same.

(7) "License fee" means a fee paid at the time a new license APPLICATION is ~~issued~~ SUBMITTED, at the time an existing license transfers ownership, ~~and~~ OR upon renewal of an existing license. ~~When the term "license fee" is modified in statute by the word "annual" it may refer to the license fee required upon renewal of an existing license. When the term is not modified it may apply to any of the above-noted licensing situations.~~

~~(8) "Licensing anniversary date" is the date a license is issued that occurs in consecutive years following the initial issuance of the particular license.~~

(9) through (18) remain the same, but are renumbered (8) through (17).

(18) "TRANSFER FEE" IS THE PROCESSING FEE AS SPECIFIED IN ARM 42.12.111.

(19) remains the same.

<u>AUTH</u>: 16-1-303, MCA

<u>IMP</u>: 16-3-311, 16-4-105, 16-4-205, 16-4-207, 16-4-301, 16-4-402, 16-4-404, 16-4-413, 16-4-420, and 16-4-423, MCA

<u>42.12.114 LICENSE FEES</u> (1) New licenses issued are assessed an annual license fee in accordance with 16-4-501, MCA. All licenses must be renewed and the annual license fee paid on or before the ~~licensing anniversary date~~ DUE DATE of each year. A change in a license designation due to a change in quota area may affect the statutory license fee. Any change of license fee will be reflected on the next renewal application and the new fee will

be due at the time of renewal.

AUTH: 16-1-303, MCA

IMP: 16-4-201, MCA

42.12.115 ASSESSMENT OF LICENSE RENEWAL LATE PAYMENT PENALTY FEE - GROUNDS FOR WAIVER (1) The department will assess a license renewal late payment penalty fee in all cases where a licensee fails to pay the license renewal fee on or before the ~~licensing anniversary date~~ DUE DATE. The renewal application and fee is timely filed and paid if mailed in an envelope postmarked by the United States postal service prior to the ~~licensing anniversary date~~ DUE DATE. If ~~the licensing anniversary date~~ THE DUE DATE falls on a Saturday, Sunday, or state legal holiday, a postmark for the following business day or a payment received at the department on the following business day is timely.

(2) The department may waive a license renewal late payment penalty fee assessment upon receipt of a written request by the licensee. The request must state the reason for late payment and be supported by documentation. A waiver of the license renewal late payment penalty fee assessment shall be granted under the following conditions:

(a) a department error;

(b) the department mailed a license renewal notice less than two weeks prior to the ~~licensing anniversary date~~ DUE DATE;

(c) a delay in payment caused by the death or serious illness of the licensee;

(d) a United States postal service error;

(e) a renewal application and fee was erroneously mailed to the internal revenue service;

(f) a delay in payment due to bankruptcy or foreclosure action; or

(g) the late payment is the only late payment within the most recent five consecutive years or since the license was acquired, whichever is less, and payment was received at the department within 30 days after the ~~licensing anniversary date~~ DUE DATE.

(3) remains the same.

AUTH: 16-1-303, MCA

IMP: 16-4-501, MCA

NEW RULE II (42.12.324) SPECIAL PERMITS (1) through (3) remain the same.

(4) The applicant for the special permit must be conducting ~~the~~ AN event or be a member of a group conducting ~~the~~ AN event.

(5) through (8) remain the same.

AUTH: 16-1-303, MCA

IMP: 16-4-301, MCA

5. Therefore, the Department adopts ARM 42.12.106, 42.12.114, 42.12.115, and New Rule II (42.12.324) as shown above.

6. The Department adopts the amendments to ARM 42.12.101, 42.12.104, 42.12.144, 42.12.209, 42.12.210, 42.12.211, 42.12.302, 42.12.303, 42.12.306, 42.12.401, 42.12.405,

42.12.406, 42.12.408; adopts New Rules I (42.12.307), III (42.12.117), IV (42.12.118), V (42.13.305), and VI (42.12.109) and repeals ARM 42.12.121, 42.12.127, 42.12.142, 42.12.304, and 42.12.305 as proposed.

/s/ Cleo Anderson	/s/ Mary Bryson
CLEO ANDERSON	MARY BRYSON
Rule Reviewer	Director of Revenue

Certified to Secretary of State June 27, 2000

VOLUME NO. 48 OPINION NO. 14

CITIES AND TOWNS - Authority of self-governing local government to acquire and operate electric and natural gas utilities;
CITY GOVERNMENT - Authority of self-governing local government to acquire and operate electric and natural gas utilities;
COUNTY GOVERNMENT - Authority of self-governing local government to acquire and operate electric and natural gas utilities;
LOCAL GOVERNMENT - Authority of self-governing local government to acquire and operate electric and natural gas utilities;
MUNICIPAL GOVERNMENT - Authority of self-governing local government to acquire and operate electric and natural gas utilities;
PUBLIC SERVICE COMMISSION - Authority of self-governing local government to acquire and operate electric and natural gas utilities;
MONTANA CODE ANNOTATED - Sections 1-2-106, 7-1-101 to -114, 7-1-4121(9), 7-2-4704(2), 7-3-302, -1103(1), -1104, -4313, 7-5-201(1), 7-6-4202(4), 7-15-4206(8), -4283(8), 69-2-101, 69-3-101, -102, 69-7-101 to -201;
MONTANA CONSTITUTION - Article XI, sections 4 to 6;
MONTANA LAWS OF 1981 - Chapter 607;
OPINIONS OF THE ATTORNEY GENERAL - 46 Op. Att'y Gen. No. 13 (1996), 46 Op. Att'y Gen. No. 12 (1995), 44 Op. Att'y Gen. No. 34 (1992), 37 Op. Att'y Gen. No. 68 (1977).

HELD: The City and County of Butte-Silver Bow, a consolidated government with self-government powers, has the authority to acquire and operate electric and natural gas utilities within and outside the boundaries of the local government unit.

June 22, 2000

Mr. Robert M. McCarthy
Silver Bow County Attorney
155 West Granite Street
Butte, MT 59701

Dear Mr. McCarthy:

You have asked my opinion on the following question:

> May a self-power city-county government operate an electric and natural gas utility under Montana law?

I understand from your letter that the consolidated city/county government of Butte-Silver Bow is considering trying to acquire electric and natural gas transmission systems offered for sale by Montana Power Company.

The nature of the local government unit known as the "City and County of Butte-Silver Bow" (herein, Butte-Silver Bow) should be

clearly understood.

> On May 2, 1977, the City of Butte and County of Silver Bow consolidated their local governments into one unified government under one charter. The new government was to have the status of a county and incorporated municipality . . . .

Butler v. Local 2033 Am. Fed'n of State, County & Mun. Employees, 186 Mont. 28, 30, 606 P.2d 141, 142 (1980). See Mont. Code Ann. § 7-3-1103(1).

> Butte-Silver Bow is a charter form of government. A charter form of government possesses self-government powers [Mont. Code Ann. § 7-3-702], and it may exercise any power not prohibited by the constitution, law, or charter [Mont. Code Ann. § 7-1-101].
> . . . .
> Butte-Silver Bow is neither a county nor a municipality. It is a consolidated government. A consolidated government must adopt either the county or municipality provisions whenever the existing provisions conflict [Mont. Code Ann. § 7-5-201(1)].

Bukvich v. Butte-Silver Bow, 215 Mont. 202, 204, 696 P.2d 444, 445 (1985).

The formation of Butte-Silver Bow did not limit the powers that the consolidated government could exercise, compared to the powers that the City of Butte and County of Silver Bow could exercise. "A consolidated local government has and may exercise all powers that are conferred on counties, cities, or towns by the constitution and laws of the state." Mont. Code Ann. § 7-3-1104.

The authority to create local governments with self-government powers is an important change brought about by Montana's 1972 Constitution. Under the 1889 Constitution, a county, city, or town only had those powers expressly conferred by law and doubts concerning powers were resolved against the local government. In contrast, the 1972 Constitution expanded the powers of local self-government. Mont. Const. art. XI, §§ 4-6. See, e.g., Tipco Corp. v. City of Billings, 197 Mont. 339, 344, 642 P.2d 1074, 1077 (1982); State ex rel. Swart v. Molitor, 190 Mont. 515, 517-18, 621 P.2d 1100, 1102 (1981). Mont. Const. article XI, section 6 provides:

> Section 6. Self-government powers. A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter. This grant of self-government powers may be extended to other local government units through optional forms of government provided for in section 3.

Under the 1972 Constitution, the assumption is that a local government with self-government powers possesses the power, unless the power has been specifically denied. D & F Sanitation Serv. v. City of Billings, 219 Mont. 437, 444-45, 713 P.2d 977, 981-82 (1986); 46 Op. Att'y Gen. No. 13 (Feb. 28, 1996).

The legislature has enacted several statutes setting forth the authority of local governments with self-government powers. Among the more pertinent are the following:

> 7-1-101. Self-government powers. As provided by Article XI, section 6, of the Montana constitution, a local government unit with self-government powers may exercise any power not prohibited by the constitution, law, or charter. These powers include but are not limited to the powers granted to general power governments.
>
> 7-1-102. Authorization for self-government services and functions. A local government with self-government powers may provide *any services* or perform any functions not expressly prohibited by the Montana constitution, state law, or its charter. These services and functions include but are not limited to those services and functions which general power government units are authorized to provide or perform. [Emphasis added.]
>
> 7-1-103. General power government limitations not applicable. A local government unit with self-government powers which elects to provide a service or perform a function that may also be provided or performed by a general power government unit is not subject to any limitation in the provision of that service or performance of that function except such limitations as are contained in its charter or in state law specifically applicable to self-government units.
>
> 7-1-106. Construction of self-government powers. The powers and authority of a local government unit with self-government powers shall be liberally construed. Every reasonable doubt as to the existence of a local government power or authority shall be resolved in favor of the existence of that power or authority.

Consistent with the Montana Constitution and these statutes, the Montana Supreme Court has recognized the "broad expanse of shared sovereignty given to self-governing local units." State ex rel. Swart, 190 Mont. at 518, 621 P.2d at 1102. See also Lechner v. City of Billings, 244 Mont. 195, 200, 797 P.2d 191, 195 (1990); D & F Sanitation, 219 Mont. at 445, 713 P.2d at 982.

The term "municipality" is defined in many different provisions

of the Montana Code. Usually, "municipality" means an incorporated city or town. See, e.g., Mont. Code Ann. §§ 7-1-4121(9), 7-2-4704(2), 7-6-4202(4), 7-15-4206(8). Sometimes "municipality" expressly includes consolidated governments. See, e.g., Mont. Code Ann. §§ 7-13-2201(4), 17-15-4283(8). The term "municipality" is not defined in Mont. Code Ann. title 69, chapter 7, which pertains to municipal utilities. Nevertheless, the intent of the legislature is expressed in Mont. Code Ann. § 7-3-1104, which states in relevant part, "A consolidated local government has and may exercise all powers that are conferred on counties, cities, or towns by the constitution and laws of the state." Thus, a consolidated government has the powers of a "municipality" under Mont. Code Ann. title 69, chapter 7. Section 1.02(a) of the Butte-Silver Bow charter also states that "the consolidated unit of local government shall have the status of a county and an incorporated municipality for all purposes." Accordingly, I conclude that statutory provisions pertaining to the ownership and operation of utilities by municipalities apply to the Butte-Silver Bow consolidated government.

In determining whether a particular self-government power is authorized, numerous previous Attorney General's Opinions have engaged in a three-part analysis:

> (1) consult the local government’s charter and consider constitutional ramifications;
>
> (2) determine whether the exercise is prohibited under the various provisions of Mont. Code Ann. title 7, chapter 1, part 1 or other statute specifically applicable to self-government units;
>
> (3) decide whether it is inconsistent with state provisions in an area affirmatively subjected to state control as defined by Mont. Code Ann. § 7-1-113.

See, e.g., 46 Op. Att’y Gen. No. 13 (1996); 44 Op. Att’y Gen. No. 34 at 140, 142 (1992); 37 Op. Att’y Gen. No. 68 at 272, 274 (1977).

With respect to the first factor, the charter of Butte-Silver Bow does not restrict the powers of the local government beyond recognizing those restrictions that exist in law. The charter provides in relevant part as follows:

> SECTION 2.01--POWERS OF THE GOVERNMENT
>
> The City-County shall have self-government powers as provided by Article XI, Sections 5 and 6 of the Montana Constitution and Part 1 of Chapter 1 of Title 7 of the Montana Code Annotated and may exercise any power not prohibited by the constitution, law, or this Charter. These powers include but are not limited to the powers granted to general power governments.

> SECTION 2.04--INTERPRETATION OF POWERS
>
> The powers and authority of this self-government unit shall be liberally construed. Every reasonable doubt as to the existence of this government's power shall be resolved in favor of the existence of that power or authority.

The charter has placed no restriction on Butte-Silver Bow's acquiring or operating electric and natural gas utilities. Similarly, I find no provision in the Montana Constitution that would prohibit a local government with self-government powers from exercising its authority under its charter to acquire and operate such utilities.

The second factor of the three-part analysis requires an examination of the relevant statutes to determine whether the actions being considered by the local government are prohibited by law. Mont. Code Ann. §§ 7-1-111 and -112 set forth specific powers that a self-governing local government is prohibited from exercising. Mont. Code Ann. § 7-1-114 identifies the laws with which a local government with self-government powers must comply. In addition, this opinion presents the specific issue of the relative powers of a local government with self-government powers and of the Montana Public Service Commission (PSC), which is charged by statute with the supervision and regulation of public utilities. Mont. Code Ann. § 69-3-102.

My examination of Mont. Code Ann. §§ 7-1-111, -112, and -114 for provisions implicated by the operation of utilities by a local government found only one issue. Arguably, the following provision of Mont. Code Ann. § 7-1-111 should be considered in connection with a proposal that a local government operate an electric or natural gas utility:

> A local government unit with self-government powers is prohibited from exercising the following:
> . . . .
> (5) any power that establishes a rate or price otherwise determined by a state agency . . . .

The PSC has broad power to regulate utility rates (Mont. Code Ann. § 69-2-101). The powers of the PSC with respect to municipal utilities were reduced by the enactment of chapter 607, 1981 Montana Laws, which amended the definition of public utility in Mont. Code Ann. § 69-3-101 and contained other provisions restricting the powers of the PSC over municipal utilities that were codified at Mont. Code Ann. title 69, chapter 7 (1981). However, before chapter 607 became effective, the power of the PSC to regulate utility rates was not perceived to be inconsistent with the ownership and operation of utilities by local governments. City of Billings v. Public Serv. Comm'n, 193 Mont. 358, 631 P.2d 1295 (1981); cf. State ex rel. Dep't of Highways v. City of Helena, 193 Mont. 441, 632 P.2d 332 (1981)

(statute requiring utility to pay part of relocation costs caused by road construction did not violate local self-government doctrine as applied to city-owned utility facilities). Under chapter 607, section 5 (codified at Mont. Code Ann. § 69-7-102 (1981)), the PSC retained power to regulate certain large rate increases by municipal utilities. The existence of this power was not inconsistent with local self-government powers. City of Billings v. Department of Revenue, 270 Mont. 307, 314, 891 P.2d 1149, 1154 (1995) ("the City of Billings, as owner and operator of a municipal utility, must always pay the PSC . . . fees"); Lechner, 244 Mont. at 202, 797 P.2d at 196 ("§ 7-1-111(5), MCA does not preempt the City from exercising its self-governing powers in the area of municipal utilities").

Accordingly, I conclude that Mont. Code Ann. § 7-1-111(5) does not prevent Butte-Silver Bow from acquiring and operating electric and gas utilities.

The final part of the three-part analysis comes directly from Mont. Code Ann. § 7-1-113, which requires that a local government with self-government powers must exercise those powers consistent with state law and regulation:

> 7-1-113. Consistency with state regulation required. (1) A local government with self-government powers is prohibited the exercise of any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control.
>
> (2) The exercise of a power is inconsistent with state law or regulation if it establishes standards or requirements which are lower or less stringent than those imposed by state law or regulation.
>
> (3) An area is affirmatively subjected to state control if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency.

In essence, § 7-1-113 allows a local government with self-government powers to enact any ordinance unless the ordinance (1) is inconsistent with state law or regulation and (2) concerns an area affirmatively subjected by law to state control. 46 Op. Att'y Gen. No. 13 (1996); 44 Op. Att'y Gen. No. 34 at 140, 143 (1992).

The legislature has enacted nearly 80 pages of laws that address in considerable detail the provision of certain utility services by local governments. These include such services as sewer, water, television translator stations, and solid waste disposal.

Mont. Code Ann. title 7, chapter 13. With much less detail the legislature has specifically authorized municipalities to acquire natural gas systems:

> 7-13-4102. Authority to acquire natural gas system -- indebtedness permitted. (1) The city or town council has power to contract an indebtedness of a city or town upon the credit thereof by borrowing money or issuing bonds for the construction, purchase, or development of an adequate supply of natural gas and to construct or purchase a system of gas lines for the distribution thereof to the inhabitants of the city or town or vicinity.
>
> (2) No money may be borrowed or bonds issued for the purposes specified in this section until the proposition has been submitted to the vote of the taxpayers of the city or town affected thereby and the majority vote cast in its favor.

The legislature employed broad language and provided little guidance in expressly granting municipalities under the commission-manager form of government the power to "acquire, construct, own, lease, and operate and regulate public utilities." Mont. Code Ann. § 7-3-4313. Finally, as noted above, state law expressly authorizes the operation of utilities by municipalities. Mont. Code Ann. tit. 69, ch. 7. Yet Mont. Code Ann. title 69, chapter 7 provides no definition of the term "municipal utility." In fact, the term "municipal utility" is not defined in the Code.

Words and phrases should be construed according to the context and the approved usage of the language. Mont. Code Ann. § 1-2-106. According to standard definitions, a "utility" is "a public service, as a telephone or electric-light system, a streetcar or railroad line, or the like" (Random House Dictionary of the English Language (2d ed. unabridged 1987)), or "one or more pieces of equipment . . . designed to provide a service (as heat, light, power, water, or sewage disposal)" (Webster's Third New International Dictionary (1986 unabridged)). Accordingly, I conclude that in relation to the power of a local government to operate a utility, the term "utility," whether modified by "public" or "municipal," includes electric and natural gas transmission systems.

Under Mont. Code Ann. § 7-1-103, if state law allows a general power government unit to provide a service or perform a function, a local government unit with self-government powers may also provide the service or perform the function. Thus, under Mont. Code Ann. § 7-13-4102, a local government with self-governing powers may operate a natural gas utility. A commission-manager form of local government may have general government powers or self-government powers. Mont. Code Ann. § 7-3-302. Under Mont. Code Ann. § 7-3-4313, a self-governing

local government may acquire and operate public utilities, which, as discussed above, include natural gas and electric utilities. Therefore, I conclude that the acquisition and operation of electric and natural gas utilities by a municipality is consistent with state law and regulation. Moreover, the Supreme Court in an opinion concerning water and sewer systems ruled:

> The legislature has given the right to control municipal utilities, including the right to establish rates and charges, to municipalities. [Mont. Code Ann. §§ 69-7-101 to -201.] Section 7-1-113, MCA, does not preempt the City from exercising this right.

Lechner, 244 Mont. at 203, 797 P.2d at 196.

MPC has electric and gas transmission systems in a large area of Montana. Butte-Silver Bow may attempt to acquire such facilities that are located outside of the geographical boundaries of the local government. Therefore, I must also consider whether a city-county government with self-government powers has the authority to acquire and operate electric and natural gas utilities outside of the boundaries of the local government. Applying the same three-part analysis set forth above, I first consider the constitution and the local government's charter. As discussed above, the charter of Butte-Silver Bow allows the local government to exercise all powers allowed by the Montana Constitution and state law. Some utility services are specifically identified in section 7.02 of the charter, which pertains to the Public Works Department. However, the legislative body of Butte-Silver Bow is allowed to establish additional responsibilities for the Department:

> SECTION 7.02--PUBLIC WORKS DEPARTMENT
>
> (a) There shall be a Public Works Department which shall be charged with the responsibility and administration of engineering: streets, roads and other public right-of-way; water and sewer; solid waste collection and disposal; parks and recreation; and maintenance and operation of related equipment.
> . . . .
> (c) The Council of Commissioners may establish by ordinance additional responsibilities for the Public Works Department.

The only geographical limitation in the charter of Butte-Silver Bow appears in a subsection of Section 1.02--Jurisdiction:

> (b) COUNTY POWERS. The consolidated local government shall have and may exercise all powers that are conferred on counties by Montana law throughout the territorial limits of the consolidated City and County.

Plainly, this provision pertains to the exercise of political powers and does not limit or even address the operation of a utility or other proprietary activities outside of the geographical boundaries of the local government.

Construing the local government powers liberally, as I must, Mont. Code Ann. § 7-1-106, I conclude that the Montana Constitution and the charter of Butte-Silver Bow do not limit the authority of Butte-Silver Bow to acquire and operate electric and natural gas utilities outside of the boundaries of the local government.

Considering the second factor for any legal prohibitions, I note that in a previous opinion I found that the legislature intended to grant municipalities broad authority to operate municipal utilities. 46 Op. Att'y Gen. No. 12 (1995). In addition, Mont. Code Ann. § 69-7-201 expressly provides for utility service to be provided outside of the municipal boundaries:

> 69-7-201. Rules for operation of municipal utility. Each municipal utility shall adopt, with the concurrence of the municipal governing body, rules for the operation of the utility. The rules shall contain, at a minimum, those requirements of good practice which can be normally expected for the operation of a utility. They shall define or provide for use of meter or flat rate user charges, the classification of users, applications for service, and uses of the service. The rules shall outline the utility's procedure for discontinuance of service and reestablishment of service as well as *the extension of service to users within the municipal boundaries and outside the municipal boundaries*. The rule shall provide that rate increases for comparable classifications and zones outside the municipal boundaries may not exceed those set within the municipal limits under the provisions of this chapter.

(Emphasis added.) Mont. Code Ann. § 69-7-101 also recognizes that municipal utilities may serve persons who are not inhabitants of the local government:

> 69-7-101. Municipal utilities -- regulation by municipality. A municipality has the power and authority to regulate, establish, and change, as it considers proper, rates, charges, and classifications imposed for utility services to its inhabitants *and other persons* served by municipal utility systems. Rates, charges, and classifications must be reasonable and just.

(Emphasis added.) Mont. Code Ann. §§ 69-7-101 and -201 do not limit municipal utility services to the proximity of the municipality. In contrast, Mont. Code Ann. § 7-13-4102, quoted

above, allows a city or town to provide natural gas utility services "to the inhabitants of the city or town *or vicinity*." However, Mont. Code Ann. § 7-13-4102 allows a city or town with general government powers to operate a natural gas utility. To the extent the vague term "vicinity" operates to limit the exercise of that authority by a general power local government, it would not so restrict a self-governing local government. Mont. Code Ann. § 7-1-103, quoted above, states that a self-governing local government that provides a service that may be provided by a general power government is not subject to any limitation in the provision of the service, "except such limitations as are contained in its charter or in state law specifically applicable to self-government units." Because the "or vicinity" language is not specifically applicable to self-government units, it would only operate to restrict general power government units, not self-government units. In addition, since Butte-Silver Bow is a self-governing local government unit, Mont. Code Ann. § 7-1-106, quoted above, requires resolving any doubt in favor of the existence of a power. Thus, I conclude that a municipal utility of a self-governing local government may provide services to customers who are not in the vicinity of the municipality.

The preceding discussion also shows that the third factor of consistency with law and regulation is satisfied. Since municipal utilities may provide services outside of municipal boundaries, such provision of services is consistent with law.

Chapter 607, 1981 Montana Laws, and chapter 288, 1995 Montana Laws, reduced and then eliminated PSC regulation of municipal utilities. Review of the legislative history of both laws shows that PSC regulation was considered to be unnecessary because local voters could hold local officials accountable for their operation of municipal utilities. When municipal utilities provide services to customers who are not voters in the municipality, this political regulation of the municipal utility is absent. However, such nonresident customers are not without recourse. Under Mont. Code Ann. § 69-7-201, rate increases outside the municipal boundaries may not exceed those within the municipality. Under Mont. Code Ann. § 69-7-113, a person may appeal municipal utility rates and rules to district court.

Finally, under the Electric Utility Industry Restructuring and Customer Choice Act (Mont. Code Ann. tit. 69, ch. 8), a municipal utility that acquires electric utilities from Montana Power Company could be considered a public utility subject to PSC regulation under the act. Mont. Code Ann. § 69-8-103(2), (5), (23). Since the question you pose may be resolved without deciding that question, I express no opinion on it here.

THEREFORE, IT IS MY OPINION:

> The City and County of Butte-Silver Bow, a consolidated government with self-government powers, has the authority

to acquire and operate electric and natural gas utilities within and outside the boundaries of the local government unit.

Sincerely,

/s/ Joseph P. Mazurek
JOSEPH P. MAZUREK
Attorney General

jpm/tgb/dm

VOLUME NO. 48 OPINION NO. 15

CITIES AND TOWNS - Authority of city or town to levy additional tax for firefighters' disability and pension fund beyond special tax levy of four mills authorized by statute;
FIRE DEPARTMENTS - Special tax levy for firefighters' disability and pension fund;
MUNICIPAL GOVERNMENT - Authority of city or town to levy additional tax for firefighters' disability and pension fund beyond the special tax levy of four mills authorized by statute;
RETIREMENT SYSTEMS - Special tax levy for firefighters' disability and pension fund;
TAXATION AND REVENUE - Special tax levy for firefighters' disability and pension fund;
MONTANA CODE ANNOTATED - Sections 19-18-503, -504.

HELD: If the city council has already imposed the maximum mill levy authorized by statute in order to fund the firefighters' disability and pension fund, it may not levy an additional special tax or seek voter approval for an additional special tax, even if the fund's value is less than 4 percent of the taxable valuation of all taxable property within the city.

June 27, 2000

Mr. Gerard M. Schuster
Wolf Point City Attorney
112 Main Street
Wolf Point, MT 59201

Dear Mr. Schuster:

You have requested my opinion concerning the authority of the Wolf Point City Council to seek voter approval for an additional special tax levy for the firefighters' disability and pension fund when the fund falls below 4 percent of the taxable valuation of all taxable property in the city.

Montana law authorizes the creation of a fire department relief association by the confirmed members of a local fire department. Mont. Code Ann. § 19-18-102. Whenever a fire department relief association is formed, the city or town must establish a "disability and pension fund" for the benefit of its members. Mont. Code Ann. § 19-18-105. The fund consists of moneys received from the state, monthly membership fees, moneys from other sources, interest and other income earned, and the proceeds of any tax levy authorized by statute. Mont. Code Ann. § 19-18-501.

There are two statutes relevant to the tax levy: Mont. Code Ann. §§ 19-18-503 and -504. The first authorizes a special tax

levy as a means of maintaining a firefighters' disability and pension fund at a level equal to at least 4 percent but no more than 10 percent of the taxable valuation of all taxable property within the limits of the city or town. Mont. Code Ann. § 19-18-503(1). Whenever the fund contains less than 4 percent of the taxable valuation of all taxable property within the city limits, the governing body is *required* to levy a special tax as provided in Mont. Code Ann. § 19-18-504. Mont. Code Ann. § 19-18-503(2).

The amount of the special tax levy is discussed in Mont. Code Ann. § 19-18-504. That statute provides:

> Whenever the fund contains an amount that is less than four percent of the taxable valuation of all taxable property in the city or town, the city or town council shall levy an annual special tax of not less than one mill and not more than four mills on each dollar of taxable valuation of all taxable property within the city or town. When the fund contains an amount that is less than ten percent but more than four percent of the taxable valuation of all taxable property in the city or town, the city or town council may, if authorized by the voters, levy an annual special tax of not less than one mill and not more than four mills on each dollar of taxable valuation.

As this statute indicates, the council is obligated to impose a levy if the fund falls below 4 percent. Voter approval is required only if the fund is between 4 percent and 10 percent of the taxable valuation of all taxable property in the city. In either instance, however, the maximum that may be imposed is four mills on each dollar of taxable valuation. You question whether the voters may approve an additional special tax levy if the fund falls below the 4 percent mark even though the council has already imposed the four-mill levy. This question must be answered in the negative.

As an incorporated city with general government powers, Wolf Point is a municipal corporation vested with "legislative, administrative, and other powers provided or implied by law." Mont. Const. art. XI, § 4(1)(a). Even though the powers of incorporated cities and towns must be liberally construed, Mont. Const. art. XI, § 4(2), this rule of construction does not "of its own force confer new powers on local governments." 40 Op. Att'y Gen. No. 17 at 66 (1983). There must nonetheless be some constitutional or statutory basis for their existence. Id.

Here, the city is expressly mandated to levy a special tax whenever the fund falls below the 4 percent mark. However, the amount that may be levied is limited to four mills on each dollar of taxable valuation. To increase the levy through an additional special tax, even with voter approval, would contravene the explicit statutory limitation of four mills. The

city cannot validate its action by putting the issue to the voters. A referendum and subsequent vote cannot ratify an action that the city does not have the authority to take in the first instance. The general rule is that the power of referendum is restricted to legislation that is within the power of the municipality to enact or adopt. 46 Op. Att'y Gen. No. 15 at 139 (1996), citing McQuillin, Municipal Corporations § 16.54. The electorate has no greater power to legislate than the municipality itself. Id.

In short, where the legislature has expressly limited the special tax levy to four mills on each dollar of taxable valuation, there is no authority, express or implied, to increase that levy beyond the four-mill limit.

THEREFORE, IT IS MY OPINION:

> If the city council has already imposed the maximum mill levy authorized by statute in order to fund the firefighters' disability and pension fund, it may not levy an additional special tax or seek voter approval for an additional special tax, even if the fund's value is less than 4 percent of the taxable valuation of all taxable property within the city.

Sincerely,

/s/ Joseph P. Mazurek
JOSEPH P. MAZUREK
Attorney General

jpm/ja/dm

VOLUME NO. 48 OPINION NO. 16

ATTORNEYS' FEES - Remuneration of indigent youth's legal defense costs;
COUNTIES - Remuneration of indigent youth's legal defense costs;
COUNTY COMMISSIONERS - Remuneration of indigent youth's legal defense costs;
COURTS - Remuneration of indigent youth's legal defense costs;
JUVENILES - Remuneration of indigent youth's legal defense costs;
YOUTH COURT ACT - Remuneration of indigent youth's legal defense costs;
MONTANA CODE ANNOTATED - Sections 41-5-104, -111, -523, -1413, 46-8-101, -201.

HELD: The county commissioners are required to fund the legal defense expenses of an indigent juvenile against whom a petition has been filed in youth court.

June 30, 2000

Mr. Dennis Paxinos
Yellowstone County Attorney
P.O. Box 35025
Billings, MT 59107-5025

Dear Mr. Paxinos:

You have requested my opinion on a question I have rephrased as follows:

> Does a county or the state of Montana have the obligation to fund the legal defense expenses of an indigent juvenile against whom a petition has been filed in youth court?

Chapter 329 of the 1974 Montana Laws established the Montana Youth Court Act, now codified at title 41, chapter 5 of the Montana Code Annotated. Mont. Code Ann. § 41-5-1413 codifies a youth's constitutional right to be represented by counsel following the filing of a petition alleging that the youth is either delinquent or in need of intervention. If the parents or guardian and the youth are unable to provide counsel, and the right to counsel has not been properly waived, counsel must be appointed. Mont. Code Ann. § 41-5-1413.

The youth-related statute is similar to the statutes that give indigent criminal defendants the right to counsel in criminal proceedings. See Mont. Code Ann. §§ 46-8-101 and -201. However, remuneration of counsel appointed to represent indigent youths is controlled by Mont. Code Ann. §§ 41-5-104 and -111, not by § 46-8-201.

The Montana Youth Court Act provides that every county commission is "authorized, empowered and required" to provide the funds necessary for the implementation of the Act. Mont. Code Ann. § 41-5-104(1). The expenses that must be covered by the youth court or other appropriate agency include "reasonable compensation for services and related expenses for counsel appointed by the court." Mont. Code Ann. § 41-5-111(2). Thus, it is the responsibility of a county's commissioners, not of the state of Montana, to provide the funds necessary for an indigent youth's legal expenses.

Mont. Code Ann. § 3-5-901 does require the state to fund a number of district court expenses. While that section lists a number of specific expenses the state is required to fund, including the expenses for indigent defense in criminal cases, it does not list the funding of youth court defense expenses as a responsibility of the state. The legislature clearly could have made the funding of youth court expenses a responsibility of the state by including it in Mont. Code Ann. § 3-5-901. The fact that the legislature did not do so supports a conclusion that the legislature did not intend the state to be responsible for the funding of youth court expenses.

In addition, in determining which governmental entity the legislature intended to be responsible for funding the youth court expenses, the specific youth court statutes set forth in Mont. Code Ann. §§ 41-5-104(1) and -111(2) control, rather than the general statute concerning the funding of district court expenses set forth in Mont. Code Ann. § 3-5-901. See Mont. Code Ann. §§ 1-2-102 and 1-3-225. Mont. Code Ann. § 41-5-104(1) and -111(2) require the county commissioners to provide the funds for an indigent youth's legal expenses in a proceeding in youth court.

THEREFORE, IT IS MY OPINION:

> The county commissioners are required to fund the legal defense expenses of an indigent juvenile against whom a petition has been filed in youth court.

Sincerely,

/s/ Joseph P. Mazurek
JOSEPH P. MAZUREK
Attorney General

jpm/mas/dm

VOLUME NO. 48 OPINION NO. 17

COURTS, DISTRICT - Dissemination of marriage records;
MARRIAGE AND DIVORCE - Confidentiality of marriage records;
PRIVACY - Confidentiality of marriage records;
PUBLIC RECORDS - Dissemination of marriage records;
RIGHT TO KNOW - Dissemination of marriage records;
VITAL STATISTICS - Confidentiality of marriage records;
ADMINISTRATIVE RULES OF MONTANA - Rule 37.8.126;
MONTANA CODE ANNOTATED - Sections 40-1-201, -202, -321, 50-15-122(1), -122(5), -301;
OPINIONS OF THE ATTORNEY GENERAL - 48 Op. Att'y Gen. No. 10 (Mar. 23, 2000).

HELD: 1. The holding in 48 Op. Att'y Gen. No. 10 applies to all marriage applications on file with a clerk of the district court, not only to those filed after the date of the opinion.

2. Pursuant to Mont. Code Ann. § 50-15-122(5), a clerk of the district court may allow public inspection and copying of the marriage certificate filed pursuant to Mont. Code Ann. § 40-1-321, but not of the marriage license.

July 5, 2000

Mr. Jeffrey A. Noble
Powder River County Attorney
P.O. Box 240
Broadus, MT 59317

Dear Mr. Noble:

On March 23, 2000, I issued a revised opinion to you on the question of the confidentiality of information contained in Montana marriage license applications. 48 Op. Att'y Gen. No. 10. You have since submitted a second request for opinion on the following related questions:

1. Is the effect of 48 Op. Att'y Gen. No. 10 (Mar. 23, 2000) limited to marriage license applications filed after the effective date of the opinion?

2. Should Montana marriage licenses on file with the clerk of the district court be treated as confidential records?

In Montana, a couple wishing to obtain a marriage license must file an application with the clerk of the district court. Mont. Code Ann. § 40-1-201. After processing the application, the

clerk then issues a marriage license and a marriage certificate. Mont. Code Ann. § 40-1-202. The license form used by most district court clerks actually combines these two documents in a single form, including both the marriage license itself and the certificate of marriage. The officiant fills out and returns the marriage certificate to the clerk of the district court within 30 days after the marriage. Mont. Code Ann. § 40-1-321. Since the form generally used contains both the license and the certificate, compliance with this statute results in the filing with the clerk of both the license and the certificate. Your request touches on the issue of the confidentiality of these documents.

I.

In 48 Op. Att'y Gen. No. 10, I provided guidance on the confidentiality of information contained in marriage license application forms submitted to the clerks of the district court pursuant to Mont. Code Ann. § 40-1-201. Your letter informs me that some clerks have adopted the view that the holdings of that opinion apply only to applications filed after the issuance of the opinion. That view is incorrect. The opinion did not create new law, but rather only interpreted statutes that have been on the books for years. Nothing in the statutes suggests that vital statistics information should be treated differently depending on when the information was collected by a government agency. Clerks should therefore be applying the guidance provided in that opinion to all marriage applications in their files, regardless of when the applications were filed.

II.

In my earlier opinion, I noted that vital statistics information is confidential unless release is specifically authorized by law. 48 Op. Att'y Gen. No. 10 at 3-4; Mont. Code Ann. § 50-15-122(1); Mont. Admin. R. 37.8.126. I found authorization in Mont. Code Ann. § 50-15-122(5) for release of a "record of marriage" upon filing by the clerk of the district court of the report of the marriage required by Mont. Code Ann. § 50-15-301. I further held that for purposes of this statute the "record of marriage" consisted only of limited information relating to the identities of the bride and groom, the date and place of the ceremony, the name of the officiant, and the type of ceremony. 48 Op. Att'y Gen. No. 10 at 4-5.

Mont. Code Ann. § 50-15-122(5) states that "[i]mmediately upon the filing of a record with the [D]epartment of [Public Health and Human Services] . . . a record of marriage . . . may be released to the public without restriction." I held in 48 Op. Att'y Gen. No. 10 that this statute is not confined to release of information by the Department of Public Health and Human Services ("DPHHS"), but also governs release of information by the clerks of district court. It follows from that opinion that those portions of the license and certificate that constitute a

"record of marriage" may be released to the public upon the filing with DPHHS of the report referred to in Mont. Code Ann. § 50-15-301.

In 48 Op. Att'y Gen. No. 10, I held that the "record of marriage" includes only that information which relates to the marriage itself--the identities of the bride and groom, the date and place of the marriage, the name of the officiant, and the type of ceremony. Reviewing the form of marriage license and marriage certificate used by most district court clerks in Montana, it appears to me that the "record of marriage" information is found in the marriage certificate form, which constitutes the bottom third of the document. The marriage license portion, constituting the top two-thirds of the form, includes personal and background information about the bride and groom that does not directly relate to the marriage itself--the race, addresses, and ages of the bride and groom, whether either had been previously married, and the identities of their parents. As I held in 48 Op. Att'y Gen. No. 10, this information is not part of the record of marriage, and its release is not authorized by Mont. Code Ann. § 50-15-122(5).

In my opinion, the best course for court clerks to follow would be as follows: Upon the filing of the report with DPHHS required by Mont. Code Ann. § 50-15-301, the clerk may disclose to the public or provide the public with a copy of the marriage certificate portion of the license/certificate form, but not the marriage license portion of the form. The certificate contains all of the information on the form that can be said to constitute a "record of marriage" under Mont. Code Ann. § 50-15-122(5), as I have interpreted it in 48 Op. Att'y Gen. No. 10.

I note that nothing in statute requires that the license, as opposed to the certificate of marriage, be filed with the clerk of the district court. Mont. Code Ann. § 40-1-202 requires the clerk, upon receipt of the required information, to "issue a license to marry and a marriage certificate form," suggesting that two different documents may be involved. Mont. Code Ann. § 40-1-321 then requires the officiant to file with the clerk the "marriage certificate," without reference to the marriage license. I am not suggesting that the inclusion of both the license and the certificate on one form is unlawful. I do believe, however, that the happenstance of inclusion of both forms in a single document should not serve as a basis for disclosure of information from the license that otherwise would clearly be confidential.

III.

As in 48 Op. Att'y Gen. No. 10, I express no opinion herein on the constitutionality of the statutes cited in this opinion.

THEREFORE, IT IS MY OPINION:

1. The holding in 48 Op. Att'y Gen. No. 10 applies to all marriage applications on file with a clerk of the district court, not only to those filed after the date of the opinion.

2. Pursuant to Mont. Code Ann. § 50-15-122(5), a clerk of the district court may allow public inspection and copying of the marriage certificate filed pursuant to Mont. Code Ann. § 40-1-321, but not of the marriage license.

Sincerely,

/s/ Joseph P. Mazurek
JOSEPH P. MAZUREK
Attorney General

jpm/cdt/dm

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

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

Business and Labor Interim Committee:

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

Education Interim Committee:

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

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

- Department of Public Health and Human Services.

Law, Justice, and Indian Affairs Interim Committee:

- Department of Corrections; and
- Department of Justice.

Revenue and Taxation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

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

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

Environmental Quality Council:

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

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

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

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

Definitions:

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

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

Use of the Administrative Rules of Montana (ARM):

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

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 2000. This table includes those rules adopted during the period April 1, 2000 through June 30, 2000 and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 2000, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1999 and 2000 Montana Administrative Registers.

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