The Montana Administrative Register (MAR or Register), 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 The Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 contains final rule notices which show any changes made since the proposal stage. All rule actions are effective the day after print publication of the adoption notice unless otherwise specified in the final notice. The Interpretation Section contains the Attorney General's opinions and state declaratory rulings. Special notices and tables are found at the end 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 Secretary of State's Office, Administrative Rules Services, at (406) 444-2055.

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BEFORE THE HARD-ROCK MINING IMPACT BOARD
DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 8.104.101, 8.104.201, 8.104.202, 8.104.211, 8.104.214, and 8.104.218 pertaining to the organization and procedural rules of the Hard-Rock Mining Impact Board	))))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On March 3, 2008, the Hard-Rock Mining Impact Board proposes to amend the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the board no later than 5:00 p.m., February 19, 2008, to advise us of the nature of the accommodation that you need. Please contact Joe LaForest, Hard-Rock Mining Impact Board, Department of Commerce, 301 South Park Avenue, P.O. Box 200523, Helena, Montana 59620-0523; telephone (406) 841-2789; TDD (406) 841-2702; fax (406) 841-2771; or e-mail jlaforest@mt.gov.

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

8.104.101 ORGANIZATION OF BOARD (1) remains the same.

(2) Information or submissions: Inquiries regarding the board may be addressed to the Hard-Rock Mining Impact Board, Department of Commerce, 301 South Park, P.O. Box ~~200501~~ 200523, Helena, Montana 59620-~~0501~~ 0523.

(3) remains the same.

AUTH: 2-4-201, MCA
IMP: 2-4-201, MCA

8.104.201 PUBLIC PARTICIPATION (1) The Hard-Rock Mining Impact Board adopts and incorporates by reference ARM 8.2.201 through 8.2.~~207~~ 206 which sets forth the Department of Commerce's public participation rules. A copy of the rules may be obtained from the Hard-Rock Mining Impact Board, Department of Commerce, ~~1424 9th Avenue, P.O. Box 200501, Helena, Montana 59620-0501~~ 301 South Park, P.O. Box 200523, Helena, Montana 59620-0523.

AUTH: 2-3-103, MCA
IMP: 2-3-103, MCA

8.104.202 GENERAL PROCEDURAL RULES (1) The Hard-Rock Mining Impact Board adopts and incorporates by reference ARM 1.3.101 through 1.3.~~234~~ 233 which sets forth the Attorney General's model procedural rules. A copy of the model rules may be obtained from the Hard-Rock Mining Impact Board, Department of Commerce, ~~1424 9th Avenue, P.O. Box 200501, Helena, Montana 59620-0501~~ 301 South Park, P.O. Box 200523, Helena, Montana 59620-0523. The board will treat the hearing provided for by 90-6-307(4), MCA, as a contested case hearing under the model rules.

AUTH: 90-6-305, MCA
IMP: 90-6-307, MCA

8.104.211 IMPLEMENTATION OF APPROVED IMPACT PLAN (1) and (2) remain the same.

(3) As required by 90-6-307(11) and (15), MCA, the board will notify the Department of ~~state lands~~ Environmental Quality if the mineral developer fails to comply, or resumes compliance, with the terms of the approved impact plan or with the requirements of Title 90, chapter 6, parts 3 and 4 of the Montana Code Annotated.

AUTH: 90-6-305, MCA
IMP: 90-6-307, 90-6-310, MCA

8.104.214 FINANCIAL GUARANTEE OF TAX PREPAYMENTS (1) remains the same.

(2) The financial guarantee must be submitted to the board in sufficient time that it may be approved by the board and be in place before mining activities under an operating permit issued by the Department of ~~state lands~~ Environmental Quality commence or prior to the time an affected local government unit must incur a financial obligation in implementation of the approved impact plan and in anticipation of revenues protected by the financial guarantee, whichever occurs first.

AUTH: 90-6-305, MCA
IMP: 90-6-309, MCA

8.104.218 WAIVER OF IMPACT PLAN REQUIREMENT (1) remains the same.

(2) Following its decision, the board will provide a copy of the waiver, conditional waiver, or denial of waiver to the Department of ~~state lands~~ Environmental Quality, the permittee, and the potentially affected local government units identified by the board and the affected county or counties for purposes of 90-6-307(14), MCA.

AUTH: 90-6-305, 90-6-307, MCA
IMP: 90-6-307, MCA

REASON: The board is proposing amendment of the organization and procedural rules in ARM 8.104.101, 8.104.201, 8.104.202, 8.104.211, 8.104.214, and 8.104.218 to accurately reflect address and contact information for the board, and update references to specific rules and departments.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: Hard-Rock Mining Impact Board, Department of Commerce, 301 South Park Avenue, P.O. Box 200523, Helena, Montana 59620; telephone (406) 841-2789; fax (406) 841-2771; or e-mail jlaforest@mt.gov, and must be received no later than 5:00 p.m., February 29, 2008.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to the Hard-Rock Mining Impact Board at the above address no later than 5:00 p.m., February 29, 2008.

6. If the board receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 25 based on the number of individuals who are interested in hard-rock mining in Montana.

7. The board maintains a list of interested persons who wish to receive notices of proposed rulemaking actions. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Hard-Rock Mining Impact Board administrative rulemaking proceedings. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the Hard-Rock Mining Impact Board, 301 South Park, P.O. Box 200523, Helena, Montana 59620-0523; telephone (406) 841-2789; fax (406) 841-2771; or by e-mail to jlaforest@mt.gov, or may be made by completing a request form at any rules hearing held by the board.

8. An electronic copy of this Proposal Notice is available through the Secretary of State's web site at http://sos.mt.gov/ARM/Register. The Secretary of State strives to make the electronic copy of the Notice 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 Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web

site may be unavailable during some periods, due to system maintenance or technical problems.

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

HARD-ROCK MINING IMPACT BOARD
DEPARTMENT OF COMMERCE

/s/ KELLY A. CASILLAS
KELLY A. CASILLAS
Rule Reviewer

/s/ ANTHONY J. PREITE
ANTHONY J. PREITE
Director
Department of Commerce

Certified to the Secretary of State January 22, 2008.

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

In the matter of the adoption of NEW RULE I pertaining to a no wake zone on Echo Lake	)))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

To: All Concerned Persons

1. On March 5, 2008, at 6:00 p.m. the Fish, Wildlife and Parks Commission (commission) will hold a public hearing at the Fish, Wildlife and Parks Region 1 offices located at 490 North Meridian Road, Kalispell, Montana to consider the adoption of the above-stated rule.

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the commission no later than 5:00 p.m. on February 22, 2008, to advise us of the nature of the accommodation that you need. Please contact Martha Abbrescia, Fish, Wildlife and Parks, Region 1, 490 North Meridian Road, Kalispell, MT 59901; telephone (406) 751-4567; fax (406) 257-0349; e-mail mabbrescia@mt.gov.

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

NEW RULE I ECHO LAKE (1) Echo Lake is located in Flathead County.

(2) Echo Lake is limited to a controlled no wake speed, as defined in ARM 12.11.101(1), except for the following areas:

(a) the upper three islands in the southwest corner of section 5, approximately 1/4 mile southeast of the entrance of Blackies Bay;

(b) the narrow corridor that serves as the entrance and exit to Blackies Bay located in the northwest corner of Echo Lake; and

(c) the narrow corridor that serves as the entrance and exit to Causeway Bay located in the northeast corner of Echo Lake.

AUTH: 23-1-106, 87-1-303, MCA
IMP: 23-1-106, 87-1-303, MCA

4. The Fish, Wildlife and Parks Commission (commission) received four petitions, regarding the no wake zone established by ARM 12.11.115, on Echo Lake. After hearing comments from the petitioners pursuant to ARM 12.11.117, the commission is proposing the enclosed rulemaking.

The commission is proposing New Rule I(2)(a) to establish an alternative route to the existing path motorized watercraft towing skiers are allowed to travel in order to allow safe travel across the whole lake. The existing no wake zone around the perimeter of the lake disallows motorized watercraft towing a skier to continue through to other portions of the lake because the 200 foot no wake zone overlaps and does not allow watercraft to travel at speeds required to pull a skier. The

commission found that in areas where watercraft can travel at speeds to tow a skier are too congested and cause wave action that resulted in damage to adjacent property owners' docks and shorelines. This proposal provides a safe route, with high visibility, allowing watercraft towing a skier to travel a greater portion of the lake relieving congestion and minimizing damage to the shoreline caused by waves.

The commission is proposing New Rule I(2)(b) and (c) to provide a continuous route from Blackies Bay and Causeway Bay to the main body of water on Echo Lake by exempting the corridor that serves as entrance and exit for each bay from ARM 12.11.115.

On November 29, 2007 the commission voted and approved to direct the Department of Fish, Wildlife and Parks to initiate rulemaking.

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 Martha Abbrescia, Fish, Wildlife and Parks, Region 1, 490 North Meridian Road, Kalispell, MT 59901; fax (406) 257-0349; e-mail mabbrescia@mt.gov, and must be received no later than March 14, 2008.

6. Rebecca Jakes Dockter, or another hearing officer appointed by the department, has been designated to preside over and conduct the hearing.

7. The Department of Fish, Wildlife and Parks maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the commission or department. Persons who wish to have their name added to the list shall make written request which includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made by completing the request form at any rules hearing held by the commission or department.

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

/s/ Steve Doherty	/s/ Rebecca J. Dockter
Steve Doherty, Chair	Rebecca J. Dockter
Fish, Wildlife and Parks Commission	Rule Reviewer

Certified to the Secretary of State January 22, 2008.

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

In the matter of the adoption of NEW RULE I pertaining to a no wake zone on Swan Lake	)))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

To: All Concerned Persons

1. On March 6, 2008, at 6:00 p.m. the Fish, Wildlife and Parks Commission (commission) will hold a public hearing at the Fish, Wildlife and Parks Region 1 offices located at 490 North Meridian Road, Kalispell, Montana to consider the adoption of the above-stated rule.

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the commission no later than 5:00 p.m. on February 22, 2008, to advise us of the nature of the accommodation that you need. Please contact Martha Abbrescia, Fish, Wildlife and Parks, Region 1, 490 North Meridian Road, Kalispell, MT 59901; telephone (406) 751-4567; fax (406) 257-0349; e-mail mabbrescia@mt.gov.

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

NEW RULE I SWAN LAKE (1) Swan Lake is located in Flathead County.

(2) Swan Lake is limited to a controlled no wake speed, as defined in ARM 12.11.101(1), including the following areas:

(a) the northern outlet of Swan Lake approximately 3/4 of a mile south to the southern tip of the southern most island or as buoyed.

AUTH: 23-1-106, 87-1-303, MCA
IMP: 23-1-106, 87-1-303, MCA

4. The Fish, Wildlife and Parks Commission (commission) received a petition from the users and landowners of Swan Lake area, Swan Lakers (a nonprofit group), Swan Sites Home Owners' Association, and Montana Trout Unlimited using the procedure outlined in ARM 12.11.117. The petition was originally submitted in 2006 and the commission did not pursue rulemaking but increased enforcement of the existing no wake zone established by ARM 12.11.115. The petitioners resubmitted the petition in 2007 requesting the no wake zone be extended from the existing 200 feet to one mile from the shoreline at the north end of Swan Lake. Staff of Montana Fish, Wildlife and Parks concurred that the situation warranted extending the no wake zone. The proposal will increase safety due to the high density of recreational use, and the anticipated increase of use due to future development, in the narrow north channel of the lake. The department recommended, and the commission approved initiating rulemaking to extend the no

wake zone to the tip of southern most island approximately three quarters of a mile south of the outlet of Swan Lake.

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 Martha Abbrescia, Fish, Wildlife and Parks, Region 1, 490 North Meridian Road, Kalispell, MT 59901; telephone (406) 751-4567; fax (406) 257-0349; e-mail mabbrescia@mt.gov and must be received no later than March 14, 2008.

6. Rebecca Jakes Dockter, or another hearing officer appointed by the department, has been designated to preside over and conduct the hearing.

7. The Department of Fish, Wildlife and Parks maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the commission or department. Persons who wish to have their name added to the list shall make written request which includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made by completing the request form at any rules hearing held by the commission or department.

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

/s/ Steve Doherty	/s/ Rebecca J. Dockter
Steve Doherty, Chair	Rebecca J. Dockter
Fish, Wildlife and Parks Commission	Rule Reviewer

Certified to the Secretary of State January 22, 2008

BEFORE THE BOARD OF PRIVATE SECURITY
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment of ARM 24.182.401 fees and 24.182.503 experience requirements	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On February 21, 2008, at 9:00 a.m., a public hearing will be held in room 439, 301 South Park Avenue, Helena, Montana to consider the proposed amendment of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Private Security (board) no later than 5:00 p.m., on February 15, 2008, to advise us of the nature of the accommodation that you need. Please contact Chris Bernet, Board of Private Security, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2334; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2309; e-mail dlibsdpsp@mt.gov.

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

24.182.401 FEE SCHEDULE (1) License application fees are as follows:

(a) Contract security companies, proprietary security organizations, and electronic security companies:

(i) remains the same.

(ii) Resident manager ~~or qualifying agent~~ 100

(iii) Security guard, alarm installer, or alarm response runner 25

(iv) through (c) remain the same.

(d) Fire investigator 200

(d) and (e) remain the same but are renumbered (e) and (f).

(2) License renewal fees are as follows:

(a) Contract security companies, proprietary security organizations, and electronic security companies:

(i) remains the same.

(ii) Resident manager ~~or qualifying agent~~ 75

(iii) Security guard, alarm installer, or alarm response runner 45

(iv) through (c) remain the same.

(d) Fire investigator 100

(d) and (e) remain the same but are renumbered (e) and (f).

(3) through (3)(b) remain the same.
(c) Changes of employer, address, or name 10
(d) through (6) remain the same.

AUTH: 37-1-134, 37-1-141, 37-60-202, MCA
IMP: 25-1-1104, 37-1-134, 37-1-141, 37-60-202, 37-60-304, MCA

REASON: The 2007 Montana Legislature enacted Chapter 502, Laws of 2007 (Senate Bill 153), an act revising professional and occupational licensing laws. The bill was signed by the Governor on May 16, 2007, and became effective on October 1, 2007. The bill amended several of the board's statutes to provide for the licensure of fire investigators. The board is amending this rule to add reasonable fees for the processing of initial and renewal licensure applications of fire investigators to coincide with the legislative changes. The proposed fees are the same as the current fees for private investigators as the board anticipates the same costs to process fire investigator applications. The board is estimating the initial licensure of 25 fire investigator applicants, resulting in an annual revenue increase of approximately $5000.

The bill also struck the licensure of qualifying agents from statute and the board is amending this rule to delete the fees for licensing these individuals. The amendment will affect approximately 23 formerly licensed qualifying agents and result in a $1725 decrease in annual revenue. The rule is also being amended to comply with ARM punctuation requirements.

24.182.503 EXPERIENCE REQUIREMENTS (1) Experience requirements for resident managers ~~and/or qualifying agents~~ of contract security companies and proprietary security organizations are as follows:

(a) and (b) remain the same.

(2) Experience requirements for resident managers ~~and/or qualifying agents~~ of electronic security companies are as follows:

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

(c) One and one-half years experience as a licensed insurance investigator may be applied toward the three years of experience required for a private investigator.

(4) Experience requirements for fire investigators are as follows:

(a) three years full-time experience:

(i) engaged in the fire investigative business;

(ii) employed as a fire investigator or having held a certificate of authority to conduct a fire investigative business; or

(iii) having been a fire investigator, fire detective, firefighter, or held a similar position acceptable to the board with a city, county, or state government or with the United States government.

(b) In determining experience qualifications for fire investigator licensure, "three years" means an accumulation of 5400 hours of experience. Self-employment must be verified by tax returns.

~~(4)~~(5) Proof of education and training must be submitted with the application and may include:

(a) through (e) remain the same.

(5) and (6) remain the same but are renumbered (6) and (7).

~~(7) One and one-half years experience as a licensed insurance investigator may be applied toward the three years of experience required for a private investigator.~~

AUTH: 37-1-131, 37-60-202, 37-60-303, MCA
IMP: 37-1-131, 37-60-301, 37-60-303, 37-60-304, MCA

REASON: The 2007 Montana Legislature enacted Chapter 502, Laws of 2007 (Senate Bill 153), an act revising professional and occupational licensing laws. The bill was signed by the Governor on May 16, 2007, and became effective on October 1, 2007. The bill amended several of the board's statutes to provide for the licensure of fire investigators. The board determined it is reasonable and necessary to amend this rule to set forth the experience qualifications for licensure as a fire investigator and further implement the legislation.

The bill also struck the licensure of qualifying agents from statute and the board is amending this rule to delete reference to these individuals. The board is relocating (7) under (3) as it applies only to private investigator applicants. The authority and implementation cites are being amended to accurately reflect the board's rulemaking authority and the statutes being implemented by the rule.

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Private Security, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2309, or by e-mail to dlibsdpsp@mt.gov, and must be received no later than 5:00 p.m., February 29, 2008.

5. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at www.privatesecurity.mt.gov. The department strives to make the electronic copy of this Notice 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 web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

6. The Board of Private Security 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 that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all Board of Private Security administrative rulemaking proceedings or other administrative proceedings. The

request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Private Security, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2309, e-mailed to dlibsdpsp@mt.gov, or made by completing a request form at any rules hearing held by the agency.

7. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was notified on January 8, 2008, by regular mail.

8. Darcee L. Moe, attorney, has been designated to preside over and conduct this hearing.

BOARD OF PRIVATE SECURITY
LINDA SANEM, PI, CHAIRPERSON

/s/ DARCEE L. MOE
Darcee L. Moe
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State January 22, 2008

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

In the matter of the amendment of ARM 38.5.6001, 38.5.6002, 38.5.6004, 38.5.6006, 38.5.6007, 38.5.6008, 38.5.6010, 38.5.8201, 38.5.8202, 38.5.8203, 38.5.8204, 38.5.8209, 38.5.8210, 38.5.8211, 38.5.8212, 38.5.8213, 38.5.8218, 38.5.8219, 38.5.8220, 38.5.8221, 38.5.8225, 38.5.8226, 38.5.8227, 38.5.8228, and 38.5.8229 and repeal of ARM 38.5.8001, 38.5.8002, 38.5.8003, 38.5.8004, 38.5.8005, 38.5.8101, and 38.5.8102 pertaining to public utilities, electricity suppliers, and natural gas suppliers	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On March 5, 2008, at 10:00 a.m., the Department of Public Service Regulation will hold a public hearing in the Bollinger Room of the Public Service Commission offices, 1701 Prospect Avenue, at Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules.

2. The Department of Public Service Regulation will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Service Regulation no later than 4:00 p.m. on February 27, 2008, to advise us of the nature of the accommodation that you need. Please contact Connie Jones, Commission Secretary, Department of Public Service Regulation, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana, 59620-2601; telephone (406) 444-6170; fax (406) 444-7618; TDD (406) 444-6199; or e-mail conniej@mt.gov.

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

38.5.6001 DEFINITIONS ~~(1)~~ (2) "Small customer" means a residential customer or a small ~~electricity or~~ natural gas commercial customer of a distribution utility.

~~(2)~~ (1) "Residential customer" means a residential customer of a distribution utility.

~~(3) "Small electricity commercial customer" means a commercial electricity customer whose individual account averaged a monthly demand in the previous~~

~~calendar year of less than 300 kilowatts (kW) or a new commercial customer whose individual account is estimated to average a monthly demand of less than 300 kW.~~

~~(4)~~ (3) "Small natural gas commercial customer" means a commercial natural gas customer with usage per year on an individual account which averages under 500 dekatherm units (dkts) or 500 mcf (each mcf unit is one-thousand cubic feet) or a new commercial customer whose individual account is estimated to average a monthly usage under 500 dkts or mcf per year.

AUTH: 69-3-1404, ~~69-8-403,~~ MCA
IMP: 69-3-1404, ~~69-8-403,~~ MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.6002 VERIFICATION OF SMALL CUSTOMER CHOICE OF SUPPLIER

(1) remains the same.

(2) The letter of authorization shall be a separate document (or an easily separable document) that is delivered to the prospective customer along with the service contract. The letter of authorization shall contain the authorizing language described in (4) ~~of this rule~~, the sole purpose of which is to authorize a natural gas ~~or electricity~~ supplier to initiate a change in the customer's choice of supplier. The letter of authorization must be signed and dated by the customer who is responsible for payment of the natural gas ~~or electricity~~ account.

(3) and (4) remain the same.

AUTH: 69-3-1404, ~~69-8-403,~~ MCA
IMP: 69-3-1404, ~~69-8-410,~~ MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.6004 SMALL CUSTOMER SERVICE CONTRACT (1) All rates, terms, and conditions for supply service must be provided to a small customer in a service contract, written in plain language. The service contract must include the letter of authorization required by ARM 38.5.6002 and the letter of authorization must be returned by the customer to the supplier before any supply service is provided. The front page of a service contract shall prominently and clearly disclose in a uniform information label prescribed by the commission and as available on the commission's internet web site:

(a) remains the same.

(b) the effective price for supply service, in ~~cents per kilowatt-hour for electricity or, for gas,~~ price per either dekatherm or mcf, whichever billing unit is used by the distribution services provider, for various levels of consumption typical for the customer's customer segment;

(c) through (2) remain the same.

(3) No supplier, regulated distribution utility, transmission service provider, energy service provider, metering service provider, billing service provider, or other company or individual involved in the sale or delivery of ~~electricity or~~ natural gas, may disclose individual customer information to others without prior written consent from the customer except as provided by commission rule or order.

(4) through (10) remain the same.

AUTH: 69-3-1404, ~~69-8-403,~~ MCA
IMP: 69-3-1404, ~~69-8-403,~~ MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.6006 BILLS TO SMALL CUSTOMERS (1) through (4) remain the same.

(5) ~~Electric and natural~~Natural gas distribution utilities may enter into agreements with ~~electricity or~~ natural gas suppliers for billings and collections. The two companies must establish an efficient method of resolving customer inquiries and disputes. The billing entity must be able to provide the customer with the name, address, and telephone number of an employee or department responsible for customer dispute resolution.

(6) ~~Bills for electricity services must clearly itemize each service component and its respective charge, including:~~

~~(a) electricity supply;~~

~~(b) transmission and distribution;~~

~~(i) if charges for transmission and ancillary services are paid by a supplier and passed on to a retail customer in electricity supply charges, the supplier must identify the transmission portion of the charges;~~

~~(c) transition charges; and~~

~~(d) universal system benefits.~~

~~(7)~~ Bills for natural gas services must clearly itemize each service component and the charge associated with each service component, including:

(a) through (d) remain the same.

(8) remains the same but is renumbered (7).

~~(9)~~ (8) Bills must provide the actual cents per ~~kilowatt hour or~~ mcf/dkt charged to the customer for the customer's usage of ~~electricity or~~ natural gas supply for the current billing period, calculated by dividing the total charge for supply service by the customer's usage for the current billing period.

(10) remains the same but is renumbered (9).

~~(11)~~ (10) A for-profit affiliate of a cooperative utility that uses a regulated distribution utility's facilities to supply ~~electricity or~~ natural gas to customers outside the cooperative utility's distribution service territory must satisfy the billing provisions of this rule.

AUTH: 69-3-1404, ~~69-8-409,~~ MCA
IMP: 69-3-1404, ~~69-8-409,~~ MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.6007 DEFAULT SUPPLIER (1) ~~The regulated electric distribution utility shall serve as the default supplier in its distribution service territory when a small customer is without supply service because the customer has not selected a competitive supplier or due to contract termination by an electricity supplier, including termination for nonpayment.~~ The regulated natural gas distribution utility shall serve as the default supplier in its distribution service territory when a small customer is without supply service because the customer has not selected a competitive supplier or due to contract termination by a natural gas supplier, including termination for nonpayment.

(2) A customer receiving default supply service must remain in that service until his account is cleared with the default supplier. Once a customer's past due account is cleared, the customer may select a competitive service option from an alternative supplier. A default supplier may disconnect service to a customer who has not paid for its distribution services or default ~~electricity or~~ natural gas supply services. The deposit and termination rules of the commission apply to a default supplier (see ARM 38.5.1101 through 38.5.1112 and ARM 38.5.1401 through 38.5.1418).

(3) After a competitive bid solicitation, a regulated ~~electric or~~ natural gas distribution utility may contract with a third-party supplier to acquire the necessary ~~electric or~~ natural gas supply to allow the distribution provider to meet its default supplier obligations. The regulated ~~electric or~~ natural gas distribution utility is responsible for ensuring compliance with the commission's deposit and termination rules.

AUTH: 69-3-1404, ~~69-8-403, 69-8-409,~~ MCA
IMP: 69-3-1404, ~~69-8-409,~~ MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.6008 SERVICE DISCONNECTION (1) ~~A regulated electric distribution utility may not disconnect or deny electric distribution service to a customer due to the customer's failure to pay for unregulated service or service provided by another entity.~~ A regulated natural gas distribution utility may not shut off or deny regulated natural gas distribution service to a customer due to the customer's failure to pay for unregulated service or service provided by another entity. ~~When the same regulated utility is both a customer's natural gas distribution utility and electric distribution utility, it may not deny, disconnect or shut off natural gas service or electric service due to the customer's failure to pay for the other utility service.~~

(2) Regulated distribution utilities may offer agreements to landlord small customers to allow them to authorize the utility to switch a rental unit's ~~electricity~~

~~and/or~~ natural gas service to the default supplier or to a specified competitive supplier in the event of a tenant customer's service termination.

AUTH: 69-3-1404, ~~69-8-403,~~ MCA
IMP: 69-3-1404, ~~69-8-403,~~ MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.6010 CLAIMS MADE IN MARKETING ~~ELECTRICITY OR~~ NATURAL GAS (1) A supplier shall include in its license application and in its annual reports sufficient documentation to substantiate any claims made to customers in advertising, marketing, promoting, or representing that ~~electricity or~~ natural gas purchased from the supplier is environmentally beneficial, environmentally benign, preserves or enhances environmental quality, is produced primarily with renewable energy sources, or is produced with specific resources or technologies.

(2) The commission may, on its own motion or in response to a complaint from a customer or another supplier, initiate a proceeding to investigate any claims made by a supplier in advertising, marketing, promoting, and representing its services to customers. On determining that a supplier's claims are misleading, deceptive, false, or fraudulent, the commission may apply appropriate penalties, including license revocation, pursuant to ~~69-4-408 and~~ 69-3-1405, MCA.

~~(3) Unregulated supply affiliates of former vertically integrated, regulated public utilities may not refer to, or imply any association with, the reliability, safety, quality, value, history, or economic benefits of service formerly provided by the vertically integrated, regulated utility business when advertising, marketing, promoting or representing unregulated electricity or natural gas supply and/or retail energy services to customers in the service area of the former vertically integrated, regulated public utility.~~

AUTH: 69-3-1404, ~~69-8-403,~~ MCA
IMP: 69-3-1404, ~~69-8-403,~~ MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes. The reference to 69-4-408, MCA, appears to be an error.

38.5.8201 INTRODUCTION AND APPLICABILITY (1) These guidelines apply to electric utilities subject to the provisions of 69-8-419 through 69-8-421, MCA.

(2) These guidelines provide policy guidance ~~to default supply utilities (DSU)~~ on long-term ~~default~~ electricity supply resource planning and procurement. With the exception of ARM 38.5.8301, the guidelines do not impose ~~on DSUs~~ specific resource procurement processes ~~nor~~ or mandate particular resource acquisitions. Instead, the guidelines describe a process framework for considering resource

needs and suggest optimal ways of meeting those needs. Electricity ~~default~~ supply resource decisions affect the public interest. A ~~DSU~~ utility can better fulfill its obligations, mitigate risks, and achieve resource procurement goals if it includes the public in the electricity supply resource portfolio planning process. An independent advisory committee of respected technical and public policy experts may offer the ~~DSU~~ utility an excellent source of up-front, substantive input that would help mitigate risk and improve resource procurement outcomes in a manner consistent with these guidelines. Consistent with these guidelines, and after an opportunity for public input, the ~~DSU~~ utility must ultimately make electricity supply resource acquisition decisions based on economics, reliability, management expertise, and sound judgment.

~~(2)~~ (3) A ~~DSU~~ utility should thoroughly document its ~~default supply~~ portfolio planning processes, resource procurement processes, and management decision-making so that it can fully demonstrate to the commission and stakeholders the prudence of ~~default~~ supply-related costs and/or justify requests for ~~advanced~~ approval of ~~power purchase agreements~~ electricity supply resources. A ~~DSU~~ utility should routinely communicate with the commission and stakeholders regarding ~~on-going default supply~~ portfolio planning and resource procurement activities.

~~(3)~~ (4) These guidelines ~~will~~ provide the basis for commission review and consideration of the prudence of a ~~DSU's~~ ~~default~~ utility's electricity supply resource planning and procurement actions, and are the standards against which the commission will evaluate ~~the reasonableness of power~~ electricity supply ~~agreements~~ resources for which a utility requests ~~filed as part of a DSU's application for advanced~~ approval under 69-8-421, MCA. As such, the guidelines should assist ~~DSUs~~ utilities in making prudent decisions and in fully recovering ~~default~~ supply-related costs. Successful application of the guidelines will require a commitment from the commission, ~~DSUs~~ utilities, and stakeholders to honor the spirit and intent of the guidelines.

~~(4) These guidelines are applicable to any public utility designated by the commission or Montana law as the default supplier of electricity to retail customers in its distribution service territory. These guidelines do not apply to public utilities that are not required to restructure pursuant to Title 69, chapter 8, MCA.~~

(5) These guidelines ~~supercede~~ supersede the commission's electric least cost planning rules (ARM 38.5.2001 through 38.5.2012) solely with respect to ~~a~~ ~~DSU's default~~ electricity supply resource planning and procurement functions.

AUTH: 69-3-2006, 69-8-403, 69-8-419, ~~69-8-1006,~~ MCA
IMP: 69-3-2004, 69-3-2005, 69-8-403, ~~69-8-1004, 69-8-1005,~~ MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. Ch. 220, L. 2007 renumbered sections derived from the Montana Renewable Power Production and Rural Economic Development Act. The change is necessary to conform the rule to the revised statutes and to adopt the preferred spelling of supersede.

38.5.8202 DEFINITIONS For the purpose of this subchapter, the following definitions are applicable:

(1) "Carbon offset provider" means a third party entity that:

(a) arranges for projects or actions that either reduce carbon dioxide emissions or that increase the absorption of carbon dioxide; and

(b) has been determined to be qualified by the commission in an order addressing a utility's application for approval of an acquisition of an equity interest or lease in a facility or equipment constructed after January 1, 2007 that generates electricity primarily by combusting natural or synthetic gas.

(2) "Cost-effective carbon offsets" means actions taken by a utility or a carbon offset provider on behalf of a utility or both which reduce carbon dioxide emissions or increase the absorption of carbon dioxide and which collectively do not increase the annual cost of producing electricity from a facility or equipment that generates electricity primarily by combusting natural or synthetic gas by more than 2.5%.

~~(1)~~ (3) "~~Default~~ Electricity supply costs" means the actual ~~electricity supply~~ costs incurred in ~~of~~ providing ~~default~~ electricity supply service through power purchase agreements, demand-side management, and energy efficiency programs, including but not limited to: capacity costs, energy costs, fuel costs, ancillary service costs, ~~demand-side management and energy efficiency costs,~~ transmission costs (including congestion and losses), ~~billing costs,~~ planning and administrative costs, and any other costs directly related to the purchase of electricity~~,~~ and the management and provision of ~~default electricity supply costs and provision of default supply and related services~~ power purchase agreements.

~~(2)~~ (4) "~~Default~~ Electricity supply resource" means:

(a) remains the same.

(b) a plant or equipment owned or leased, in whole or in part, by a utility for purposes of generating electricity and used to serve the utility's native load;

~~(b)~~ (c) a demand-side management activity, including energy efficiency and conservation programs, load control programs, and pricing mechanisms; or

~~(c)~~ (d) a combination of ~~wholesale power transactions and demand-side management activities~~ (4)(a), (b), and (c).

~~(3) "Default supply utility or DSU" means a distribution services provider regulated by the commission.~~

~~(4)~~ (5) "Environmentally responsible" means explicitly recognizing and incorporating into ~~default~~ electricity supply resource portfolio planning, management, and procurement processes and decision-making the policy of the state of Montana to encourage utilities to acquire resources in a manner that will help ensure a clean, healthful, safe, and economically productive environment.

~~(5)~~ (6) "External costs" means costs incurred by society but not incorporated directly into electricity production and delivery activities, or retail prices for electricity services directly paid by consumers.

~~(6)~~ (7) "Long-term" means a time period at least as long as a ~~DSU's default~~ utility's electricity supply resource planning horizon. ~~Long-term should also be considered that time period in which a DSU can reasonably expect to provide default supply service.~~

~~(7)~~ (8) "Planning horizon" means the longer of:

(a) the longest remaining contract term in a ~~DSU's~~ utility's ~~current default~~ electricity supply resource portfolio;

(b) the period of the longest lived ~~contract term being considered for a new~~ electricity supply resource being considered for acquisition; or

(c) ten years.

~~(8)~~ (9) "Pre-filing communication" means, with respect to an application by a ~~DSU~~ utility for ~~advanced~~ approval of a electricity supply resource, informal information exchange, including oral dialogue and written discovery, between the ~~DSU~~ utility and members of its stakeholder advisory committee, the Montana Consumer Counsel, other stakeholders, and commission staff that occurs after the ~~DSU~~ utility files a notice of intent to request ~~advanced~~ approval of a new electricity supply resource pursuant to ARM 38.5.8228 up to the date the ~~DSU~~ utility files ~~an~~ the application ~~for advanced approval~~.

~~(9)~~ (10) "Rate stability" means minimal price variation, both month-to-month and year-to-year, and minimal price inflation over time.

~~(10)~~ (11) "Stakeholder" means a member of the public (individual, corporation, organization, group, etc.) who may have a special interest in, or may be especially affected by, these rules.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.8203 GOALS (1) The goals of these ~~default~~ electricity supply resource planning and procurement guidelines are ~~to~~:

(a) to facilitate a ~~DSU's~~ utility's provision of adequate and reliable ~~default~~ electricity supply services, stably and reasonably priced, at the lowest long-term total cost;

(b) to promote economic efficiency and environmental responsibility;

(c) to facilitate a ~~DSU's~~ utility's ~~on-going~~ financial health;

(d) to facilitate a process through which a ~~DSU~~ utility identifies and cost-effectively manages and mitigates risks related to its obligation to provide ~~default~~ electricity supply service ~~in a retail choice environment~~; and

~~(e) foster an environment in which meaningful retail customer choice and workable competition can develop, where feasible; and~~

~~(f)~~ (e) to build on the fundamental rate making relationship between the commission and the ~~DSU~~ utility to advance these goals.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.8204 OBJECTIVES (1) In order to satisfy its ~~default~~ electricity supply service responsibilities, a ~~DSU~~ utility should pursue the following objectives in assembling and managing an electricity supply resource portfolio~~. The DSU should~~:

(a) provide ~~default supply~~ customers adequate and reliable ~~default~~ electricity supply services, stably and reasonably priced, at the lowest long-term total cost;

(b) design rates ~~for default supply service~~ that are equitable and promote rational, economically efficient consumption ~~and customer choice~~ decisions;

(c) assemble and maintain a balanced, environmentally responsible portfolio of ~~power~~ electricity supply ~~and demand-side management~~ resources coordinated with economically efficient cost allocation and rate design that most efficiently ~~supplies firm, full~~ provides electricity supply services to ~~default supply~~ customers over the planning horizon;

(d) maintain an optimal mix of ~~demand-side management and power~~ electricity supply ~~sources~~ resources with respect to underlying fuels, ~~generation~~ technologies, and associated environmental impacts, and a diverse mix of long, medium, and short duration power supply contracts with staggered start and expiration dates; and

(e) maximize the dissemination of information to ~~default~~ customers regarding the mix of resources and the corresponding level of emissions and other environmental impacts associated with ~~default~~ electricity supply service through itemized labeling and reporting of the ~~default supply~~ portfolio's energy products.

(2) These objectives are listed in order of importance, but no single objective should be pursued such that others are ignored. Simultaneously achieving these multiple objectives will require a balanced approach. A ~~DSU~~ utility should apply the recommendations in ARM 38.5.8209 through 38.5.8213, 38.5.8218 through 38.5.8221, 38.5.8225, and 38.5.8226, in addition to relevant commission orders, to achieve these goals and objectives.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.8209 ~~DEFAULT SUPPLY~~ UTILITY EMERGENCY SERVICE ~~RESPONSIBILITIES~~ RESPONSIBILITY (1) A ~~DSU's default~~ utility's electricity supply service ~~responsibilities are~~ responsibility is~~:~~

~~(a) to plan and manage its resource portfolio in order to provide adequate, reliable, and efficient annual and long-term default electricity supply services at the lowest total cost;~~

~~(b)~~ to provide all or a substantial amount of the emergency electricity supply requirements of retail customers who have electricity supply service contracts with a non-utility electricity supplier or marketer that has failed to deliver the required electricity supply. (A ~~DSU~~ utility is not required to maintain a reserve of electricity supply to fulfill its emergency supply responsibilities. To the greatest extent

practicable, a ~~DSU~~ utility should recover the costs of providing emergency service from the supplier or marketer that failed to deliver the required electricity or the customers that directly benefited from the ~~DSU's~~ utility's provision of emergency service. A ~~DSU~~ utility must provide emergency service according to commission-approved tariff schedules.~~; and~~.

~~(c) to comply with the provisions of the Montana Renewable Power Production and Rural Economic Development Act, codified at 69-8-1001 through 69-8-1008, MCA, and ARM 38.5.8301.~~

~~(2) The DSU should establish an optional retail electricity product composed of or supporting power from certified environmentally preferred resources that include but are not limited to biomass, wind, solar or geothermal resources. The resources used to provide this service should be certified as meeting industry-accepted standards.~~

AUTH: 69-8-403, 69-8-419, ~~69-8-1006,~~ MCA
IMP: 69-8-403, ~~69-8-1004, 69-8-1005,~~ MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. Ch. 220, L. 2007 renumbered sections derived from the Montana Renewable Power Production and Rural Economic Development Act. The change is necessary to conform the rule to the revised statutes.

38.5.8210 RESOURCE NEEDS ASSESSMENT (1) Before ~~soliciting~~ acquiring ~~new~~ multi-year ~~wholesale power contracts~~ electricity supply resources ~~for inclusion in the default supply portfolio~~, a ~~DSU~~ utility should evaluate its existing ~~default supply resource portfolio~~ resources and analyze future resource needs in the context of the goals and objectives of these guidelines. A ~~DSU~~ utility should use a planning horizon as defined in these rules.

(2) A ~~DSU's default supply portfolio~~ utility's resource needs assessment should include:

(a) analyses of ~~default~~ customer loads including base load, intermediate load, peak load and ancillary service requirements, seasonal and daily load shapes and variability, the number and type of ~~default~~ customers, load growth, trends in customer choice and retail markets, technology that may lead to substitutes for grid-based electricity service, impacts of demand-side management, and price elasticity of demand;

(b) remains the same.

(c) an assessment of the types of wholesale electricity products that could effectively and efficiently contribute to meeting portfolio needs including base load, heavy load, peak, dispatchable, curtailable, assignable, firm, full requirements, load following, unit contingent, slice of the system (fixed percentage of hourly system load requirements), and others;

(d) an assessment of ~~the~~ resource diversity ~~of~~ within the existing portfolio with respect to generation fuel and generation technology (e.g., conventional coal, clean coal, hydro, natural gas combined cycle, natural gas simple cycle, wind, fuel cell, etc.) ~~in the context of the goals and objectives of these guidelines~~; and

(e) remains the same.

(3) A ~~DSU's~~ utility's resource needs assessment should include analyses of how cost allocation and rate design decisions might impact future loads and resource needs. A ~~DSU's~~ utility's cost allocation and rate design practices should support and complement the goals and objectives of these guidelines.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.8211 COST ALLOCATION AND RATE DESIGN (1) A ~~DSU's~~ utility's cost allocation and rate design practices and rate case proposals should support and complement the goals and objectives of these guidelines. Different approaches to allocating costs and designing rates have different advantages and disadvantages. A ~~DSU~~ utility should consider these advantages and disadvantages in the context of the goals and objectives of these guidelines when proposing particular cost allocations and rate designs. A ~~DSU~~ utility should evaluate and consider the following items when allocating costs and designing rates:

(a) through (f) remain the same.

~~(2) A DSU must ensure that all allowable default supply-related costs are recovered through default supply service prices, not in transmission or distribution service prices. An analysis of the sources of default supply costs might support the recovery of some costs through non-bypassable default supply prices.~~

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.8212 RESOURCE ACQUISITION (1) A ~~DSU~~ utility should apply industry ~~accepted~~ standard procurement practices to acquire ~~default~~ electricity supply resources. The commission cannot prescribe in advance the precise industry ~~accepted practices~~ standards a ~~DSU~~ utility must apply since industry ~~accepted practices~~ standards vary depending on context and circumstances. Generally, an ~~industry accepted~~ acceptable approach to resource procurement should encompass the following basic steps:

(a) remains the same.

(b) explore a wide variety of alternative electricity supply ~~and demand-side~~ resources~~, products and prices~~;

(c) collect proposals from various parties offering electricity supply ~~and demand-side~~ resources ~~and products~~;

(d) analyze the feasibility and economic costs, risks, and benefits of rate basing versus wholesale alternative electricity supply arrangements;

~~(d)~~ (e) analyze ~~the proposals or offers~~ alternative electricity supply resources with respect to price and non-price factors in the context of the goals and objectives of these guidelines;

~~(e)~~ (f) select the most appropriate ~~proposals~~ options and develop a shortlist;

~~(f)~~ (g) refine the analysis of short-listed options and select ~~negotiate~~ the most appropriate ~~contract~~ option; and

~~(g)~~ (h) anticipate changing circumstances and remain flexible.

(2) Although these basic steps could be achieved through a variety of methods, a ~~DSU~~ utility should use competitive solicitations with short-list negotiations as a preferred procurement method ~~of procuring default supply resources~~. A ~~DSU~~ utility should design requests for proposals based on its resource needs assessment. Competitive solicitations should treat bidders fairly, promote ~~transparency in a DSU's default supply~~ transparent portfolio planning and electricity supply resource procurement processes and contribute to achieving the goals and objectives of these guidelines. A ~~DSU's~~ utility's resource acquisition process should conform to the following principles:

(a) A ~~DSU~~ utility should clearly define the resources, products, and services it needs before issuing a resource solicitation and clearly communicate these needs to potential bidders in the request(s) for proposals. Multiple solicitations and/or solicitations for multiple resources, products, and services may be necessary to obtain information sufficient for prudent analyses and decision-making;

(b) A ~~DSU~~ utility should establish bid evaluation and bidder qualification standards and criteria it will use to select from among offers before issuing a resource solicitation and clearly communicate these standards and criteria to potential bidders in the request for proposals. Once bids are received, a ~~DSU~~ utility should apply its bid evaluation and bidder qualification standards and criteria firmly and consistently;

(c) A ~~DSU~~ utility should develop a systematic rating mechanism that allows it to objectively rank bids with respect to price and nonprice attributes. A ~~DSU~~ utility is not required to reveal to bidders the specific ranking method used to select preferred bids, however a ~~DSU~~ utility should thoroughly document the development and use of the method for later presentation to the commission;

(d) A ~~DSU~~ utility should establish a shortlist of offers from bidders with which the ~~DSU~~ utility will pursue contract negotiations. A ~~DSU~~ utility should complete due diligence regarding bid qualifications, bidder credit worthiness and experience and project feasibility before selecting an offer for the shortlist. A ~~DSU~~ utility should not indicate to a bidder that its offer is being considered for the shortlist while performing initial due diligence;

(e) If, in evaluating offers, a ~~DSU~~ utility determines that a previously unidentified resource attribute should be considered in the bid evaluation, or that additional evaluation criteria should be used, all bidders should be given an opportunity to supplement their offering to address the ~~DSU's~~ utility's desire for the new attribute or the new criteria. The ~~DSU~~ utility should attempt to minimize such occurrences;

(f) A ~~DSU~~ utility should not reassign or "flip" ~~default~~ supply contracts to an additional third party(ies) after the original bid activity and during the evaluation of bids. A ~~DSU~~ utility must notify the commission before reassigning any fully executed contract;

(g) During competitive solicitation and resource acquisition processes, a ~~DSU~~ utility should not publicly disclose specific information related to particular bids, including price, before the ~~DSU~~ utility completes its resource acquisition process and has signed contracts with the selected bidder(s);

(h) The ~~DSU~~ utility should obtain input and recommendations from an advisory committee regarding any procurement process that may involve projects or proposals by an affiliate of the ~~DSU~~ utility. The ~~DSU~~ utility should employ an independent third party to develop competitive solicitations if affiliate interests could be involved. An independent third party should review the contract terms and conditions in any power purchase agreement between a ~~DSU~~ utility and an affiliate before the ~~DSU~~ utility signs the agreement. A ~~DSU~~ utility should consult with its advisory committee before selecting the independent third party and should evaluate the third party's findings with the advisory committee. The ~~DSU~~ utility should be prepared to offer substantially the same form of contract to other bidders for similar products to the extent procuring such products is otherwise justified under the goals, objectives, and procedures established in these guidelines; and

(i) A ~~DSU~~ utility should not provide any information to an affiliate with respect to the ~~DSU's~~ utility's resource needs assessment, evaluation criteria, bidder qualification criteria, due diligence, or any other relevant resource procurement information unless such information is simultaneously provided to all other prospective bidders.

(3) To the extent a ~~DSU~~ utility does not use competitive solicitations to acquire ~~default~~ electricity supply resources it should thoroughly document the exercise of its judgment in evaluating and selecting resource options, including the decision not to use competitive solicitations.

(4) A decision by a utility regarding the acquisition of an equity interest in an electricity generating plant or equipment or the construction of such a resource on its own should be thoroughly evaluated against available market-based alternatives.

~~(4)~~ (5) Use of competitive solicitations as the preferred method for procuring ~~default~~ electricity supply resources may not adequately achieve the goals and objectives of these guidelines with respect to demand-side resources. A ~~DSU~~ utility should design programs and associated marketing and verification measures, as necessary, to ensure that its procurement of demand-side resources is optimized in the context of the goals and objectives of these guidelines.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.8213 MODELING AND ANALYSIS (1) A ~~DSU's~~ utility's ~~default~~ electricity supply resource ~~portfolio~~ planning, ~~resource~~ procurement, and decision-making processes should incorporate proven, cost-effective computer modeling and rigorous analyses. A ~~DSU~~ utility should use modeling and analyses to:

(a) evaluate and quantify probable ~~default supply~~ load characteristics, including trends in load shapes, load growth, ~~load migration to choice~~ and price elasticity of demand;

(b) remains the same.

(c) evaluate and quantify projected ~~portfolio~~ electricity supply resource requirements over the planning horizon;

(d) develop competitive resource solicitations, including associated bid evaluation and selection criteria, and/or develop alternative candidate resources for utility construction and ownership;

(e) develop methods for weighting resource attributes and ranking bid offers and alternative candidate owned resources. Resource attributes may include, but are not necessarily limited to:

(i) through (f) remain the same.

(g) help the ~~DSU~~ utility, with input from an advisory committee, inject prudent and informed judgments into the ~~portfolio~~ electricity supply resource planning and ~~resource~~ acquisition process;

(h) optimize the mix of ~~portfolio~~ electricity supply resources in the context of the goals and objectives of these guidelines; and

(i) meet the ~~DSU's~~ utility's burden of proof in prudence and cost recovery filings before the commission.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.8218 DEMAND-SIDE RESOURCES (1) Energy efficiency and conservation measures can effectively contribute to serving total ~~default~~ electricity load requirements at the lowest long-term total cost. A ~~DSU~~ utility should develop a comprehensive inventory of all potentially cost-effective demand-side resources available in its service area and optimize the acquisition of demand-side resources over its planning horizon.

(2) A ~~DSU~~ utility should evaluate the cost-effectiveness of demand-side resources and programs based on its long-term avoidable costs. Cost-effectiveness evaluations of demand-side resources should encompass avoidable electricity supply, transmission, and distribution costs.

(3) A nonparticipant (no-losers) test considers utility-sponsored demand-side management programs cost effective only if rates to customers that do not participate in the program are not affected by the program. A ~~DSU~~ utility should not evaluate the cost-effectiveness of demand-side resources using a nonparticipant test.

(4) A ~~DSU~~ utility should develop and strive to achieve targets for steady, sustainable investments in cost-effective, long-term demand-side resources. A ~~DSU's~~ utility's investment in demand-side resources should be coordinated with and complement its universal system benefits activities.

(5) Except when the entire resource would otherwise be lost, a ~~DSU's~~ utility's demand-side management programs should not be focused on "cream skimming;" the least expensive and most readily obtainable resource potential should be acquired in conjunction with other measures that are cost-effective only if acquired in a package with the least expensive, most readily available resources.

(6) remains the same.

(7) A ~~DSU's~~ utility's development of demand-side resources should include an examination of innovative methods to address cost recovery issues related to demand-side resource investments and expenses, including undesirable effects on revenues related to the provision of transmission and distribution services.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.8219 RISK MANAGEMENT AND MITIGATION (1) Prudent ~~default~~ electricity supply resource planning and procurement includes evaluating, managing, and mitigating risks associated with the inherent uncertainty of wholesale electricity ~~supply~~ markets and ~~default supply~~ customer load ~~characteristics~~. A ~~DSU~~ utility should identify and analyze sources of risk using its own techniques, market intelligence, risk management policies, and judgment. The ~~DSU~~ utility should apply industry ~~accepted~~ standard instruments and strategies, document decisions to use various instruments and strategies, and monitor the ongoing appropriateness of such instruments and strategies. Sources of risk that should be evaluated may include, but are not limited to:

Underlying Risk Factor	Price/Cost Uncertainty Risk	Load Uncertainty Risk
(a) Fuel prices and price volatility	X	X
(b) Environmental regulations ~~&~~ and taxes	X	X
(c) ~~Default~~Retail supply rates	X	X
(d) Competitive suppliers' prices	X	
(e) Transmission constraints	X	
(f) Weather	X	X
(g) Supplier capabilities	X	X
(h) Supplier creditworthiness	X	
(i) Contract terms and ~~condition~~ conditions	X	X
(j) Construction costs	X	X

(2) A ~~DSU's~~ utility's strategy for managing and mitigating risks associated with the identified risk factors should be developed in the context of the goals and objectives of these guidelines and include an evaluation of relevant opportunity costs.

(3) A ~~DSU~~ utility should manage and mitigate risk through adequate utility staffing and technical resources (e.g., computer modeling), diversity (fuels, technology, contract terms), and contingency planning.

(4) A ~~DSU~~ utility should use an independent advisory committee of respected technical and public policy experts as a source of upfront, substantive input to mitigate risk and optimize resource procurement outcomes in a manner consistent with these guidelines.

(5) A ~~DSU~~ utility should use cost-effective resource planning and acquisition techniques to manage and mitigate risks associated with the above identified risk factors, including, but not limited to:

(a) through (e) remain the same.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.8220 TRANSPARENCY AND DOCUMENTATION (1) A ~~DSU~~ utility should thoroughly document the exercise of its judgment in implementing all aspects of the guidelines, including any deviations from the framework set forth in these guidelines.

(2) A ~~DSU~~ utility must procure and manage a portfolio of ~~power purchase contracts and demand-side~~ electricity supply resources to serve the full load requirements of its ~~default supply~~ customers. The commission must allow a ~~DSU~~ utility to recover ~~through default supply rates~~ all costs it prudently incurs to perform this function. Whether the costs a ~~DSU~~ utility incurs are prudent is, in part, directly related to whether its resource procurement process was conducted prudently. It is vital that a ~~DSU~~ utility document its ~~default supply~~ portfolio planning, management and electricity supply resource procurement activities to justify the prudence of its resource procurement decisions. The better a ~~DSU~~ utility documents the steps involved in its resource procurement process and explains how and why decisions were made during procurement and in developing management strategies, the easier it is to satisfy its burden of proof. When a ~~DSU~~ utility requests cost recovery related to the procurement of ~~new power purchase contracts~~ electricity supply resources it should, as applicable:

(a) remains the same.

(b) provide and explain the calculation of all cost estimates for all resource alternatives considered;

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

~~(f)~~ (g) document relevant industry practices, instruments, and actions to procure resources and manage risk observed in other utilities in the Western

Electricity Coordinating Council regarding portfolio design, to the extent such practices form the basis for a ~~DSU's~~ utility's decisions;

~~(g)~~ (h) document and explain how and when management injected its judgment onto analyses of resource alternatives, final selection, and contract negotiations, and the impact of management judgment; and

~~(h)~~ (i) document the discussion and recommendations of the ~~DSU's~~ utility's advisory committee.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.8221 AFFILIATE TRANSACTIONS (1) The commission subjects transactions between a ~~DSU~~ utility and any of its ~~corporate~~ affiliates to close scrutiny. A ~~DSU~~ utility should not acquire resources involving affiliate transactions except through competitive solicitations that are consistent with these guidelines. ~~DSUs~~ A utility should sufficiently demonstrate through transparent, documented modeling, analysis, and judgment that any resource acquired from an affiliate corresponds to a predetermined portfolio need.

(2) To the extent a ~~DSU~~ utility procures resources involving affiliate transactions it should respond to the following primary regulatory concerns:

(a) A ~~DSU~~ utility should demonstrate that it has not subordinated its ~~default~~ electricity supply service obligations in favor of an affiliate ~~corporate entity~~;

(b) The burden of proof is on a ~~DSU~~ utility to demonstrate that costs it incurs through any affiliate transactions are just and reasonable and in the public interest and, as such, are recoverable through regulated rates. Since, by definition, such transactions cannot be presumed to be conducted on a truly arm's-length basis, inevitably leaving room for gaming, self dealing, and certain subsidies, the commission will subject these transactions to greater scrutiny to reasonably protect ratepayers served under regulated rates from harm. This higher level of protection is referred to as the "no harm to ratepayer" standard. This standard has evolved over time from long standing regulatory practices and policies that require affiliated transactions to be fair, reasonable, and in the public interest before the associated costs are recoverable through rates. In keeping with the "no harm to ratepayer" standard, the commission will judge the reasonableness of affiliate transactions-related costs in relation to the lower of cost or market at the time of contract execution. For purposes of this rule, cost, by definition, is the applicable regulated cost of service structure, including a return on the capital invested, to provide the relevant affiliated services;

(c) A ~~DSU~~ utility must reasonably assure that costs and revenues are accurately and properly segregated between regulated and nonregulated affiliated entities in order to protect captive customers served under regulated rates, and avoid subsidies to, and excess charges by, nonregulated affiliates;

(d) The "no harm to ratepayer" standard requires that the books of account and related records of any affiliate transacting business with the ~~DSU~~ utility must be available for audit and review purposes. A ~~DSU~~ utility should impute the estimated costs of necessary audit activity into affiliate resource costs when evaluating resource alternatives according to these guidelines. As reasonable and necessary and when lawful, the commission will protect affiliate information through confidentiality agreements;

(e) In order to provide for ongoing regulatory review, a ~~DSU~~ utility should separately report on its on-going affiliated transactions and relationships in the context of the issues identified in this rule. Such reporting should be sufficient to allow the commission to adequately monitor whether ~~on-going~~ affiliate transactions-related costs are prudent and, therefore, recoverable through regulated rates; and

(f) A ~~DSU~~ utility must implement a code of conduct to guide management and other employees regarding standards for day-to-day business activities with affiliates and to guard against self-dealing, gaming, and resulting subsidies.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.8225 STAKEHOLDER INPUT (1) A ~~DSU~~ utility should maintain a broad-based advisory committee to review, evaluate, and make recommendations on technical, economic, and policy issues related to ~~a DSU's default supply~~ electricity supply resource portfolio planning, management, and ~~resource~~ procurement ~~process~~. An independent advisory committee of respected technical and public policy experts may provide an excellent source of upfront, substantive input to mitigate risk and optimize resource procurement outcomes consistent with these guidelines. Maintaining an effective advisory committee could involve funding certain member participation. A ~~DSU~~ utility should also facilitate processes that provide opportunities for a broader array of stakeholders to comment. Such processes could include:

(a) and (b) remain the same.

(c) other processes that may provide a ~~DSU~~ utility information about public opinion on resource procurement matters.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.8226 ~~DEFAULT~~ ELECTRICITY SUPPLY RESOURCE PLANNING AND PROCUREMENT FILINGS (1) A ~~DSU~~ utility must file a comprehensive, long-term

portfolio management and electricity supply resource procurement plan by December 15 in each odd-numbered year.

(2) As necessary, a ~~DSU's~~ utility's periodic electricity supply cost tracking filings should include the information, analyses, and documentation recommended in these guidelines to support its request for cost recovery related to ~~default~~ electricity supply ~~resource~~ cost additions or changes.

(3) A ~~DSU's annual~~ periodic cost tracking filing should document the status of on-going ~~default supply~~ portfolio planning, management, and electricity supply resource procurement activities and include rolling three-year action plans. Action plans should include a discussion of activities involving transmission and distribution functions and services.

(4) The commission may implement a ~~DSU's annual~~ utility's periodic electricity supply cost recovery request on an interim basis, subject to retroactive adjustment, to allow adequate time to process such requests and render a final order.

AUTH: 69-8-403, MCA
IMP: 69-8-403, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.8227 REWARD FOR ~~SUCCESSFUL DEFAULT~~ SUPERIOR ELECTRICITY SUPPLY SERVICE (1) The commission will evaluate a ~~DSU's~~ utility's performance in providing ~~default~~ service pursuant to the goals and objectives of these guidelines and may reward the ~~DSU~~ utility monetarily for superior performance at a level commensurate with such performance.

AUTH: 69-8-403, MCA
IMP: ~~69-8-201, 69-8-210,~~ 69-8-403, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

38.5.8228 MINIMUM FILING REQUIREMENTS FOR ~~DSU~~ UTILITY APPLICATIONS FOR ~~ADVANCED~~ APPROVAL OF ELECTRICITY SUPPLY RESOURCES (1) If a ~~DSU~~ utility intends to file an application for ~~advanced~~ approval of a ~~power purchase agreement~~ electricity supply resource that is not yet procured, it must notify the commission and the Montana Consumer Counsel far enough in advance of filing to accommodate adequate pre-filing communication. If the ~~power purchase contract~~ resource will result from a competitive solicitation, notice must be provided before the ~~DSU~~ utility issues a request for proposals.

(2) An application by a ~~DSU~~ utility for ~~advanced~~ approval of a ~~power purchase agreement~~ electricity supply resource must ~~incorporate by reference the~~

~~DSU's most recent long-term resource plan, must include the DSU's most recent three year action plan, and must provide~~ include, as applicable:

~~(a) a complete explanation and justification of all changes, if any, to the DSU's most recent long-term resource plan and three year action plan, including how the DSU has responded to all commission written comments on the long-term plan;~~

~~(b) a copy of the proposed power purchase agreement, including all appendices and attachments, if any;~~

~~(c) testimony and supporting work papers demonstrating the need for the resource/electricity supply product(s) underlying the power purchase agreement;~~

~~(d) testimony and supporting work papers demonstrating that the resource/electricity supply product(s) underlying the power purchase agreement:~~

~~(i) is in the public interest;~~

~~(ii) will facilitate achieving the goals and objectives of these guidelines; and~~

~~(iii) complies with all resource procurement guidelines in this subchapter;~~

~~(e) if the power purchase agreement resulted from a competitive solicitation, copies of:~~

~~(i) the DSU's request for proposals;~~

~~(ii) all bids received;~~

~~(iii) testimony and work papers demonstrating all due diligence and bid evaluation conducted by the DSU, including the application of bid rating mechanisms and management judgment;~~

~~(f) testimony and supporting work papers demonstrating that the price, term and quantity associated with the power purchase agreement are reasonable and in the public interest;~~

~~(g) thorough explanation and justification for any other terms in the power purchase agreement for which the DSU is requesting advanced approval;~~

~~(h) testimony describing all pre-filing communication;~~

~~(i) thorough explanation and justification for any request for a commission decision less than 180 days from the date the DSU's application is filed including a specific plan for ensuring adequate due process; and~~

~~(j) testimony and supporting documentation related to any advice received from the DSU's stakeholder advisory committee regarding the power purchase agreement or the underlying resource/electricity product(s) and actions taken or not taken by the DSU in response to such advice.~~

(a) a complete and thorough explanation and justification of all changes to the utility's most recent long-term resource plan and three year action plan, including how the utility has responded to all commission written comments;

(b) a statement explaining whether the application pertains to a power purchase agreement with an existing generating resource, a lease or acquisition of an equity interest in a new or existing generating resource, or a power purchase agreement for which approval will result in construction of a new generating resource;

(c) testimony and supporting work papers describing the resource and stating the facts (not conclusory statements) that show that acquiring the resource is in the public interest and is consistent with the requirements in 69-3-201 and 69-8-419,

MCA, the utility's most recent long-term resource plan (as modified by (2)(a)), and these rules;

(d) testimony and supporting work papers demonstrating the utility's estimates of the cost of the resource compared to the cost of each alternative resource the utility considered and all relevant functional differences between each alternative;

(e) testimony and supporting work papers demonstrating the implementation of cost-effective carbon offsets for a electricity supply resource fueled primarily by natural or synthetic gas constructed after January 1, 2007;

(f) testimony and supporting work papers demonstrating the capture and sequestration of 50% of the carbon dioxide produced by a electricity supply resource fueled primarily by coal constructed after January 1, 2007;

(g) a copy of the proposed power purchase agreement, including all appendices and attachments;

(h) a copy of any request for proposals issued in connection with acquisition of the electricity supply resource;

(i) testimony and supporting work papers comparing all bids received in connection with any request for proposals with respect to price and nonprice factors;

(j) testimony and work papers describing all due diligence and bid evaluation in connection with any request for proposals, including the ranking of bids and reliance on management judgment;

(k) thorough explanation and justification for any terms, other than price, quantity, and contract duration, in a power purchase agreement for which the utility is requesting approval;

(l) a complete description of each aspect of the resource for which the utility requests approval;

(m) testimony and supporting documentation describing all pre-filing communication; and

(n) testimony and supporting documentation related to any advice received from the utility's stakeholder advisory committee regarding the proposed resource and actions taken or not taken by the utility in response to such advice.

AUTH: 69-8-403, 69-8-419, MCA
IMP: 69-8-403, 69-8-419, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes. Additionally, the ability of a utility to request approval of rate-based assets requires revision to the minimum filing requirements.

38.5.8229 CONSULTANT FEES (1) When the commission engages independent consultants or advisory services to evaluate a utility's ~~default supply~~ resource procurement plans and proposed ~~power~~ electricity supply resources ~~purchase agreements~~ pursuant to 69-8-421, MCA, the commission will charge the ~~default supplier~~ utility a fee commensurate with the costs of the consultant or advisory services. The ~~default supplier~~ utility, at the commission's direction, will

deposit the fee into the commission's account in the special revenue fund pursuant to 69-8-421, MCA. The initial fee charged to the ~~default supplier~~ utility will be based upon the commission's estimate of costs for the consultant or advisory services. The commission may revise the fee amount as the actual costs become known.

AUTH: 69-8-403, MCA
IMP: 69-1-114, 69-8-421, MCA

REASON: Ch. 491, L. 2007 repealed electric customer choice for small customers and eliminated the definition of and references to default supply. The change is necessary to conform the rule to the revised statutes.

4. The department proposes to repeal the following rules:

38.5.8001 GENERAL REQUIREMENT TO OBTAIN LICENSE TO SUPPLY ELECTRICITY found at page 38-6001 of the Administrative Rules of Montana.

AUTH: 69-8-403, MCA
IMP: 69-8-404, MCA

38.5.8002 CONTENTS OF APPLICATION FOR LICENSE TO SUPPLY ELECTRICITY found at page 38-6002 of the Administrative Rules of Montana.

AUTH: 69-8-403, MCA
IMP: 69-8-404, MCA

38.5.8003 ELECTRONIC REGISTRATION found at page 38-6004 of the Administrative Rules of Montana.

AUTH: 69-8-403, MCA
IMP: 69-8-404, MCA

38.5.8004 ANNUAL REPORTS found at page 38-6005 of the Administrative Rules of Montana.

AUTH: 69-8-403, MCA
IMP: 69-8-404, MCA

38.5.8005 STANDARD SERVICE OFFER found at page 38-6005 of the Administrative Rules of Montana.

AUTH: 69-8-403, MCA
IMP: 69-8-404, MCA

38.5.8101 DEFINITIONS found at page 38-6101 of the Administrative Rules of Montana.

AUTH: 69-8-403, MCA
IMP: 69-8-203, 69-8-416, MCA

38.5.8102 APPLICATION FOR ELIGIBILITY TO BE A DEFAULT SUPPLIER found at page 38-6101 of the Administrative Rules of Montana.

AUTH: 69-8-403, MCA
IMP: 69-8-203, 69-8-416, MCA

REASON: Sec. 21, Ch. 491, L. 2007 repealed 69-8-203 and 69-8-404, MCA. Sec. 20, Ch. 565, L. 2003 repealed 69-8-416, MCA. Repeal of the statutes implemented by the rules requires repeal of the rules.

5. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments (original and ten copies) may also be submitted to Legal Division, Public Service Commission, 1701 Prospect Avenue, P.O. Box 202601, Helena, MT 59620-2601, and must be received no later than March 5, 2008, 5:00 p.m., or may be submitted to the PSC through the PSC's web-based comment form at http://psc.mt.gov (go to "Contact Us," "Comment on Proceedings Online," then complete and submit the form no later than March 5, 2008. (PLEASE NOTE: When filing comments pursuant to this notice please reference "Docket No. L-08.01.1-RUL.")

6. The PSC, a commissioner, or a duly appointed presiding officer may preside over and conduct the hearing.

7. The Montana Consumer Counsel, 616 Helena Avenue, P.O. Box 201703, Helena, Montana 59620-1703, telephone (406) 444-2771, is available and may be contacted to represent consumer interests in this matter.

8. The PSC maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the PSC. Persons who wish to have their name added to the list should make a written request which includes that name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: electric utilities, providers, and suppliers; natural gas utilities, providers, and suppliers; telecommunications utilities and carriers; water and sewer utilities; common carrier pipelines; motor carriers; rail carriers; and/or administrative procedures. Such written request may be mailed or delivered to Public Service Commission, Legal Division, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601, faxed to Connie Jones at (406) 444-7618, e-mailed to conniej@mt.gov, or may be made by completing a request form at any rules hearing held by the PSC.

9. An electronic copy of this Proposal Notice is available through the Secretary of State's web site at http://sos.mt.gov/ARM/Register. The Secretary of State strives to make the electronic copy of the Notice 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 Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

10. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled. Representative Alan Olson was notified by letter dated September 27, 2007, when the department began to work on the substantive comment and wording of the amendments. A copy of the published notice will be sent within three days after publication.

/s/ Greg Jergeson
Greg Jergeson, Chairman
Public Service Commission

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

Certified to the Secretary of State, January 22, 2008.

BEFORE THE PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.43.441 pertaining to the purchase of service credit through trustee-to-trustee fund transfers	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On November 21, 2007, the Montana Public Employees' Retirement Board published MAR Notice No. 2-43-394 regarding the proposed amendment of the above-stated rule at page 1841 of the 2007 Montana Administrative Register, Issue Number 22.

2. The board has amended ARM 2.43.441 as proposed.

3. No comments were received.

/s/ Jay Klawon
Jay Klawon, President
Public Employees' Retirement Board

/s/ Melanie Symons
Melanie Symons, Legal Counsel and
Rule Reviewer

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

Certified to the Secretary of State on January 22, 2008.

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

In the matter of the adoption of New Rules I through XII pertaining to Funeral Insurance Rules	)))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On November 8, 2007, the State Auditor and Commissioner of Insurance published MAR Notice No. 6-171 regarding the public hearing on the proposed adoption of the above-stated rules at page 1718 of the 2007 Montana Administrative Register, issue number 21.

2. On November 29, 2007, the State Auditor and Commissioner of Insurance held a public hearing to consider the proposed adoption of the above-stated rules. Comments were heard at the hearing, and written comments were received before the comment deadline.

3. The State Auditor and Commissioner of Insurance has adopted NEW RULE I (ARM 6.6.1001), NEW RULE III (ARM 6.6.1003), NEW RULE V (ARM 6.6.1006), and NEW RULE IX (ARM 6.6.1014) exactly as proposed.

4. The department is adopting the following rules as proposed with the following changes. New matter is underlined. Matter to be deleted is interlined.

NEW RULE II (ARM 6.6.1002) SCOPE (1) remains as proposed.

(a) all life insurance policy forms delivered or issued for delivery, marketed, ~~used,~~ or designated as intended for use in this state as funeral insurance;

(b) through (d) remain as proposed.

NEW RULE IV (ARM 6.6.1004) DEFINITIONS For the purposes of ~~[NEW RULES I through XII]~~ ARM 6.6.1001, 6.6.1002, 6.6.1003, 6.6.1004, 6.6.1006, 6.6.1008, 6.6.1010, 6.6.1012, 6.6.1014, 6.6.1016, 6.6.1018, and 6.6.1020, the following definitions apply:

(1) ~~"Authorized agent" means a person legally entitled to order the final disposition, including burial, cremation, entombment, donation to medical science, or other means, of human remains.~~

~~(2)~~ "Excess beneficiary" means the person designated in the funeral insurance policy or certificate to receive any amount of the funeral insurance proceeds that exceed the cost of the funeral goods and services provided to the insured. Payment to the excess beneficiary may be subject to recovery by Medicaid pursuant to 33-20-1501, MCA.

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

~~(4)~~ (3) "Funeral insurance" is a type of life insurance as defined in 33-20-1501, MCA. Funeral insurance may be purchased by making a one time payment of premium or by paying premium in installments. Funeral insurance may be issued on

a group or individual basis. Annuity contracts and viatical settlement agreements are not funeral insurance and may not be ~~used~~ marketed or designated as intended for use as funeral insurance.

(5) through (8) remain as proposed but are renumbered (4) through (7).

~~(9)~~(8) "Person" means an individual or a business entity including a corporation, association, partnership, limited liability company, limited liability partnership, or other legal entity.

~~(10)~~(9) "Preneed funeral arrangement" means an arrangement made with a person licensed under Title 37, chapter 19, parts 3 and 4, MCA, by the intended recipient of the funeral goods and services on that individual's own behalf, or by an authorized ~~agent~~ individual on ~~the individual's~~ behalf of the intended recipient, prior to the death of the ~~individual~~ intended recipient. Preneed funeral arrangements are governed by Title, 37, chapter 19, MCA, and the rules promulgated to implement that chapter.

~~(11)~~(10) "Primary beneficiary" means the person designated in the funeral insurance to receive the funeral insurance proceeds intended by the applicant or insured, if not one in the same, to fund a preneed funeral arrangement or to pay for funeral goods and services for the insured. The primary beneficiary may, but need not, be a person licensed under Title 37, chapter 19, parts 3 and 4, MCA. Payment to the primary beneficiary may be subject to recovery by Medicaid pursuant to 33-20-1501, MCA.

(12) and (13) remain as proposed but are renumbered (11) and (12).

NEW RULE VI (ARM 6.6.1008) REPORTING BY ISSUER (1) ~~Every issuer of funeral insurance in this state shall report in a form or manner approved by the commissioner. The commissioner may require a supplement to the insurer's annual statement.~~The commissioner may require a funeral insurance issuer to file a supplement to the annual statement. The supplement will be in a form approved by the commissioner.

NEW RULE VII (ARM 6.6.1010) FUNERAL INSURANCE POLICY FORMS

(1) through (2)(b) remain as proposed.

(c) ~~allow the insured, or applicant, if the applicant has an insurable interest in the life of the insured, to designate a primary beneficiary and an excess beneficiary~~ contain beneficiary designation provisions as set out in ARM 6.6.1012.

NEW RULE VIII (ARM 6.6.1012) BENEFICIARY DESIGNATION

(1) Funeral insurance policy forms must clearly and conspicuously:

(a) allow the insured, or applicant, if the applicant has an insurable interest in the life of the insured, to designate a primary beneficiary and an excess beneficiary~~.~~;

(b) state that funeral insurance proceeds may be subject to recovery by Medicaid pursuant to 33-20-1501, MCA; and

~~(2) If an excess beneficiary is not designated and~~

(c) subject to (1)(b), provide that if the primary beneficiary is a funeral director, mortician, mortuary, or undertaker: ~~the funeral insurance policy forms shall clearly and conspicuously provide that~~

(i) any funeral insurance proceeds that exceed the cost of funeral goods and services provided will be paid ~~to the insured's estate~~ in accordance with the terms of the funeral insurance, such as an excess beneficiary designation or provision regarding a failed beneficiary designation; and

(ii) under no circumstance may any funeral insurance proceeds be paid to the primary beneficiary that exceed the cost of funeral goods and services provided.

NEW RULE X (ARM 6.6.1016) UNINTENTIONAL LAPSE (1) remains as proposed.

(a) No funeral insurance policy or certificate shall be issued until the issuer has received from the applicant either a written designation of at least one individual who is to receive notice of lapse or termination of the policy or certificate for nonpayment of premium, or a written waiver dated and signed by the applicant electing not to designate an additional ~~persons~~ individual to receive notice. The applicant has the right to designate at least one individual who is to receive the notice of termination in addition to the insured. Designation shall not constitute acceptance of any liability by the third party for any goods or services provided to the insured. The form used for the written designation must clearly and conspicuously provide space for listing at least one individual. The designation shall include each individual's full name and home address. In the case of an applicant who elects not to designate an additional individual, the waiver shall state:

(i) "Protection against unintended lapse." I understand that I have the right to designate at least one individual other than myself to receive notice of lapse, or termination of this funeral insurance policy or certificate for nonpayment of premium. I understand that notice will not be given until 30 days after a premium is due and unpaid. I do ~~elect~~ not elect to designate an individual to receive this notice."

(b) remains as proposed.

NEW RULE XI (ARM 6.6.1018) REQUIRED DISCLOSURES (1) In addition to any disclosures required for life insurance by statute or rule, the funeral insurance issuer shall develop clear and conspicuous written disclosures~~,~~ regarding the following information:

(a) ~~that a life insurance product is involved, or is being used to fund a preneed funeral arrangement;~~ the information contained in 33-20-1501(3), MCA;

(b) remains as proposed.

(c) the nature of the relationship among the soliciting producer, the provider of the funeral goods and services, and any other person ~~that~~ identified in a preneed funeral arrangement who will or may profit from the transaction;

(d) whether ~~that~~ a sales commission, or other form of compensation, is being paid in connection with the sale of the funeral insurance and the identity of the persons ~~who will receive it~~ to whom it will be paid;

(e) remains as proposed.

(f) the relationship of the funeral insurance to the funding of the preneed funeral arrangement and the nature and existence of any guarantees in relation to the preneed funeral arrangement;

(g) ~~including~~ an itemized list of the funeral goods and services which are applied or contracted for in the preneed funeral arrangement and all relevant

information concerning the price of the same and whether the price is guaranteed or to be determined at the time of need;

(g) remains as proposed but is renumbered (h).

(i) remains as proposed.

(ii) penalties to be incurred by the ~~applicant or insured~~ policyholder as a result of failure to make premium payments; and

(iii) remains as proposed.

(h) and (i) remain as proposed but are renumbered (i) and (j).

~~(j)~~(k) if known, whether the provider of funeral goods and services making or entering a preneed funeral arrangement will accept assignments of funeral insurance and preneed funeral arrangements sold by any other properly licensed person;

~~(k)~~(l) that after the death of ~~a person~~ an individual who at any time received Medicaid benefits, a funeral director, mortician, mortuary, undertaker, or other person, including but not limited to the decedent's spouse, heir, devisee, or personal representative, who is the beneficiary of funeral insurance in excess of $5,000 in value designated to pay for the disposition of the Medicaid recipient's remains and for related expenses shall, after paying for the disposition and related expenses, pay all remaining funds to the Department of Public Health and Human Services within 30 days following the receipt of the funeral insurance death benefit. The funds must be paid to the Department of Public Health and Human Services regardless of any provision in a written contract, insurance policy, or other agreement entered into on or after January 1, 2008, directing a different disposition of the funds. Funds paid to the department under these rules are not considered to be property of the deceased Medicaid recipient's estate, and the provisions of 53-6-167, MCA, do not apply to recovery of the funds by the department;

(l) remains as proposed but is renumbered (m).

~~(m)~~(n) that a discount from the ~~current~~ price of funeral goods and services will not be offered, or provided, as an inducement to purchase or assign funeral insurance; and

(n) remains as proposed but is renumbered (o).

(2) through (4) remain as proposed.

NEW RULE XII (ARM 6.6.1020) PROHIBITIONS (1) The sale of funeral insurance may not be conditioned on:

(a) ~~the applicant or insured designating a specific beneficiary, including but not limited to a funeral director, mortician, mortuary, or undertaker;~~

~~(b)~~ the applicant or insured agreeing to assign the funeral insurance proceeds to a funeral director, mortician, mortuary, or undertaker; or

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

(2) ~~A discount from the current price of funeral goods and services may not be offered or provided as an inducement to purchase, or assign funeral insurance.~~ Prohibited inducements under 33-18-208, MCA, include, but are not limited to, discounts from the price of funeral goods and services.

5. The department has thoroughly considered all commentary received. The comments received and the department's responses to each comment follow:

NEW RULE II (ARM 6.6.1002) SCOPE

COMMENT 1: The American Council of Life Insurers (ACLI) commented that NEW RULE II (ARM 6.6.1002), subsection (1)(a) is too broad because the phrase and concept of "use" appears to require insurers to exercise knowledge and control over how the proceeds are used from every life insurance policy. It further commented that "normal" life insurance, purchased without a specified purpose, but later the proceeds of which are used to pay for funeral expenses, would appear to fall under the rule and be noncompliant. It asked that subsection (1)(a) be amended to read as follows: "(1) These rules shall apply to: (a) all funeral insurance policy forms delivered or issued for delivery, or marketed in this state;"

RESPONSE 1: The department revised the rule to address the concern that the proposed rule was too broad by removing the word "used," but did not accept the suggested language. Insurers will be issuing funeral insurance as a type of life insurance under 33-20-1501, MCA, and will have knowledge and control over the policy forms delivered or issued for delivery, marketed, or designated as intended for use as funeral insurance.

NEW RULE IV (ARM 6.6.1004) DEFINITIONS

COMMENT 2: The Montana Funeral Directors Association (MFDA) commented that the defined term "authorized agent" in proposed NEW RULE IV (ARM 6.6.1004) should be changed to "authorizing agent" to be consistent with 37-19-101, MCA. It also asked that 37-19-101, MCA, be referenced.

RESPONSE 2: The department removed the definition of "authorized agent." The term "authorized agent" was being used to identify who may legally order the final disposition of human remains and the term appeared in the definition of "preneed funeral arrangement." The definition of preneed funeral arrangement was revised to state that an "authorized individual" may make preneed funeral arrangements to be consistent with 37-19-101(32), MCA, and ARM 24.147.302(8). The term "authorized individual" is not defined in either Title 37, chapter 19, MCA, or the administrative rules promulgated by the Board of Funeral Service.

COMMENT 3: The ACLI commented that the definition of "funeral insurance" in NEW RULE IV (ARM 6.6.1004) deviates from and engrafts further requirements on the definition of funeral insurance in 33-20-1501, MCA. It commented that there was no statutory basis supporting the rule that annuity contracts are not funeral insurance. It commented that viatical settlement agreements are not used to fund preneed funeral arrangements. It asked that the rule only contain a reference to 33-20-1501, MCA.

RESPONSE 3: The department does not agree that funeral insurance in 33-20-1501, MCA, includes annuity contracts. Section 33-20-1501, MCA, states that funeral insurance is an insurance policy or certificate and that it is a "type of life

insurance" provided for in 33-1-208, MCA. Section 33-1-208, MCA, lists types of life insurance but does not include annuity contracts.

The terms annuity contract and annuity are used in the Montana Insurance Code in Title 33, chapter 20, MCA, but are not specifically defined except in Title 33, chapter 20, part 8, MCA, regarding suitability in annuity transactions. Instead, a definition is found in ARM 6.6.805 in the appendix titled "Buyer's Guide" in the National Association of Insurance Commissioners' Annuity Disclosure Model Regulation (April 1999), which was adopted by reference. The Buyer's Guide broadly defines an annuity contract as an arrangement with an insurance company in which the insurance company makes a series of income payments at regular intervals in return for premium payments that were made. It further states that an annuity contract is usually bought to provide future retirement income and "is neither life insurance nor a health insurance policy." Accordingly, an annuity is not the same as life insurance simply because it can be sold by a life insurance company. See also Estate of Miles, 2000 MT 41, 298 Mont. 312, 994 P.2d 1139 (2000) (Contracts of life insurance and annuity are distinctly different. The sale of a product by a life insurance issuer does not automatically render that product life insurance).

Additionally, general guidance can be found in the Dictionary of Insurance Terms, 4th ed. (2000), which states that an annuity is a "contract sold by insurance companies that pays a monthly (or quarterly, semiannual, or annual) income benefit for the life of a person (the annuitant), for the lives of two or more persons, or for a specified period of time. The annuitant can never outlive the income from the annuity. While the basic purpose of life insurance is to provide an income for a beneficiary at the death of the insured, the annuity is intended to provide an income for life for the annuitant."

Accordingly, the rule stating that annuity contracts are not funeral insurance does not conflict with or engraft additional requirements on the statutes. Further, this comment demonstrates the need for this rule and clarification regarding the definition of funeral insurance.

COMMENT 4: The ACLI commented that the definition of "funeral insurance" in NEW RULE IV (ARM 6.6.1004) may impair the assignment of existing annuity contracts.

RESPONSE 4: The department revised the rule to avoid impairing the use of existing annuity contracts and to specify that annuity contracts and viatical settlement agreements may not be marketed or designated as intended for use as funeral insurance.

COMMENT 5: The ACLI commented that the definition of "person" in NEW RULE IV (ARM 6.6.1004) is too restrictive in regard to beneficiaries. It asked that the definition either be broadened to include other associations or nonprofit arrangements or that the use of the term in regard to beneficiaries be considered and amended.

RESPONSE 5: The department revised the definition of "person" to specify that "person" means an individual or business entity including a corporation, association, partnership, limited liability company, limited liability partnership, or other legal entity.

COMMENT 6: The MFDA commented that the definition of "preneed funeral arrangement" in Rule IV (ARM 6.6.1004) should be revised to use the term "another person" instead of "authorized agent" because a third party, such as a trustee for a disabled person, who does not meet the proposed definition of authorized agent, may wish to make and fund a preneed funeral agreement.

RESPONSE 6: Consistent with 37-19-101(32), MCA, and ARM 24.147.302(8), the department revised the definition of "preneed funeral arrangement" to provide that an "authorized individual" may make a preneed funeral arrangement on behalf of another individual. The term "authorized individual" is not defined in either Title 37, chapter 19, MCA, or the administrative rules promulgated by the Board of Funeral Service. It is unknown to the department whether a trustee may make a preneed funeral arrangement. This rule does not affect who may make a preneed funeral arrangement.

Additionally, under 33-20-1501(3)(b), MCA, an applicant for funeral insurance on another individual must have an insurable interest in the life of the insured to make beneficiary designations. Insurable interest is governed by 33-15-201, MCA. Accordingly, only trustees with an insurable interest in the life of the insured may select a beneficiary.

NEW RULE V (ARM 6.6.1006) LICENSING

COMMENT 7: The MFDA commented that the proposed rules do not address the insurance continuing education requirements for specialized funeral insurance producers. It stated that specialized funeral insurance producers would be selling a limited product and therefore the insurance continuing education requirements for specialized funeral insurance producers should be either reduced or eliminated. The MFDA requested that proposed NEW RULE V (ARM 6.6.1006) include a new section (6) as follows, "The Commissioner may exempt specialized funeral insurance producers from the minimum continuing education requirement set forth in 33-17-1203, MCA."

RESPONSE 7: The department disagrees. In discussions with representatives of MFDA during the legislative session, department staff advised that the insurance continuing education requirements for life insurance producers in 33-17-1203, MCA, would apply to specialized funeral insurance producers since SB 276 created funeral insurance as a type of life insurance. Due to National Association of Insurance Commissioners (NAIC) uniformity, all life insurance licensees must comply with standardized insurance continuing education requirements.

NEW RULE VI (ARM 6.6.1008) REPORTING BY ISSUER

COMMENT 8: The ACLI commented that NEW RULE VI (ARM 6.6.1008) appears to be unnecessary, but if the rule is adopted, it asked that the "(1)" be stricken.

RESPONSE 8: The department disagrees that the rule is unnecessary. Although life insurance issuers submit an annual report to the commissioner, establishing funeral insurance as a type of life insurance under 33-20-1501, MCA, makes it necessary for life insurers to separate funeral insurance information to identify funeral insurance volume and to aid the commissioner in monitoring and ensuring compliance with Montana law regarding funeral insurance.

The department revised the rule to clarify that funeral insurance issuers may be required to file a supplement to the annual statement. The "(1)" earmark is required formatting by the Secretary of State's Office.

NEW RULE VIII (ARM 6.6.1012) BENEFICIARY DESIGNATION

COMMENT 9: The ACLI commented that section (1) of NEW RULE VIII (ARM 6.6.1012) is duplicative of NEW RULE VII (ARM 6.6.1010(2)(c)) and asked that section (1) not be adopted.

RESPONSE 9: The department agrees that section (1) of NEW RULE VIII (ARM 6.6.1012) was duplicative. The department revised NEW RULE VII (ARM 6.6.1010) to reference NEW RULE VIII (ARM 6.6.1012).

COMMENT 10: The ACLI commented that section (2) of NEW RULE VIII (ARM 6.6.1012) conflicts with 33-20-1501(6) and 33-20-1502, MCA, which deal with payment of excess funeral insurance proceeds. It also commented that paying excess proceeds to an insured's estate might conflict with other provisions of the Montana Insurance Code, Probate Code, and case law and that it may inadvertently trigger other tax and probate consequences. It asked that section (2) not be adopted.

RESPONSE 10: The department agrees that 33-20-1501(6), MCA, regarding possible recovery by Medicaid of funeral insurance proceeds from beneficiaries should be referenced and has revised NEW RULE VIII (ARM 6.6.1012) to include the same.

The department does not agree that the proposed rule conflicts with 33-20-1502, MCA. Section 33-20-1502, MCA, addresses funeral insurance proceeds that exceed of the cost of the funeral goods and services provided and contemplates that an excess beneficiary will be designated. Specialized funeral insurance producers, who are also funeral directors, morticians, mortuaries, and undertakers, will be selling funeral insurance which may also designate the same funeral director, mortician, mortuary, or undertaker as a beneficiary of the insurance to fund a preneed funeral arrangement made with that same funeral director, mortician, mortuary, or undertaker. This rule protects the public by addressing this conflict of

interest and avoiding any potential windfall to the funeral director, mortician, mortuary, or undertaker. Similarly, a Board of Funeral Service administrative rule at ARM 24.147.1504(1)(c) provides that upon revocation of a preneed funeral arrangement, the money to fund it will be paid to the named beneficiaries in the insurance policy. Accordingly, the Legislature, Board of Funeral Service, and department all recognize the possibility of a windfall to the funeral director, mortician, mortuary, or undertaker and seek to protect the public.

The ACLI appears to support rules protecting the public from the possibility of a windfall to the funeral director, mortician, mortuary, or undertaker. The ACLI appears to object to the requirement that excess proceeds be paid to the insured's estate when the primary beneficiary is a funeral director, mortician, mortuary, or undertaker and an excess beneficiary is not designated. While the ACLI states that requiring excess proceeds be paid to the insured's estate in this circumstance may conflict with other statutes and case law and have inadvertent tax consequences, it did not explain or provide any examples. Accordingly, the department revised this rule without the benefit of any specific explanation or example in an attempt to address these generalized concerns.

The revised rule provides that if the primary beneficiary is a funeral director, mortician, mortuary, or undertaker, any funeral insurance proceeds that exceed the cost of the funeral goods and services provided will be paid in accordance with the terms of funeral insurance, such as an excess beneficiary designation or provision regarding a failed beneficiary designation. But, if the primary beneficiary is a funeral director, mortician, mortuary, or undertaker, under no circumstance may any funeral insurance proceeds that exceed the cost of the funeral goods and services provided be paid to the primary beneficiary. If the department learns of a specific conflict with other statutes or case law or a specific tax consequence, it will consider revising the rule.

COMMENT 11: The MFDA commented that section (2) of proposed NEW RULE VIII (ARM 6.6.1012), providing that funeral insurance proceeds that exceed the cost of funeral goods and services provided will be paid to the insured's estate, is misleading because: (1) if the "preneed contract funded by the funeral insurance policy is a ‘guaranteed price agreement,' all the proceeds of the funeral insurance policy will be paid to the funeral home regardless of the at-need prices of the funeral home," and therefore would not be paid to the insured's estate; and (2) the possible recovery by Medicaid from funeral insurance beneficiaries is not addressed. The MFDA suggested revising section (2) to include a reference to the possibility of recovery by Medicaid of funeral insurance proceeds.

RESPONSE 11: The department disagrees in part. The MFDA appears to assume that the face amount of the funeral insurance policy and/or the funeral insurance policy proceeds will match exactly the dollar amount of a preneed funeral arrangement. Although this is possible, it is not required and will not be true in every case.

A funeral insurance policy with a face amount of $15,000.00 could be purchased to fund a preneed funeral arrangement of $6,000.00 and a funeral director designated as the primary beneficiary. According to a Federal Trade Commission guide titled "Funerals: A Consumer Guide" available on the www.ftc.gov web site in October 2007, a traditional funeral, including casket and vault, costs about $6,000.00, and therefore it is quite possible that the funeral insurance proceeds will exceed the cost of the funeral goods and services provided.

Additionally, the Board of Funeral Service administrative rules at ARM 24.147.302(3) and (6) defining a "guaranteed price agreement" and "nonguaranteed price agreement" indicate that a preneed funeral arrangement need not have a guaranteed price. Further, while a preneed funeral arrangement may contain guaranteed price items (such as the casket price), every item may not have a guaranteed price (such as flowers, obituary notices, and special music and musicians). Accordingly, the cost of the funeral goods and services provided may not be identical to the preneed funeral arrangement.

The department agrees that the rule should reference possible recovery by Medicaid of funeral insurance proceeds. While not accepting the suggested language, the department revised the rule to include a reference to possible recovery of funeral insurance proceeds by Medicaid.

NEW RULE XI (ARM 6.6.1018) REQUIRED DISCLOSURES

COMMENT 12: The ACLI commented that NEW RULE XI (ARM 6.6.1018) appeared to be based in part on the National Association of Insurance Commissioners (NAIC) Life Insurance Disclosure Model Regulation, Section 6, Preneed Funeral Contracts or Prearrangements, but expressed concern that some disclosure requirements in proposed NEW RULE XI (ARM 6.6.1018) deviated or expanded upon the Model Regulation.

RESPONSE 12: NEW RULE XI (ARM 6.6.1018) is based in part on the NAIC Life Insurance Disclosure Model Regulation, Section 6, Preneed Funeral Contracts or Prearrangements (2005). While not verbatim, the rule contains the disclosures in the Model Regulation.

Disclosure statutes and regulations of other states and the requirements of the Montana Insurance Code and associated rules were also considered. To further inform and protect consumers, the department included additional disclosures in substantive areas that are not addressed in the Model Regulation.

COMMENT 13: The ACLI commented that the funeral insurance disclosures required in 33-20-1501(3), MCA, should be added to the disclosures required in NEW RULE XI (ARM 6.6.1018) so that a single list of required disclosures is available for the insurer to consult.

RESPONSE 13: Section 33-20-1501(3), MCA, pertains to the content of funeral insurance policy forms and solicitation materials. The rule lists disclosures to be made by the issuer in a separate form and to be signed by the prospective purchaser.

The rule at subsection (1)(a) repeated 33-20-1501(3)(a). The department agreed that including the information in 33-20-1501(3), MCA, in the disclosures was appropriate and revised the rule to reference 33-20-1501(3), MCA, to avoid repeating the statute.

COMMENT 14: The MFDA commented that several of the disclosures in NEW RULE XI (ARM 6.6.1018) are outside of the knowledge and expertise of the funeral insurance issuer. Further, funeral homes are required by the Board of Funeral Service to make most of these disclosures in preneed funeral agreements.

RESPONSE 14: Disclosure forms are required to be developed by the issuer and submitted to the commissioner for review and approval prior to issuing the same. For any information that cannot be determined until the time of application, section (2) of the rule provides that the life insurance producer or specialized funeral insurance producer will complete the disclosure information specific to that funeral insurance transaction.

While the Board of Funeral Service requires certain disclosures, those disclosures may vary from or exceed the disclosures contemplated by the department. For any disclosures required by both the board and the department, the disclosure form may identify the nature of the information to be disclosed and the life insurance producer or specialized funeral insurance producer may fill in the specific information or provide a detailed reference to where the specific information can be found in the preneed funeral arrangement, and attach a copy of the preneed funeral arrangement.

COMMENT 15: The ACLI and MFDA commented that subsection (1)(c) of NEW RULE XI (ARM 6.6.1018) regarding disclosures about "any other person that will or may profit from the transaction" includes individuals that are unknowable to the insurer and producer making the rule vague and unenforceable. The MFDA asked that the rule not be adopted. The ACLI suggested that the rule follow the NAIC Life Insurance Disclosure Model Regulation, Section 6, more closely by replacing this phrase with "who will be compensated for the sale of the funeral insurance."

RESPONSE 15: The rule requires disclosures to inform consumers of the conflict of interest when funeral insurance is sold by specialized funeral insurance producers who are also funeral directors, morticians, mortuaries, or undertakers and are entering a preneed funeral arrangement with the consumer. Consumers need this information to make better informed decisions about purchasing funeral insurance.

The Model Regulation has similarly broad disclosure language. In Section 6, paragraph B, the Model Regulation requires a disclosure regarding "the nature of the

relationship among the soliciting agent or agents, the provider of the funeral or cemetery merchandise or services, the administrator **and any other person**." (Emphasis added.)

The department revised the rule to address the concern that the rule was vague by specifying that the disclosures be made in regard to the relationship among the soliciting producer, the provider of the funeral goods and services, and any other individual or entity identified in the preneed funeral arrangement that will or may profit from the transaction. The department did not accept the suggestion to revise the rule by adding language about who will be compensated for the sale of the funeral insurance. Disclosures regarding sales commissions or other compensation are addressed separately in both the Model Regulation and the rule.

COMMENT 16: The ACLI commented that subsection (1)(d) of NEW RULE XI (ARM 6.6.1018) appears to be drawn from the NAIC Life Insurance Disclosure Model Regulation, Section 6. It asked that the rule follow the Model Regulation more closely which acknowledges the possibility that a commission may not be paid and relies on the concept of payment rather than receipt. It asked that the rule be revised to state, "(d) if so, that a sales commission or other form of compensation is being paid in connection with the sale of the funeral insurance and the identity of person to whom it is paid."

RESPONSE 16: The department revised the rule to address the possibility that a commission may not be paid, but did not accept the suggested language.

COMMENT 17: The ACLI commented that subsection (1)(f) of NEW RULE XI (ARM 6.6.1018) appeared to be drawn from two sections of the NAIC Life Insurance Disclosure Model Regulation, Section 6, that address two independent areas and asked that subsection (1)(f) be separated into two subsections like the Model Regulation.

RESPONSE 17: The department revised the rule into two subsections.

COMMENT 18: The MFDA commented that subsection (1)(f) of NEW RULE XI (ARM 6.6.1018) is redundant to ARM 24.147.1504, promulgated by the Board of Funeral Service which requires these disclosures in the preneed funeral agreement. It commented that the insurer will not be aware of the relationship of the funeral insurance to the funding of a preneed funeral agreement and any guarantees in the agreement. It commented that the funeral insurance policy is a funding vehicle that is intended to be transferable to other funeral homes and that it is not appropriate to tie the funeral insurance to a particular funeral contract.

RESPONSE 18: The rule is based on the NAIC Life Insurance Disclosure Model Regulation, Section 6, pertaining to preneed funeral arrangements to be funded by life insurance.

While the Board of Funeral Service requires certain disclosures, those disclosures may vary from or exceed the disclosures contemplated by the department. For any disclosures required by both the board and the department, the disclosure form developed by the funeral insurance issuer and approved by the commissioner may identify the nature of the information to be disclosed and the life insurance producer or specialized funeral insurance producer will complete the specific information or provide a detailed reference to where the specific information can be found in the preneed funeral arrangement and attach a copy of the preneed funeral arrangement.

COMMENT 19: The ACLI commented that subsection (1)(g), now (1)(h), of NEW RULE XI (ARM 6.6.1018) appeared to be drawn from the NAIC Life Insurance Disclosure Model Regulation, Section 6. It asked that (1)(g)(ii) and (iii) be amended to mirror the Model Regulation and more clearly reflect the effect to be described. The ACLI asked that the rule be revised to state: "(ii) penalties to be incurred by the policyholder as a result of failure to make premium payments;" and "(iii) penalties to be incurred or monies to be received as a result of cancellation or surrender of the funeral insurance policy."

RESPONSE 19: The department revised subsection (1)(g)(ii), now (1)(h)(ii), as suggested. The department did not revise subsection (1)(g)(iii), now (1)(h)(iii), as suggested because "funeral insurance" is defined in these rules to include both individual policies and certificates where the policy is issued to a group.

COMMENT 20: The MFDA commented that subsection (1)(g), now (1)(h), of NEW RULE XI (ARM 6.6.1018) regarding when and under what circumstances a preneed funeral agreement is breached would not be known to the insurer. It commented that this information should be disclosed in the preneed funeral agreement and not repeated in the funeral insurance.

RESPONSE 20: See Response 18.

COMMENT 21: The MFDA commented that subsection (1)(h), now (1)(i), of NEW RULE XI (ARM 6.6.1018) regarding entitlements or obligations that arise if there is a difference between the funeral insurance proceeds and the amount needed to fund the preneed funeral arrangement would not be know to the insurer. It commented that the rule is redundant to ARM 24.147.1504, promulgated by the Board of Funeral Service, and the information should not be repeated in the funeral insurance.

RESPONSE 21: See Response 18.

COMMENT 22: The MFDA commented the subsection (1)(i), now (1)(j), of NEW RULE XI (ARM 6.6.1018) is redundant to ARM 24.147.1504, promulgated by the Board of Funeral Service which requires these disclosures in the preneed funeral agreement. It asked that the rule not be adopted.

RESPONSE 22: See Response 18.

COMMENT 23: The ACLI commented that subsection (1)(j), now (1)(k), of NEW RULE XI (ARM 6.6.1018) is not part of the NAIC Life Insurance Disclosure Model Regulation, Section 6. The ACLI and MFDA commented that whether the provider of funeral goods and services will accept assignments of funeral insurance and preneed funeral arrangements would not be known to insurers. The ACLI and MFDA asked that the rule not be adopted.

RESPONSE 23: The department revised the rule to require a disclosure, if known, whether the provider of funeral goods and services entering a preneed funeral arrangement with the applicant or insured would accept assignments of funeral insurance and preneed funeral arrangements. When a preneed funeral arrangement is made contemporaneously with the sale of funeral insurance, the producer will likely know whether the provider of funeral goods and services in the preneed funeral arrangement will accept assignments. The disclosure will help consumers in deciding whether to purchase funeral insurance or enter a preneed funeral arrangement or to assign existing life insurance or a preneed funeral arrangement.

The disclosure forms are required to be developed by the issuer and submitted to the commissioner for review and approval prior to issuing the same. For any information that cannot be determined until the time of application, the rule in (2) provides that the life insurance producer or specialized funeral insurance producer will complete the disclosure information specific to that funeral insurance transaction.

COMMENT 24: The ACLI commented that subsection (1)(l), now (1)(m), of NEW RULE XI (ARM 6.6.1018), regarding disclosure that funeral goods and services may be purchased prior to death by making payment directly to the licensed provider of funeral goods and services who would hold the funds in trust for the benefit of the purchasers under Title 37, chapter 19, MCA, is not part of the NAIC Life Insurance Disclosure Model Regulation, Section 6. The ACLI commented that the disclosure requirement would lead to overlapping regulatory authority over insurance producers and issuers which it does not support. The ACLI and MFDA commented they were not confident that the information to be disclosed benefited consumers. The ACLI commented that, to the extent that the information should be provided, it is more properly provided by an individual or entity regulated by the Board of Funeral Service under Title 37, chapter 19, MCA. The MFDA commented that there was no corresponding requirement in the Montana statutes or rules regulating the funeral industry requiring a trust-funded preneed funeral contract to disclose to the consumer that insurance could be used instead. The MFDA commented that the two funding methods should be on an even playing field. The ACLI and MFDA asked that the rule not be adopted.

RESPONSE 24: The disclosure will help consumers make a better informed decision whether purchasing funeral insurance is the best option for him or her. The funeral insurance being considered for purchase may not pay a death benefit or may pay a reduced death benefit in certain circumstances in accord with 33-20-121, MCA. The disclosure that funeral goods and services in a preneed funeral

agreement may also be purchased by making payment directly to the provider of funeral goods and services who will hold the payment in trust under Title 33, chapter 19, MCA, will educate consumers.

If an application for funeral insurance is declined by the insurer, a specialized funeral insurance producer, who is also a funeral director, mortician, mortuary, or undertaker and entering a preneed funeral arrangement, would reasonably be expected to advise the consumer that the preneed funeral arrangement could be funded through a trust arrangement under Title 33, chapter 19, MCA. By disclosing initially that a trust arrangement is available, consumers will be more informed and able to decide whether purchasing funeral insurance is their best choice.

The benefit to consumers from the disclosure is clear. Informed consumers are better able to make decisions that are suitable to their personal needs and situation.

Additionally, the rule only requires disclosure. It does not require that any specialized funeral insurance producer or other funeral director, mortician, mortuary, or undertaker make or enter trust arrangements. Further, the rule does not create an uneven playing field for either of these funding methods merely by requiring disclosure that a trust arrangement could be used to fund a preneed funeral arrangement.

The comment that the disclosure requirement would lead to overlapping regulatory authority over insurance producers and issuers is not clear to the department. Insurers and insurance producers are governed by the Montana Insurance Code in Title 33, MCA, and the associated administrative rules and regulated by the department.

COMMENT 25: The ACLI commented that subsection (1)(m), now (1)(n), of NEW RULE XI (ARM 6.6.1018) is not part of the NAIC Life Insurance Disclosure Model Regulation, Section 6, and referenced its comment regarding Rule XII (ARM 6.6.1020). The MFDA commented that there is not a similar prohibition if the preneed funeral arrangement is funded by a trust arrangement (under Title 37, chapter 19, MCA). The MFDA commented that it does not understand why the department opposes funeral homes offering discounts to attract preneed consumers and that it sees no reason for the prohibition. The ACLI and MFDA asked that the rule not be adopted.

RESPONSE 25: The department revised this disclosure rule to remove the word "current" before the word "price" to coincide with the prohibition in NEW RULE XII (ARM 6.6.1020). Please see the comments and response regarding section (2) of NEW RULE XII (ARM 6.6.1020) prohibiting inducements, such as discounts from the price of funeral goods and services, in the solicitation and sale of funeral insurance.

NEW RULE XII (ARM 6.6.1020) PROHIBITIONS

COMMENT 26: The ACLI commented that section (1) of NEW RULE XII (ARM

6.6.1020) prohibiting sale of funeral insurance conditioned upon certain requirements is duplicative of other statutory provisions, specifically, 33-18-301, 33-20-1501(2)(b), (5), and (6), MCA, and creates an ambiguity or conflict with those provisions. It asked that this rule not be adopted.

RESPONSE 26: The department removed subsection (1)(a) from the rule to avoid duplication with 33-18-301(4), MCA. The rest of the proposed rule did not duplicate or conflict with the statutory provisions listed.

The rule prohibits conditioning the sale of funeral insurance upon the applicant or insured agreeing to assign the funeral insurance proceeds to a funeral director, mortician, mortuary, or undertaker. Section 33-20-1501(3)(b), MCA, provides that funeral insurance must clearly indicate that the applicant may designate the beneficiary, including but not limited to a funeral director, mortician, mortuary, or undertaker, if the applicant has an insurable interest in the life of the insured. The statute pertains to the policy forms and the rule prohibits a practice.

Section 33-20-1501(5)(a), MCA, provides that, notwithstanding 33-15-414, MCA, funeral insurance contain an assignability clause allowing the policy or certificate to be assigned or otherwise transferred to another funeral director, mortician, mortuary, or undertaker licensed in Montana in conjunction with the assumption of the contractual obligation to provide funeral goods and services to the extent permitted by state or federal law for the purpose of the insured's eligibility for supplemental security income benefits, Medicaid, or other public assistance. The statute pertains to the policy forms and the rule prohibits a practice.

Section 33-20-1501(5)(b), MCA, prohibits a funeral director, mortician, mortuary, or undertaker from using the assignability clause to pledge, assign, transfer, borrow from, or otherwise encumber an insurance policy assigned to it for purposes of purchasing funeral goods or services prior to delivering all of the goods and performing all of the services contracted for, by, or on behalf of the insured. The rule prohibits a different practice.

The rule prohibits the practice of conditioning the sale of funeral insurance upon either the applicant agreeing to assign the funeral insurance proceeds to a funeral director, mortician, mortuary, or undertaker or the applicant or insured making or entering a preneed funeral arrangement. Funeral insurance is a separate contract from a preneed funeral arrangement and may be purchased without making or entering a preneed funeral arrangement.

Section 33-20-1501(6), MCA, pertains to possible recovery by Medicaid of funeral insurance proceeds. The rule does not conflict with or impair recovery by Medicaid.

COMMENT 27: The ACLI and MFDA commented that section (2) of NEW RULE XII (ARM 6.6.1020) prohibiting discounts from the current price of funeral goods and services as an inducement to purchase or assign funeral insurance would be detrimental to consumers. The ACLI commented that there is no statutory basis for the rule and the terms "discount" and "inducement" are not defined in the rule. The

ACLI commented that the funeral industry practice of entering contracts that guarantee the price of funeral goods and services to be used in the future at present-day prices may be prohibited under the rule. The MFDA commented that the rule may curtail the ability of a consumer to transfer a preneed funeral arrangement to another funeral home because the rule prevents the funeral home receiving the assignment from honoring the guaranteed-price items in the preneed funeral arrangement if that funeral home's current prices are higher. The ACLI and MFDA asked that section (2) of the rule not be adopted.

RESPONSE 27: The department revised the rule and removed the word "current" before the word "price" to address the concerns about guaranteed-price items in preneed funeral arrangements. The revised rule does not impair the performance of or the assignment of preneed funeral arrangements that have guaranteed-price items. The revised rule provides that inducements to purchase funeral insurance are prohibited and identifies discounts from the price of funeral goods and services as a form of inducement.

The funeral industry is required to have and disclose price lists to consumers. Section 27-19-315, MCA, provides that the Board of Funeral Service shall adopt rules requiring mortuaries to disclose in writing to all customers a complete itemized list of all funeral costs and complete information regarding the need for embalming. ARM 24.147.1502 provides that mortuaries shall provide, in advance and prior to need, price information for types of funerals or alternatives. ARM 24.147.406 provides that morticians shall comply with all Federal Trade Commission (FTC) regulations governing the pricing of funeral goods and services and incorporates FTC Funeral Industry Practice Rules, 16 CFR 453 (1997), by reference.

In 16 CFR 453.2, funeral providers, being any individual or entity that sells or offers to sell funeral goods and services to the public, are required to provide casket price lists, outer burial container price lists, and a general price list. The general price list must be provided upon beginning discussion of the price of funeral goods and services, the type of funeral service or disposition, or specific funeral goods or services offered by the funeral provider. The general price list must contain prices for certain funeral goods and services listed in the regulation. Further, 16 CFR 453.7 provides a funeral provider may not include in the required price lists any statement or information that alters or contradicts the information required to be included in the list.

Additionally, ARM 24.147.1504(1)(b)(v) and (vii) provide that preneed funeral agreements must include the provider's current general price list and an itemized statement of funeral goods and services to be provided and whether the items are price-guaranteed. Accordingly, the funeral industry is clearly required to have and provide price lists to consumers making preneed funeral arrangements.

Under 33-20-1501, MCA, funeral insurance is a type of life insurance that may be sold by life insurance producers or specialized funeral insurance producers. The solicitation and sale of life insurance is governed by the Montana Insurance Code.

To protect consumers by promoting easier price comparisons and competition in the industry, inducements are broadly prohibited in the solicitation and sale of life insurance at 33-18-208, MCA (no person shall offer, promise, or give anything of value whatsoever not specified in the insurance contract). In 33-20-1503, MCA, the department may make rules pertaining to funeral insurance, a type of life insurance, to protect consumers.

The revised rule provides that inducements to purchase funeral insurance are prohibited and identifies discounts from the price of funeral goods and services as a form of inducement. Since specialized funeral insurance producers will also be funeral directors, morticians, mortuaries, and undertakers and will likely be entering a preneed funeral arrangement contemporaneously with selling funeral insurance, a rule specifically addressing discounts as inducements will provide guidance to specialized funeral insurance producers and consumers.

/s/ Christina L. Goe
Christina L. Goe
Rule Reviewer

/s/ Janice S. VanRiper
Janice S. VanRiper
Deputy Insurance Commissioner
State Auditor/Commissioner of Insurance

Certified to the Secretary of State January 22, 2008.

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

In the matter of the adoption of New Rules I through VI pertaining to Permitting the Recognition of Preferred Mortality Tables for Use in Determining Minimum Reserve Liabilities	))))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On November 21, 2007, the State Auditor and Commissioner of Insurance published MAR Notice No. 6-170 regarding the public hearing on the proposed adoption of the above-stated rules at page 1844 of the 2007 Montana Administrative Register, issue number 22.

2. On December 12, 2007, the State Auditor and Commissioner of Insurance held a public hearing to consider the proposed adoption of the above-stated rules. Comments were heard at the hearing, and a written comment was received before the comment deadline.

3. The State Auditor and Commissioner of Insurance has adopted NEW RULE I (ARM 6.6.7101) AUTHORITY, NEW RULE II (ARM 6.6.7102) PURPOSE, NEW RULE IV (ARM 6.6.7105) PREFERRED CLASS STRUCTURE TABLE, and NEW RULE VI (ARM 6.6.7109) SEPARABILITY, exactly as proposed.

4. The department is amending the following rules as proposed with the following changes from the original proposal. New matter is underlined. Matter to be deleted is interlined.

NEW RULE III (ARM 6.6.7103) DEFINITIONS For the purposes of ~~[New Rules I through VI]:~~ ARM 6.6.7101, 6.6.7102, 6.6.7103, 6.6.7105, 6.6.7107, and 6.6.7109:

(1) through (2) remain as proposed.

(3) "Statistical agent" means an entity with proven systems for protecting the confidentiality of individual insured and insurer information; demonstrated resources for, and history of ongoing electronic communications and data transfer ensuring data integrity with insurers, which are its members or subscribers; and a history of~~,~~ and means for aggregation of data and accurate promulgation of the experience modifications in a timely manner.

NEW RULE V (ARM 6.6.7107) CONDITIONS (1) remains as proposed.

(a) the present value of death benefits over the next ten years after the valuation date, using the anticipated mortality experience without recognition of ~~morality~~ mortality improvement beyond the valuation date for each class, is less than

the present value of death benefits using the valuation basic table corresponding to the valuation table being used for that class; and

(b) and (2) remain as proposed.

(a) the present value of death benefits over the next ten years after the valuation date, using the anticipated mortality experience without recognition of mortality improvement beyond the valuation date for each class, is less than the present value of death benefits using the preferred smoker valuation ~~basis~~ basic table corresponding to the valuation table being used for that class; and

(b) and (3) remain as proposed.

5. The department has thoroughly considered all commentary received. The comments received and the department's response to each follows:

COMMENT 1: Jacqueline T. Lenmark of American Council of Life Insurers commented that the ACLI stands in strong support of the adoption of the rules as noticed, and noted that the rules substantially follow the pertinent NAIC Model Regulation.

RESPONSE 1: The department thanks the ACLI for its support.

COMMENT 2: Jacqueline T. Lenmark commented that New Rule IV (ARM 6.6.7105) proposes to implement the preferred mortality tables effective on or after April 1, 2008. The ACLI requests that the implementation date be January 1, 2007, or at minimum January 1, 2008. She stated that approximately 40 states have adopted a similar rule applicable to contracts issued on or after January 1, 2007, by the end of 2007. Also stated is that it is administratively most efficient to have the table available for an entire calendar year of issue, and for a company using the tables it is important to have on valuation basis for a policy or block of policies. Also stated is that it is costly to provide one value to most states, then compute a second value to report to one or a few states, and that it adds no value to the process of financial reporting or solvency oversight. Since most other states have adopted January 1, 2007, in the interest of uniformity, ACLI members request that Montana also adopt a policy of uniform application to contracts back to January 1, 2007. Ms. Lenmark believes that such implementation can be incorporated without offending applicable implementation guidelines.

Ms. Lenmark stated that if the department is not comfortable with that approach, ACLI strongly urges the department, again in the interest of uniformity, to adopt a January 1, 2008, effective date and allow for issues in 2007 with the commissioner's approval.

Ms. Lenmark suggested the following amendment to accomplish the latter suggestion:

At the election of the company, for each calendar year of issue, for any one or more specified plans of insurance, the 2001 CSO Preferred Class Structure Mortality Table may be substituted.....as the minimum valuation standard for policies issued

on or after January 1, 2008, or on or after January 1 through December 31, 2007, with the commissioner's approval. No such election shall be made.

Such an amendment would allow a company to present appropriate information to the department's actuary and examiner and preserve the desired uniformity with all other jurisdictions that have adopted the NAIC regulation or similar rule. In addition to providing this written comment, ACLI would be willing to provide additional information the department may desire with respect to the concern it has noted.

RESPONSE 2: The department agrees that it is most effective to begin the implementation at the start of the calendar year but has concerns about having an effective date of January 1, 2007, to implement the 2001 CSO Preferred Class Structure Mortality Table. The annual statements for the life insurance companies would already be filed and have the reserves set. As such, the department is not comfortable with that approach. The department appreciates Ms. Lenmark's idea, in the alternative, of using January 1, 2008, as an effective date, but allowing the use of the minimum valuation standard for policies issued between January 1 through December 31, 2007, with the commissioner's approval. The effective date will be beyond January 1, 2008, but these rules will be applied retroactively back to January 1, 2008. Since the rules are only retroactive to January 1, 2008, the department will not adopt Ms. Lenmark's suggestion of commissioner approval on policies issued in 2007. Furthermore, as noted above, the annual statements for the life insurance companies would already be filed and have the reserves set. The department will strike "April 1" and replace with "January 1." These rules will be applied retroactively to January 1, 2008.

COMMENT 3: Ms. Lenmark made the suggestion that the "(1)" earmark in New Rule I (ARM 6.6.7101), New Rule II (ARM 6.6.7102), New Rule IV (ARM 6.6.7105), and New Rule VI (ARM 6.6.7109) be stricken, as there are no other sections in these rules.

RESPONSE 3: The department is unable to make this change, as it is a formatting requirement by the Secretary of State ARM Bureau.

COMMENT 4: Ms. Lenmark suggested that in New Rule III (ARM 6.6.7103) Definitions, section (3), that the comma after "and a history of" in the last sentence be stricken.

RESPONSE 4: The department agrees, and the comma has been stricken.

COMMENT 5: Ms. Lenmark pointed out that in New Rule V (ARM 6.6.7107(1)(a)), that the word "morality" should instead be "mortality." Also pointed out in (2)(a), the word "basis" should be "basic."

RESPONSE 5: The department agrees, and thanks Ms. Lenmark for pointing out these errors.

6. The department intends to apply New Rule I (ARM 6.6.7101), New Rule II (ARM 6.6.7102), New Rule III (ARM 6.6.7103), New Rule IV (ARM 6.6.7105), New Rule V (ARM 6.6.7107), and New Rule VI (ARM 6.6.7109) retroactively to January 1, 2008.

/s/ Christina L. Goe
Christina L. Goe
Rule Reviewer

/s/ Janice S. VanRiper
Janice S. Vanriper
Deputy Insurance Commissioner
State Auditor/Commissioner of Insurance

Certified to the Secretary of State January 22, 2008.

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

In the matter of the proposed amendment of ARM 36.12.101, definitions and ARM 36.12.120, basin closure area exceptions and compliance	))))	NOTICE OF AMENDMENT

To: All Concerned Persons

1. On August 23, 2007, the Department of Natural Resources and Conservation published MAR Notice No. 36-22-121 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 1164 of the 2007 Montana Administrative Register, Issue No. 16.

2. The department has amended ARM 36.12.101 and 36.12.120 as proposed but with the following changes from the original proposal, matter to be stricken interlined, new matter underlined:

36.12.101 DEFINITIONS Unless the context requires otherwise, to aid in the implementation of the Montana Water Use Act and as used in these rules:

(1) through (36) remain as proposed.

(37) "Net depletion" for the purposes of 85-2-360, MCA, means the calculated volume, rate, timing, and location of reductions to surface water resulting from a proposed groundwater appropriation that is not offset by the corresponding accretions to surface water by water that is not consumed and subsequently ~~returned~~ returns to the surface water.

(38) through (48) remain as proposed.

(49) "Potentially affected area" for the purposes of 85-2-361, MCA, means, as referred to in basin closure rules and in the context of a ~~net depletion analysis~~ hydrogeologic assessment, the area or estimated area where groundwater will be affected by a proposed project. The identified area is not required to exceed the boundaries of the drainage subdivisions established by the Office of Water Data Coordination, United States Geological Survey, and used by the Water Court, unless the applicant chooses to expand the boundaries.

(50) through (78) remain as proposed.

36.12.120 BASIN CLOSURE AREA EXCEPTIONS AND COMPLIANCE

(1) through (4) remain as proposed.

~~(5) In a basin closure area, evaporation losses must be mitigated.~~

(5) An applicant must identify the potentially affected area and provide a map depicting that area.

(6) A net depletion analysis must be submitted with the water right application and must include but is not limited to analysis of the following factors within the potentially affected area:

~~include hydrogeologic data or a model developed by a hydrogeologist, a qualified scientist, or a qualified licensed professional engineer.~~

~~(a) The net depletion analysis must include but is not limited to analysis of the following factors within the potentially affected area:~~

~~(i) The degree of hydraulic connection between the source aquifer and all potentially affected surface water. Surface water means, in addition to ARM 36.12.101(63) and for the purposes of 85-2-360 through 85-2-362, MCA, includes but is not limited to rivers, streams, irrigation canals, or drains.~~

~~(ii) The average monthly flow rate and volume of water consumed for a proposed project.~~

~~(iii) Propagation of drawdown from a well or other groundwater diversion and rate, timing, and location of any resulting surface water depletion effects.~~

~~(iv) The volume, rate, timing, and locations of accretions to surface water by water that is not consumed and is subsequently returned to surface water.~~

~~(b) The determination of the degree of hydraulic connection between a source aquifer and surface water within the potentially affected area must include an analysis of geology and static groundwater elevations relative to the elevation of surface water beds. Such analysis must include:~~

~~(i) Groundwater boundaries identified by the applicant for the potentially affected area. The identified area does not need to extend beyond the boundaries of the water right basins used by the department and established by the Office of Water Data Coordination, United States Geological Survey and used by the Water Court, unless the applicant chooses to expand the boundaries. The following information must be included with the application to establish the location of the aquifer boundaries:~~

~~(A) a description of how the potentially affected area was delineated;~~

~~(B) geologic maps (including stratigraphy and structure), well-log data, and aquifer testing;~~

~~(C) the extent (vertical and lateral) and properties of a source aquifer (hydraulic conductivity, transmissivity, storage coefficient, flow direction, rate of movement, and water availability) and any confining layers; and~~

~~(D) the presence of any faults, all relative to the locations of potentially affected surface water.~~

~~(ii) Evidence and supporting information of the degree of hydraulic connection between the source aquifer and surface water sources located within the potentially affected area, including but not limited to rivers, springs, creeks, streams, reservoirs, lakes, irrigation canals, or drains that may or may not show a net depletion. The assessment may include, but is not limited to the following:~~

~~(A) map showing locations of potentially affected surface water;~~

~~(B) the distance between the proposed points of diversion and potentially affected surface water;~~

~~(C) geologic map from United States Geological Survey or Montana Bureau of Mines and Geology of the potentially affected area;~~

~~(D) using existing test and production well logs, cross-section(s) showing source aquifer and any confining layers;~~

~~(E) aquifer test results and interpretation of those results;~~

~~(F) locations where bedrock aquifers outcrop beneath surface water and where alluvial aquifers exist in the potentially affected area;~~

~~(G) relevant stream-flow data from United States Geological Survey or other published source for rivers, springs, creeks, streams, reservoirs, lakes, irrigation canals, or drains within the potentially affected area;~~

~~(H) relative elevations of groundwater and surface water beds in the potentially affected area, as determined by measuring static water levels in wells that have been surveyed relative to surface water bed elevations;~~

~~(I) hydrographs of groundwater levels and surface water flows in the area of potential effect;~~

~~(J) monitored groundwater levels and measured surface water gains and losses; and~~

~~(K) any surface water measurements that have been made by the applicant, or another, including but not limited to canal, drain, water commissioner, or other stream gauging records.~~

~~(iii) Existing water rights - an applicant must provide the following information:~~

~~(A) a list and map of the points of diversion of surface water appropriation rights, including but not limited to rivers, springs, creeks, streams, reservoirs, lakes, irrigation canals, or drains located within the potentially affected area; and~~

~~(B) a list and map of the points of diversion of groundwater rights on record with the department that are located within the potentially affected area.~~

~~(c) The flow rate diverted and the volume of water consumed by a proposed project must include an analysis of:~~

~~(i) the flow rate and period of diversion of water actually diverted for the proposed project as compared to that diverted for like beneficial uses; and~~

~~(ii) estimates of the average monthly flow rate and volume consumed by evaporation, plant transpiration (evapotranspiration), interception losses, depression storage losses, and all other forms of consumption associated with the proposed project. Interception losses include that portion of precipitation which wets and adheres to surface objects, such as vegetation and other cover, and is returned to the atmosphere through evaporation. Depression storage losses include that portion of precipitation that is trapped in small surface depressions and returned to the atmosphere through evaporation:~~

~~(A) consumed water calculation - the following methods may be used to determine the rate and volume of water consumed by the proposed project:~~

~~(I) for irrigation or lawn and garden use, the potential evapotranspiration losses via measurements or computations using a method that is scientifically defensible;~~

~~(II) household consumption estimates from generally accepted published data and guidelines; and~~

~~(III) wastewater treatment estimates considering evaporation rates from lagoons and evapotranspiration rates from disposal beds or flow measurements from similar existing systems.~~

~~(d) An analysis of the drawdown must include the volume, rate, timing, and location of any resulting surface water depletion effects, within the potentially affected area caused by pumping the proposed well or other groundwater diversion, including at a minimum, but is not limited to the following:~~

~~(i) the distance between a well and any potentially affected surface water;~~

~~(ii) depth of a well;~~

~~(iii) aquifer properties from aquifer tests, existing data, or other previous studies;~~

~~(iv) the location of all wells or other sources of groundwater of record within the potentially affected area;~~

~~(v) the degree of connection between the surface water and the source aquifer to the proposed well;~~

~~(vi) pumping schedule for the proposed project;~~

~~(vii) confining layer properties from source aquifer testing; and~~

~~(viii) location and type of source aquifer boundaries.~~

(a) evidence addressing the hydraulic connection between the source aquifer and all surface water. Surface water means, in addition to ARM 36.12.101(64) and for the purposes of 85-2-360 through 85-2-362, MCA, includes but is not limited to irrigation canals and drains;

(b) evidence of propagation of drawdown from pumping a proposed well or other groundwater diversion and volume, rate, timing, and location of any resulting surface water effects;

(c) evidence of the comparison of the proposed flow rate and period of diversion to similar types of existing water uses;

(d) estimates of the monthly volume of water consumed by a proposed project through evaporation, evapotranspiration, and all other forms of consumption associated with the proposed project;

(e) ~~An~~ an ~~evaluation~~ assessment of potential return flows to a source aquifer or surface water source ~~within the potentially affected area must be included~~ and ~~must identify~~ the volume, rate, timing, and location of return flows~~.~~ ;~~-~~

~~(i)~~ (f) ~~In~~ in addition to ARM 36.12.101~~(57)~~ (56) and for the purposes of 85-2-361, MCA, return flow~~s~~ includes but is not limited to any treated wastewater if the treated wastewater will be used as part of an aquifer recharge plan~~.~~ ;

~~(f) Drawdown from a well and the volume, rate, timing, and location of any resulting gross surface water depletion which depends on:~~

~~(i) the distance between a well and surface water;~~

~~(ii) the depth of the well;~~

~~(iii) aquifer properties;~~

~~(iv) location of aquifer boundaries; and~~

~~(v) the degree of hydraulic connection between surface water and the source aquifer to the well.~~

(g) the volume, rate, timing, and locations of accretions to surface water that is not consumed and subsequently returns to surface water; and

~~(g)~~ (h) ~~A~~ a water balance table must be included that describes the monthly and total annual water balance for the proposal. ~~It must include an accounting of the following:~~

~~(i) the volume of water that would be diverted;~~

~~(ii) the volume of water that would be consumed;~~

~~(iii) the volume of water that would return to an aquifer and to surface water; and~~

~~(iv) the volume of net depletion to surface water, including but not limited to rivers, springs, creeks, streams, reservoirs, lakes, irrigation canals, or drains.~~

(7) An applicant must provide a list and map of the points of diversion of surface water appropriation rights and groundwater rights on record with the department that are located within the potentially affected area.

~~(h)~~ (8) Information required by the hydrogeologic assessment may not be sufficient to meet applicable criteria under 85-2-311, MCA, including but not limited to adverse effect to a prior appropriator. The applicant for a beneficial water use permit pursuant to 85-2-311, MCA, is responsible for providing sufficient evidence to meet all applicable criteria.

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

COMMENT 1

The proposed amendments to ARM 36.12.120 attempt to present an exhaustive listing of all the hydrological elements that must be considered by an applicant to secure the use of water for beneficial purposes. The list includes many items that a trained professional would consider as standard practice when performing a hydrological accounting of water resources. However, there are a number of items that are impossible to ascertain beyond any reasonable doubt with no specific or even general evaluation criteria referenced or presented in the proposed amendments. The amendments also do not clearly identify the procedures and scientific protocol that would be used and be acceptable to the DNRC. The proposed amendments are inadequate in providing a framework that results in an understandable, practical, and objective preparation and analysis process for beneficial use applications.

RESPONSE 1

The department received comments that both encouraged the department to 1) adopt more detailed rules describing how data collection and analysis should be completed and 2) to adopt less detailed rules and rely on the professionals to determine what data collection and procedures would be needed to evaluate net depletions in closed basins. The department considered both alternatives and determined that, because basin closure areas are spread throughout the state and groundwater properties that data collection and analysis should be based on the conditions specific to the application. The department recognizes there are numerous ways in which an applicant might meet the requirements and is therefore adopting rules that will leave the applicant some flexibility. The department agrees that trained professionals should review the applicable statutes and provide information based on the water right application proposal. The department has removed many of the details published in the proposed amendment.

The department will review the data provided by an applicant and will determine if the produced data and evaluation of that data is scientifically sound. The department suggests that applicants consult with a department hydrogeologist before determining how net depletions will be estimated for a specific application. The department may be able to offer valuable insight on the chosen methods based

on its review of previous applications and its knowledge of groundwater properties within the area.

COMMENT 2
Many of the evaluation requirements presented in the proposed amendment are basic hydrologic principles which should be followed and/or examined to one degree or another by the professional. Portions of the proposed rules may apply in some situations, providing reasonable conclusions based on scientific interpretation, while in other situations, they provide useless and erroneous results. Yet the latter will be required when there is little or no reason to do so.

RESPONSE 2
The department agrees. Please refer to Response 1.

COMMENT 3
The rules state that the potentially affected area is not required to extend beyond the boundaries of the water right used by the department and established by the Office of Water Data Coordination, United States Geological Survey and used by the Water Court, unless the applicant chooses to expand the boundaries. The rule amendment is contradictory to the many other reporting criteria demanded of the applicant elsewhere in the ARM and hydrologic science. This also contradicts DNRC's policy regarding surface water and groundwater interconnection. An accurate hydrological balance will not result if portions of the hydrogeological system are left out.

RESPONSE 3
This rule has been removed because the requirement duplicates statute. The department recognizes that the statutory scope for the hydrogeologic assessment may not be sufficient to meet permitting criteria.

COMMENT 4
"Net depletion" as it is used in the ARM sections should be replaced with "hydrologic balance". This assumes that all hydrologic factors are considered in the analysis of the hydrologic system which results in either a net depletion or a net accretion.

RESPONSE 4
The term "net depletion" is a key term of the new statute and therefore, the department deems it necessary to retain the phrase in the rules. However, the department definition of the term appears to embody the comments raised.

COMMENT 5
The amendment appears to pay attention only to "accretions" that are the result of unused portions of diversions that are otherwise not consumed, not to other mechanisms that could contribute to net accretions to the surface water systems as a result of land use change. The evaluation of accretions associated with changes to land use, i.e., storm water capture, decrease in evapotranspiration, the elimination of a pond, change in land use from agricultural to residential, etc., are ignored.

RESPONSE 5
The commenter is correct. In calculating net depletion only the waters returned to the system from the specified use are considered. Accretions associated with changes to land use could be part of a mitigation plan.

COMMENT 6
In addition, the proposed amendments are completely silent on the possible ramifications associated with a change in respective water use practices and their role in the hydrologic balance. This factor alone results in a considerable volume of water that becomes available to the surface water system in the vast majority of cases. Conversion from flood irrigation to residential use will reduce the consumptive use of water, yet its contribution is ignored in the proposed rule change. It should be noted that these potential accretions should not be construed to be intentional elimination of vegetation to gain evapotranspiration credit, but rather as a consequence of legitimate land use.

RESPONSE 6
These changes to water use practices may be part of a mitigation plan if the applicant is able to protect the prior water rights through a change of use as contemplated by statute.

COMMENT 7
Methods for determining the volume of water that falls on a parking lot that is either evaporated and or infiltrated are used routinely in the civil engineering field. The amount of water that evaporates from a small depression is approximated by applying an initial abstraction from the total amount of water which makes it to an infiltration structure. These methods should be identified and incorporated in the amended ARM as an acceptable method to evaluate any contribution or consumption of storm water runoff. There are no such technical references anywhere in the proposed amendment document.

RESPONSE 7
Please refer to Response 5.

COMMENT 8
In the context of closed basins, it appears that many of the hydrological issues currently identified in the proposed amendments have little bearing on the issuance of a water right since it is presumed by DNRC that water is simply consumed by any new request to appropriate. Thus, does the determination of volume, rate, or timing of the depletion have any practical significance if consumption is automatically assumed?

RESPONSE 8
The department does not presume that water is simply consumed by any new request to appropriate. Also, 85-2-360(5), MCA, specifically states that prediction of net depletion does not mean that an adverse effect on a prior appropriator will occur, or if an adverse effect does occur, that the entire amount of net depletion is the

cause of adverse effect. Therefore, the department cannot, nor will it presume, that water will be consumed water or that it will create an adverse effect. The department will review and base its decision on all the information provided by an applicant. However, it is the rare use of water that is nonconsumptive.

COMMENT 9
The proposed amendments fail to identify, reference, or mention the use of standard, scientifically acceptable criteria and methods when performing hydrological analysis. Incorporating these criteria would not only serve the applicant well to understand the methodologies associated with DNRC's evaluation, but would provide a mechanism which the application can be objectively evaluated based on available data and best scientific and engineering practices that have been accepted by the scientific and engineering community.

RESPONSE 9
Please refer to Response 1.

COMMENT 10
Proposed rules will force people to use the permit exception for groundwater wells and develop individual 35 gpm up to ten acre-feet rather than develop central water systems.

RESPONSE 10
The department implements statutes as passed by the Legislature and develops rules to accomplish that task.

COMMENT 11
The department proposes a regulatory structure that will prove itself unavailable to a great deal of Montana's citizens because of expense. The department clearly anticipates collection of geological, hydrological, and geographical data by trained professionals that will incur routine application costs well in excess of $10,000. Such a regulatory scheme may violate the Constitution's due process and equal protection clauses.

RESPONSE 11
The department cannot control the cost that may be incurred by implementation of new statutes. The department must clarify through rules how such implementation should occur and believes the proposed rules accomplish that task. The collection of geological, hydrological, and geographical data by trained professionals is required by 85-2-361, MCA.

COMMENT 12
Proposed amendments, as written, propose a level of precision that is not realistically possible even where financially capable business concerns prepare applications for groundwater diversions in closed basins. Construction of hydrologic models and collection of the required data, particularly in proposed amendments to ARM 36.12.120, is not realistically possible because natural systems are not

homogenous enough to draw the conclusions sought, i.e., "Evidence and supporting information of the degree of hydraulic connection between the source aquifer and surface water sources . . . (ARM 36.12.120(6)(b)(D)(ii));" "the degree of connection between the surface water and the source aquifer to the proposed well (ARM 36.12.120(d)(v)." The department should consider verbiage that better reflects the inherently imprecise nature of local and regional hydrology such as: "Evidence and supporting information showing the presence or absence of a hydraulic connection between the source aquifer and surface water sources . . .;"

RESPONSE 12
The department believes the proposed rules accurately implement the new statutes; however, the department also agrees that professionals should be allowed some flexibility to determine the data collection and evaluation methods used based on the specifics of the water right application and the groundwater properties in the area. Please refer to Response 1.

COMMENT 13
A developer seeking industrial or domestic water supplies will find it more expedient to drill and complete individual wells producing 35 gallons or less in order to avoid the considerably more difficult process of applying for a single, and more appropriate source.

RESPONSE 13
Please refer to Response 10.

COMMENT 14
The backlog of unprocessed water applications backed up at the department is significant. It is not in the least uncommon for an applicant, particularly an industrial applicant or developer, to be engaged with the department for three years attempting to get a permit to put water to beneficial use. The complexity of the proposed amendments guarantee that an already overly burdened system is going to become more so.

RESPONSE 14
The department disagrees that the complexity of the proposed rules, as opposed to the statute, will increase review time of an application by the department. The department finds that its review time decreases when an application includes the required information and evaluations set forth in the correct and complete rules and believes that if an application conforms to the proposed rules, review time will be reduced. Nevertheless, the department recognizes that applications in closed basins are increasingly complex and take time to thoroughly evaluate.

COMMENT 15
HB 831, the source of the proposed amendments, does not contain language as restrictive as the proposed amendments.

RESPONSE 15

Please refer to Response 12.

COMMENT 16
The term "degree" should be removed from ARM 36.12.120(6)(a)(i), 36.12.120(6)(b)(ii), 36.12.120(6)(c)(d)(v), and 36.12.120(6)(f)(v). Use of the term "degree" implies that an applicant can provide evidence proving or otherwise quantifying the requested information. In light of the fact that an applicant cannot do so, use of the term "degree" will subject an applicant, as well as the department, to inconclusive hearing on every contested application and will ultimately subject an applicant to a potentially endless process attempting to present the department with a correct and complete application. The term "degree" should be replaced with "evidence addressing" and other appropriate changes in grammar to render the context correct.

RESPONSE 16
The department agrees. The term has been eliminated.

COMMENT 17
Rules need to have some flexibility to allow a scope of work that is proportional to the potential for impacts. Rather than requiring extremely detailed data collection in all cases, the rules should have an option that allows an applicant to adopt mitigation based on a very conservative set of assumptions regarding depletion and have a reasonable degree of certainty that the application will be acceptable with regard to the issue. Otherwise, these rules will exacerbate the trend for unregulated development using the individual well exemption. The department needs to allow the applicant to conservatively assume that there is a direct hydrologic connection and derive a conservative estimate of depletion.

RESPONSE 17
The department believes the commenter is suggesting that a hydrogeologic assessment report should not be required if an applicant assumes that there is a hydraulic connection between groundwater and surface water and adopts a mitigation plan. In developing rules, the department must follow the statute which requires that a hydrogeologic assessment be submitted with an application for groundwater in a basin closure area.

COMMENT 18
This provision requires the quantification of the volume, rate, timing, and location of any accretions to surface water as part of the net depletion analysis. Timing and location are only significant if there are very localized impacts to surface water associated with the project (i.e., depletion due to induced infiltration). They are not relevant if a project intercepts groundwater providing regional recharge to a surface water body. In the latter case, the timing and location of discharge cannot be accurately estimated and are not critical to establish. Language should be added that provides for this distinction or the application will be extremely difficult to technically defend.

RESPONSE 18
The specific item referred to by the commenter has been removed from the final rules; the rules now allow the applicant more flexibility. The department recommends that as part of the net depletion analysis, the applicant evaluate the volume, rate, timing, and location of any accretions to surface water relevant to the proposed project. Hydrologic considerations and physical characteristics at the project site, potential locations where adverse effects might occur, and technical and data limitations should all be considered when determining the extent of the analysis that is appropriate.

COMMENT 19
Rules specify that an evaluation of potential return flow must be included and that it must identify the volume rate, timing, and location of return flows. The department needs to clarify whether this applies specifically to agricultural return flows or all potential return flows, including return flows due to domestic wastewater infiltration and lawn irrigation. In most cases this requirement will be virtually impossible to calculate with any degree of technical certainty; and therefore, it would be more appropriate to remove the word "identify" and substitute the word "estimate."

RESPONSE 19
The evaluation of return flow for a hydrogeologic assessment must include all return flow and is not limited to agricultural return flow, as specified in the statute, 85-2-361(1)(b)(iii), MCA. The word "identify" has been removed.

COMMENT 20
This provision requires estimates of volume consumed by evaporation, plant transpiration, interception losses, depression storage losses and other forms of consumption associated with the project. It is unclear when this provision would be necessary or appropriate. This information would presumably only be applicable for an irrigation application. DNRC has well established estimates for crop water use and consumption; therefore, it is not clear that this degree of analysis would be necessary. To the extent that it would apply to mitigation, the department would likely base mitigation credit on established consumptive use rates for crops historically raised on the site; and therefore, a detailed accounting of water balance components such as depression storage and interception losses would not be necessary. This requirement should be removed or clarified.

RESPONSE 20
If the commenter is referring to the standard water use requirement rules, the table for irrigation use describes an amount that may be a reasonable place to start when estimating new irrigation use. The table is not to establish crop consumption figures for existing irrigation. Because crop water use associated with existing irrigation is so variable and fact specific, crop consumptive use must be estimated based on a consideration of the crops and soils being irrigated, actual irrigation practices, and any return flows.

COMMENT 21

Why are rules being written prior to the report that must be written by the Montana Bureau of Mines and Geology?

RESPONSE 21
Statute requires the Bureau of Mines and Geology submit a report to the appropriate legislative interim committee and the 61st Legislature (which convenes in 2009) providing a detailed analysis of the results of the review and case study. DNRC will be receiving water right applications in 2008 and 2009 that will be subject to the 2007 statute changes and finds it necessary to adopt rules now that implement the new statutes.

COMMENT 22
The department needs to add lakes under ARM 36.12.120(6)(a)(i) and better define drains to include tile drains, French drains, waste drains, etc.

RESPONSE 22
The terms referenced by the commenter have been removed as to not exclude any types of waters.

COMMENT 23
There needs to be an exemption from the rules for nonconsumptive applications.

RESPONSE 23
Statute requires that if an application is for groundwater in a basin closure area, a hydrogeologic assessment must be submitted that includes the information required by statute. These rules allow an applicant for a nonconsumptive application to demonstrate there will be no net depletion.

COMMENT 24
Limiting the potentially affected area to the boundaries identified by USGS and used by the Water Court is not scientifically sound or defensible.

RESPONSE 24
The basin limits are identified in statute for the purposes of the hydrogeologic assessment. Expanded boundaries may be necessary for evaluation of the permitting criteria.

COMMENT 25
Define depression.

RESPONSE 25
The term "depression" has been removed from the rule.

COMMENT 26
Under original ARM 36.12.120(6)(a)(ii), commenter notes that plant transpiration should be eliminated and replaced with evapotranspiration, which includes both soil and plant evaporation.

RESPONSE 26
The department agrees and has changed the wording to reflect the commenter's suggestion.

COMMENT 27
The proposed amendments are required to implement House Bill 831 and such rules must be consistent with, and not exceed the requirements for groundwater permitting set forth in HB 831. In the commenter's view, the proposed amendments impose restrictions and requirements on what must be provided in a hydrogeologic assessment in excess of the requirements for such assessment set forth in HB 831. In particular, the proposed amendments to ARM 36.12.120(6)(b)(ii) through (iii) and (c) through (g) far exceed the parameters for hydrogeologic assessment set forth in Section 15 of HB 831, now codified at 85-2-361, MCA.

RESPONSE 27
The department believes the proposed rules accurately implement the new statutes. However, the department also agrees that professionals should have some flexibility to determine the data collection and evaluation methods necessary to address the specific water right application and to reflect the groundwater properties in the area.

COMMENT 28
The proposed amendments establish a system whereby prospective permittees are priced out of using water before they even get past the application process. The requirements set out in the proposed amendment to ARM 36.12.120(6)(b)(ii) through (iii) and (c) through (g) would make the preliminary analysis required to submit a permit application cost-prohibitive for the majority of agricultural and residential users. Particularly for permittees attempting to develop workforce housing and other subdivisions, such costs will be passed on to future homeowners, resulting in inflated housing prices solely to recover the cost of obtaining potable water. Of course, this cost analysis does not even consider the cost for actual implementation of groundwater development under the proposed amendments, which is an additional undue and, for most water users, unaffordable burden. Under Article IX, Section 3 of the Montana Constitution, all waters of the state are "for the use of its people…"

The system that will result from the proposed amendments is a system in which the people no longer have the ability to use the water, either because the process is so obtuse or so cost-prohibitive.

RESPONSE 28
The department notes that while all waters of the state are for the use of its people, such use cannot impinge on senior water rights. New groundwater use in closed basins, the subject of these rules, is limited to appropriations that will not adversely affect senior water rights. An applicant may not be able to easily obtain a new groundwater right, but there are other options available to the applicant, including

obtaining an existing water right and changing it to a new purpose. Also, please refer to Response 11.

COMMENT 29
DNRC's role in water use has been to administer the people's use of the water (see 85-2-101, MCA). Under the proposed amendments, DNRC's role as an administrative agency is exceeded such that DNRC will no longer be facilitating and administering the use of water, but rather will effectively be prohibiting any future new uses of water. 85-2-370, MCA (Section 22 of HB 831), also charges DNRC with orienting rules "toward the protection of existing rights from adverse effects from net depletions..." However, throughout the proposed amendments net depletion is equated with adverse effect, thereby failing to recognize, as the Montana Legislature did in HB 831, that net depletion does not always result in adverse effect.

RESPONSE 29
Please refer to Responses 8 and 29.

COMMENT 30
The very last provision in the proposed amendment raises significant concern. The proposed amendment to ARM 36.12.120(6)(h) states, "Information required by the hydrogeologic assessment may not be sufficient to meet applicable criteria under 85-2-311, MCA, including but not limited to adverse effect to a prior appropriator." In other words, a permit applicant can expend every last cent they have to show that there is no net depletion that results in adverse effect, and DNRC can still find adverse effect. Once DNRC makes a determination that a hydrologic assessment demonstrates no net depletion or shows that even though there is net depletion, there will be no adverse effect, the application should then go forward. If DNRC disagrees with the determination that there is no adverse effect, that disagreement should be resolved before the application goes to public notice so that the applicant can prepare an augmentation plan if DNRC is going to require one.

Otherwise, not only is the process a waste of the applicant's time and money, it also squanders DNRC's already admittedly short resources, as DNRC will process an application and put it out to public notice when DNRC has already made the determination that the application is deficient for lack of an augmentation plan. Water users need and deserve regulatory certainty before investing what will be considerable amounts of time and expense into applying for beneficial use permits for groundwater. The proposed amendment to ARM 36.12.120(6)(h) does not provide that regulatory certainty.

RESPONSE 30
The new statute requires an applicant to submit a hydrogeologic assessment with an application located within a basin closure area and determine net depletion to surface water (85-2-360(3)(a), MCA) and whether the net depletion will result in adverse effect to a senior water right. The statutory scope of the hydrogeologic assessment may not be sufficient in all cases to evaluate adverse effect or other criteria in 85-2-311, MCA. An applicant should submit information sufficient to

evaluate adverse effect and an applicant can include that information in the hydrogeologic assessment. If the applicant determines that the net depletion will result in an adverse effect, then the applicant must submit a aquifer recharge plan or a mitigation plan as required under 85-2-362, MCA, along with the water right application and hydrogeologic assessment.

As required by statute, the department must proceed to public notice if the application meets the correct and complete rule requirements and the rules pertaining to a basin closure. Prior to public notice however, the department will draft an Application Review Form that will identify remaining issues that need to be resolved. Also, please refer to Response 24.

COMMENT 31
The rules as proposed are contrary to the legislative intent expressed in the preamble to HB 831, and will result in a groundwater permitting program which in effect prevents Montana citizens from obtaining permits in these areas to use groundwater for beneficial purposes.

RESPONSE 31
Please refer to Response 28.

COMMENT 32
Should DNRC continue to pursue the proposed rules, the agency should prepare the appropriate environmental review under MEPA, as well as the analysis of the social and economic impacts associated with the proposed action, under both MEPA and MAPA. By making groundwater permitting virtually impossible, or if theoretically possible, economically unattainable for most agricultural producers, the new rules will no doubt have significant, social, economic, and environmental effects. If these rules are adopted, they will impact not only water use in these basins, but also land use practices associated with the development of land for subdivision purposes. These indirect and cumulative impacts of the rules should be assessed. MEPA applies to agency rulemaking, and applies directly to the proposed adoption of the rule amendments at issue. Prior to adoption of the rules as proposed, DNRC should conduct the appropriate level of MEPA review, which may involve an EIS given the scope of the proposed action.

RESPONSE 32
The department is preparing an environmental evaluation of the proposed rules.

COMMENT 33
ARM 36.12.101(37): The proposed definition of "net depletion" is not consistent with the term as provided in 85-2-360, MCA, the statutory provision for which the proposed rule is connected. Under 85-2-360, MCA, "net depletion" is included in the statute to determine whether net depletion results in adverse effect on a prior appropriator (see 85-2-360(3)(a), MCA). Under the statute, the hydrogeologic assessment is used by the applicant to analyze whether there is a result of adverse effect by the proposed groundwater development. As 85-2-360(5), MCA, makes

clear, as does 85-2-401(i), MCA, the prediction of net depletion does not equate to a determination of adverse effect. The DNRC's proposed definition of "net depletion" is not consistent with the term as used in 85-2-360, MCA.

RESPONSE 33
Please refer to Response 8.

COMMENT 34
Amendments a. (1) through (5) of the existing rules in ARM 36.12.120 should also be deleted. These rules address whether or not applications in these basins can be "processed," an issue which was clarified by HB 831. DNRC's retention of these rules will only lead to further confusion over whether the agency may "process" an application in the first instance. b. (6)

RESPONSE 34
The department agrees and has made the change as noted by the commenter.

COMMENT 35
DNRC should provide examples for the various basins and aquifers in the area affected by the rules, on what compliance with the rules will cost. In fact, the rule states the net depletion analysis includes "but not limited to" the identified factors, meaning DNRC may require anything else a particular application reviewer may desire. Before considering passing the rules, DNRC should propose to the public, and policy makers, an estimate of compliance costs associated with meeting the terms of the rules.

RESPONSE 35
Please refer to Response 11.

COMMENT 36
ARM 36.12.120(6)(a)(i): What is meant by the term "degree of hydraulic connection" and how will such a determination be achieved or interpreted?

ARM 36.12.120(6)(a)(iii) and (iv): By adding "timing and location" the proposed rules greatly add to the cost and complexity of the data or model required. At best, any such assessment is an arbitrary guess. If required, DNRC should be willing to describe for applicants in rule, how these factors will be determined, and the effect of the factors in review of the application by the agency.

RESPONSE 36
A source aquifer is hydraulically connected to surface water if water can move between the aquifer and surface water. Hydraulic connection can be evaluated by inspection of geologic maps, analysis of pumping tests, water level monitoring, and comparison of water chemistries and temperatures. The language "degree of hydraulic connection" has been replaced by "evidence addressing the hydraulic connection" in recognition that determination of hydraulic connection is imprecise. 85-2-361(1)(a), MCA, states that a "hydrogeologic assessment" must describe …

"predicted net depletion, if any, including the timing of any net depletion …" 85-2-362(3), MCA, states "An aquifer recharge plan must include: …(c) when and where, generally, water reallocated through exchange or substitution will be required; …" Also, please refer to Response 1.

COMMENT 37

ARM 36.12.120(b): By including the analysis of the static groundwater elevations relative to surface water elevations, the proposed rules become increasingly arbitrary, unless some rationale for this data is established. Both elevations will vary seasonally, monthly, weekly, daily, and even hourly. What quantum of such data is expected and to what degree? A few piezometer fields, or a whole field of monitoring wells throughout the "potentially affected area"? What scope of surface water elevations is expected and utilizing what methodologies?

RESPONSE 37

This language has been stricken from the proposed amendment to the rules. Recognizing that temporal variations exist in groundwater and surface water observations, a hydrogeologist, qualified scientist, or professional engineer can still utilize these measurements as evidence relative to the hydraulic connection between the aquifer and surface water bodies. Groundwater level data collection can range from weekly to monthly and must be measured to the nearest 0.01 foot. A few wells constitute the minimum data-collection network; however, groundwater levels can be measured in as many wells as is practical, depending on the circumstances of a particular application. Also, please refer to Response 1.

COMMENT 38

ARM 36.12.120(6)(b)(i): The requirement of locating groundwater boundaries in the potentially affected area is quite complex. It may be more appropriate for DNRC to identify the same for areas of potential development in the basins at issue. If not, DNRC should describe with particularity how this will be achieved by the applicant, and what level of data and analysis will suffice. Is (A) through (D) the extent of data required? If so, the rule should clarify that this data suffices.

ARM 36.12.120(6)(b)(ii): Again, the term "degree of hydraulic connection" is used. What is the extent of this term in regard to regulatory compliance or application of the rules? Several factors are then listed for determining surface water source aquifer connections, but the assessment "is not limited to" the identified factors. What else may be involved?

ARM 36.12.120(6)(f): Please identify how an applicant will identify these aquifers and these locations for the potentially affected area. Can DNRC produce these? If not, how will DNRC review the data, and how would DNRC determine the sufficiency of the same?

RESPONSE 38

This language has been stricken from the proposed amendment to the rules as much of it is already codified in statute (85-2-361, MCA) or duplicated in rule.

Recognizing the potentially complex assessment of the aquifer extent and properties, in addition to interaction between groundwater and surface water, the statute requires that the hydrogeologic assessment must include data or a model developed by a hydrogeologist, qualified scientist, or qualified licensed professional engineer. The minimum information required by the hydrogeologic assessment has been removed from the rules as it is already required by statute. Additional information submitted to locate and identify groundwater and surface water relationships will be left to the discretion of the qualified professional. The term "degree of hydraulic connection" has been replaced by "evidence addressing the hydraulic connection". Also, please refer to Response 1.

COMMENT 39

ARM 36.12.120(6)(b)(ii)(H) and (I): From what source of information are applicants expected to derive this information? Is the applicant expected to manufacture or create this data with an application (i.e., test wells, monitoring wells, piezometer fields, surface water bed measurements), or will examining existing available data, if any, be sufficient?

ARM 36.12.120(6)(b)(ii)(K): How will the applicant know whether "another" has made the surface water measurements. Is this limited to public record searches?

ARM 36.12.120(6)(b)(iii): Is the information from (a) from the DNRC database or what may exist on the ground? Does DNRC expect the applicant to field truth or survey claim information, or rely on Water Court information?

ARM 36.12.120(6)(c)(ii): By including "interception losses," "depression storage losses," and "all other forms of consumption" DNRC is in effect asking an applicant to demonstrate the hydrologic cycle for the project area. In the project area, why does the applicant need to describe how much rain adheres to leaves, grasses, or passing automobiles? Why does the applicant need to identify small surface depressions (a/& puddles) and include the evaporation loss from those? This particular subsection epitomizes the problems with the proposed rules and the level of analysis required.

ARM 36.12.120(6)(d): In determining drawdown effects to what extent is the applicant expected to assess location or timing to any degree of accuracy? For deep aquifers, how is one to track the route of water molecules to the point of discharge to surface water? How much would such an analysis cost? Does DNRC propose any methods or standards by which the agency itself would judge such a demonstration?

RESPONSE 39

This language has been stricken from the proposed amendment to the rules. The amount of information required by the applicant will be dependent on the complexity of the hydrogeological setting and will require the use of existing data sources as well as data obtained and analyzed from the aquifer test. Reference to measurements by "another" recognizes that measurements may be performed by an agent of the applicant and that additional information may be found in assessments

and reports made by a third party not related to the applicant. The detail of the analysis of stream depletion will depend on the complexity of the hydrogeological setting. In some cases, it may be sufficient to use analytical models to describe the rate and timing of the depletion. In other cases, a numerical model may be required. Please refer to Response 1.

COMMENT 40

What is meant by "degree of connection" and how will the term be used in determining compliance with the rules? ARM 36.12.120(6)(d)(vii) and (viii): How are confining layer properties and location and type of boundaries to be explained? What standards or methods will be used to assess this? If boundaries are encountered, to what extent do they need to be located?

ARM 36.12.120(6)(e): Is the evaluation of return flows for the project area or for the potentially affected area as a whole?

ARM 36.12.120(6)(f): Why is "gross surface water depletion" assessed? Again, how will the timing or location be realistically assessed, particularly from deep well projects?

ARM 36.12.120(6)(g)(iii): Water balance assessments for an aquifer and the surface water for returns seems quite complex. Why doesn't the assessment of (iv) suffice for the entire body of proposed rules?

RESPONSE 40

This language has been stricken from the proposed amendment to the rules. The term "degree of hydraulic connection" has been replaced by "evidence addressing the hydraulic connection". Provision and assessment of evidence addressing the hydraulic connection between the source aquifer and surface water will be performed by a qualified professional. Similarly, the qualified professional will identify the location and extent of boundary conditions and other aquifer characteristics within the hydrogeologic assessment. The evaluation of return flows and water balance will examine the impacts imposed by the proposed project on an existing system. Also, please refer to Response 1.

COMMENT 41

DNRC should rewrite the rules to actually describe how an applicant can apply the concept of net depletion as promulgated in HB 831 to an analysis of whether or not another appropriator is adversely affected by the proposed groundwater development. Such a regulatory approach would allow applicants and others to assess whether or not net depletion results in adverse effect as prescribed by HB 831 and whether to pursue a permit from the agency. DNRC's proposed rules add great expense and uncertainty to the applications and make the regulatory compliance difficult, if not unachievable.

RESPONSE 41

While 85-2-360(5), MCA, statutorily precludes an automatic assumption that net depletion to a surface water body creates adverse effect, the department recognizes that basin closures were statutorily adopted (85-2-330, 85-2-336, 85-2-341, 85-2-343, and 85-2-344, MCA) or administratively closed pursuant to 85-2-319, MCA, because streams within their boundaries were deemed fully or over-appropriated.

Impacts to surface water from groundwater appropriations can vary. Whether a senior water right will be adversely affected depends on a number of factors that cannot be generally described. Therefore, the determination of adverse effect must be based on the proposed application. Also, please refer to Responses 1 and 11.

COMMENT 42

More specifically, the rules require advanced scientific evaluations and analyses that require extensive data which are not readily available and which in most circumstances are not practically attainable. Even if a major data collection effort were undertaken, there would still be significant uncertainties, including the lack of historical data. Requiring such analysis in normal/complex hydrogeologic settings will more likely than not lead to "imaginary" interpretations and "fictional" predictions for the purpose of defining the degree of hydraulic connection, rate, and timing analyses that are defined in the proposed rules. As an illustration, numerous streams, springs, ditches, and other water features are present in the Gallatin Valley. It is more likely than not that a computed cone of depression would intercept several surface water features. It is not practical to reliably quantify the degree of hydraulic connection or the timing, location, and rate of depletion for each stream/ditch/drains/spring in such multiple stream settings.

RESPONSE 42

85-2-361(b), MCA, states "In predicting net depletion of surface water from a proposed use, consideration must be given, at a minimum, to: (iv) the locations of surface waters within the area described in subsection (2)(a)(i)". The department agrees that it may not be practical to quantify hydraulic connection and net depletion for every surface water body that is identified; it is necessary to provide evidence to evaluate whether a prior appropriator is adversely affected and, if so, to design a mitigation or aquifer recharge plan. The commenter seems to suggest that since data may be difficult to obtain, less information should be required. A water right can be granted, and must be based on the criteria set forth in statute, including a determination of adverse effect which is required for the protection of senior water rights. A basin closed to new appropriations means that new water use is limited or may be authorized with conditions that protect senior water rights.

COMMENT 43

The proposed rules make it practically impossible to "prove" that any potential net depletion or adverse impact will not occur or that they will be "insignificant". For all intents and purposes, the rules establish that any and all future groundwater appropriations in a closed basin will result in net depletion, and hence, cause adverse impacts (however small).

RESPONSE 43
Montana's water laws do not allow for "insignificant" adverse effect. If adverse effect will occur, then an applicant for a new water use must mitigate the effect no matter how small. Also, please refer to Response 8.

COMMENT 44
All applicants will be required to implement either mitigation or aquifer recharge. If this is indeed the policy of the state of Montana, then simply require mitigation and establish simple and plain requirements for mitigation. For example, let it be assumed that a proposed residential development proposes to mitigate adverse impacts using existing surface water rights. A plain and simple rule would be for the proposed development to retire irrigated acreage, thus leaving water in a stream to offset depletions. There are instances where mitigation (or aquifer recharge) is feasible. There are many instances where it will not be feasible. For example, it may not be feasible for a proposed development located in an area lacking historical irrigation. Where can it purchase or obtain water rights to eliminate net depletions? Will it be allowed to off-set "adverse impacts" say ten or twenty miles down-stream where there are water rights? Or will the beneficial use application simply be denied because of location issues?

RESPONSE 44
The rules do not limit the scope of mitigation or aquifer recharge plans as the comment appears to suggest. The "plain and simple" approach where irrigated acreage is retired leaving water in the stream to mitigate adverse effects caused by net depletion may be acceptable in many instances. However, 85-2-362(1), MCA, states "An applicant whose hydrogeologic assessment conducted pursuant to 85-2-361 predicts that there will be a net depletion of surface water shall offset the net depletion that results in the adverse effect through a mitigation plan or an aquifer recharge plan". Therefore, the department does not have the discretion to waive the need for mitigation or aquifer recharge in instances that it is not feasible as implied by this comment.

The department does not have the authority to make the assumption or decision suggested by the commenter. The commenter raises good questions pertaining to where water rights can be obtained to eliminate net depletions, or where mitigation water must be located. The department encourages an applicant to present an application that the applicant believes will meet the criteria required to obtain a water right.

COMMENT 45
Consideration needs to be made to develop a uniform, consistent, realistic set of guidelines that can be followed so that each engineer or scientist knows approximately where the applicant stands at the end of the application process.

RESPONSE 45
Please refer to Response 1.

COMMENT 46
Specific Comment 1 on ARM 36.12.101(37): It is generally not practical nor feasible to quantify the timing and location of these depletions in a complex ground/surface water system. For example, the groundwater appropriation point of diversion may be located several miles from the nearest gaining surface water.

RESPONSE 46
The department acknowledges that net depletion evaluation in a complex geologic setting may be difficult. However, the statutes require that a net depletion analysis be conducted. The amount of potential net depletion can be estimated by approximating consumptive use for the proposed appropriation. Rate and timing of stream depletion can be grossly approximated in a complex geologic setting; net depletion will approach a constant rate as distance from a stream increases. Location of the net depletion can also be conceptualized based on details of the complex geologic setting.

COMMENT 47
It may be appropriate to define or establish "non-significant" net depletion criteria in the same manner that Montana non-degradation laws work (e.g., a discharge is non-significant if it does not cause an exceedance of a trigger concentration).

RESPONSE 47
Streams in basin closure areas have been deemed "fully or over-appropriated" by the Montana Legislature and administratively by the department. Montana's water laws also do not allow for "insignificant" adverse effect. Also, please see Response 44.

COMMENT 48
Specific Comment 2 on ARM 36.12.101(49): It would be helpful if the term concept "affected groundwater" was more succinctly defined. Theoretically, this concept could include most of the groundwater in a basin.

RESPONSE 48
The commenter raises a good point; however, no two water right applications are the same, and so any attempt to define "affected groundwater" would be impossible. Every applicant will need to evaluate and determine what groundwater may be affected based on the specifics of the application. An applicant will need to document how the "potentially affected area" was determined.

COMMENT 49
Specific Comment 3 on ARM 36.12.120(6)(a)(i): It would be helpful if the concept of "degree of hydraulic connection" and "potentially affected surface water" were defined. In other words, is this a qualitative or quantitative assessment? If it is meant to be quantitative, this requirement is practically infeasible in most natural settings, i.e., like the Gallatin Valley.

RESPONSE 49

The term "degree of hydraulic connection" has been replaced by "evidence addressing the hydraulic connection". The "potentially affected" phrase of the term "potentially affected surface water" has been deleted.

COMMENT 50
Specific Comment 4 on ARM 36.12.120(6)(a)(iii): It is generally not realistic in most natural systems to reliably project the propagation of drawdown or surface water depletions if the well is located a significant distance from the surface water. It is even more unrealistic to reliably quantify the rate, timing, and location of any resulting surface water depletion at distant locations in most geologic settings. It may be reasonable to establish a preliminary drawdown criterion. The minimum amount of drawdown required for assessment purposes should be 0.1 feet or greater. Use of a 0.01 feet draw down as a criterion is unreasonable.

RESPONSE 50
85-2-360, MCA, specifies a "hydrogeologic assessment. . . to predict whether the proposed appropriation right will result in a net depletion of surface water . . ." A net depletion evaluation typically quantifies the amount (i.e., rate and volume) of depletion; in addition, the hydrogeologic assessment of 85-2-361(1)(a), MCA, specifies that ". . . timing of any net depletion" is also described. In most geologic settings, net depletion approaches a more or less "constant" rate as distance to a stream increases. The department acknowledges that a net stream depletion evaluation constitutes an approximation or estimation and that it cannot account for stream depletion on a "drop-by-drop" basis, but encourages applicants to collect adequate information and submit as credible a net depletion evaluation as can reasonably be accomplished.

COMMENT 51
Specific Comment ARM 36.12.120(6)(c)(ii)(A): The water use requirements already established in the existing administrative rules should also be allowed as an appropriate method.

RESPONSE 51
Please refer to Response 20.

COMMENT 52
Specific Comment 6 on ARM 36.12.120(6)(g): The water balance analysis required in the rules could be interpreted as incomplete as it does not clearly establish that all accretions aside from mitigation or aquifer recharge are to be included. Although the draft rule goes on to discuss minutia and trifling details for evaporative losses, it is unclear if its counts for other potential accretions such as runoff from impermeable surfaces (e.g., driveways, roofing), etc. The rules should be clarified accordingly so that it is clear that a complete water balance addressing all hydrologic factors including runoff from impervious surfaces, detention basin recharge, etc. is to be included.

RESPONSE 52

Please refer to Responses 1 and 8.

COMMENT 53
Commenter states rules are adequate as written and should not be changed except for further definition in some areas.

RESPONSE 53
The department appreciates the commenter's time and effort put forth reviewing the proposed rules.

COMMENT 54
Commenter referred department to, and provided a copy of USGS Circular 1186, Sustainability of Ground-Water Resources.

RESPONSE 54
Commenter did not specifically point the department to sections of the circular that pertain to comments the commenter has about the proposed rules. However, department reviewed the circular and notes that information contained in the circular describes how groundwater development affects surface water.

COMMENT 55
Commenter referred the department to and provided copy of a May 31, 2002, "Report on Groundwater-Surface Water Interactions" written by Bill Uthman, Hydrogeologist, Water Management Bureau, DNRC.

RESPONSE 55
Commenter did not specifically point department to sections of the document that pertain to comments the commenter has about the proposed rules. However, the department reviewed the document and notes that information contained in the document describes how groundwater development affects surface water.

COMMENT 56
Commenter suggested that applicant and department meet prior to submission of a water right application to establish the criteria for the net depletion analysis, agree on the model that will be used, and other requirements based on the complexity of an application.

RESPONSE 56
The department encourages applicants to contact a department hydrogeologist prior to filing a water right application, particularly in a basin closure area.

COMMENT 57
The proposed rule fails to address those hydrogeologically complex cases in which anyone will have a difficult time locating and characterizing the source aquifer. Commenter recommends that the rules for "net depletion" allow a "bucket-for-bucket" mitigation, meaning an applicant should simply replace every acre-foot of estimated new consumptive use from new groundwater pumping with an acre-foot of

a senior, historically-consumed surface water right which would be changed to a "mitigation" purpose.

The need to characterize the timing and reach of the depletion would still remain, at least to the extent that it affects the applicant's mitigation plan. The applicant can then make the determination of whether offering more mitigation water than he or she might under a rigorous hydrogeologic analysis of net depletion is worth the trade-off of predictability and ease of computation.

This mitigation approach will need the water to be returned within the reach of stream where the groundwater's pumping impacts are likely to show up, and the mitigation water should recharge the stream during roughly the same time as the depletion. Flexibility can still be built into meeting the timing and reach requirements. This analysis will be less expensive and less demanding in the complex cases that the hydrogeologic assessment currently proposed by the "net depletion" rules.

RESPONSE 57

The department does not have the authority to waive the requirement for a hydrogeologic assessment or make other decisions proposed by the commenter. Statute requires that if an application is for groundwater in a basin closure area, a hydrogeologic assessment must be submitted that includes the information required by statute.

Offsetting 100 percent of net depletions (bucket-to-bucket mitigation) to surface waters is the ideal standard for an application in a closed basin. However, the department cannot support the total elimination of the required hydrologic assessment even if an applicant proposes to mitigate 100 percent of the net depletion. The location and timing of mitigation would have to be considered to evaluate whether senior water right holders will be adversely affected by a new appropriation. Inadequate information about the complexity of groundwater/surface water interactions would place the department in the difficult situation of having no facts to base the decision to grant, modify, or deny a new water right and associated change. The burden regarding adverse effect would shift from the applicant to the department and objectors.

The Water Use Act purposefully placed the burden of proving no adverse effect to senior appropriators on the applicant. This was a departure from prior law. Where there is a lack of data or failure to prove affirmatively lack of adverse effect, a water right permit application cannot be issued.

COMMENT 58

While proposed ARM 36.12.120(6)(b)(iii)(B) requires the applicant to "list and map" all groundwater rights within the "potentially affected area," the proposed rule does not take the next step and ask how these existing groundwater pumpers change local groundwater flow characteristics.

RESPONSE 58
The department believes the commenter's concerns will be addressed in an applicant's analysis of physical and legal water availability.

COMMENT 59
Proposed rule ARM 36.12.120(6)(b) asks the applicant to determine the "degree of hydraulic connection" between the source aquifer and potentially affected surface waters. Subsection (6)(b)(i) then asks the applicant to establish the location of the aquifer boundaries. Subsection (6)(b)(i)(B) should include the word "results" after "testing" (the last word in that subsection). Subsection (6)(b)(i)(C) should first ask the applicant to provide the basic measured properties of the aquifer, and then ask for the applicant's derived properties. This means that the applicant would first be asked for the testing results that determine the measured properties of: K (hydraulic conductivity), b (thickness), h (water levels or head), and S (storage coefficient). From these properties, subsection (6)(b)(i)(C) should then ask the applicant for the derived properties of : T (transmissivity), flow rate, volume, and direction of flow, and how these change with time. After the first two words of subsection (6)(b)(i)(D), "the presence," the words "and properties" should be added.

RESPONSE 59
Net depletion does not depend on the flow rate, volume, and direction of groundwater flow. In general, net depletion depends on distance from a well to surface water, aquifer transmissivity, and the location and nature of aquifer boundaries. The commenter incorrectly identifies measured and derived properties. Transmissivity and aquifer thickness are measured or estimated properties and hydraulic conductivity is derived. Storage coefficient is extraneous information for a net depletion analysis. Estimates of aquifer properties from an aquifer test are valuable, but evidence of hydraulic connection and aquifer boundaries are key to what to do with those properties.

COMMENT 60
ARM 36.12.120(6)(c) should be modified to require both flow rate and volume for water diverted and consumed: "The flow rate and volume of water diverted and the flow rate and volume of water consumed by a proposed project must include an analysis of:…"

RESPONSE 60
The department agrees in part. The rule has been modified to include a monthly volume only. If needed, a flow rate can be calculated using the monthly volume figure.

COMMENT 61
The term "wetlands" should be added to the list of potentially affected surface water throughout ARM 36.12.12.120(6). Specifically, this would be in subsections (6)(a)(i), (6)(b)(ii), and (6)(g)(iv).

RESPONSE 61

The department has eliminated specific references to potentially affected surface water.

COMMENT 62
If an applicant intends to fully replace calculated depletions through an aquifer recharge plan, based on rate and timing of depletions, it appears that the information requested may be excessive and not particularly useful for some applications.

RESPONSE 62
Please refer to Responses 17 and 57.

COMMENT 63
The rules have the negative effect of forcing development of individual wells using the permit exception for groundwater wells that are less than 35 gpm up to ten acre-feet rather than developing central water systems.

RESPONSE 63
Please refer to Response 10.

COMMENT 64
ARM 36.12.120(6)(a)(i): This paragraph references 85-2-360 through 85-2-362, MCA. To the best of my knowledge, these statutes have not yet been published. The state should not ask the public to comment on rules for which the statutes have not yet been written. To this end, I request that you postpone this rulemaking process until after such time that the statutes become available. The review package I received should have included them.

RESPONSE 64
The new statute became effective upon passage and approval which was on May 3, 2007. The department proceeded to draft rules based on the language passed in HB 831. On July 24, 2007, Legislative Services made the MCAs available. If the commenter would have contacted the department, the web site address for the statute language would have been provided, and if requested, a copy of the draft statute with codifications.

COMMENT 65
ARM 36.12.120(6)(b)(i)(C): Please change this text as follows: "the extent (vertical and lateral) and properties of a source aquifer (hydraulic conductivity, transmissivity, storage coefficient, hydraulic gradient, and flow direction, rate of movement, and water availability) and confining layers; and…" It is not clear as to what is being asked by the terms "rate of movement" and "water availability". To ask for hydraulic gradient is consistent with the other information of the sentence.

RESPONSE 65
"Rate of movement", or flow rate, and direction of groundwater flow, as referenced in 85-2-361(2)(iii)(E), MCA, are not necessary to an estimation of net depletion. A determination of net depletion depends on the hydraulic properties of the aquifer,

distance from the production well to the stream, and hydraulic connection with the stream. Aquifer geometry determination, rate of movement, and direction of groundwater flow (i.e., terms mentioned by the respondent) are important to general hydrogeologic environment characterization requirements of 85-2-361(1)(a), MCA, but not to net depletion analysis. A consumptive use estimate is most important and quantifies the volume of the net depletion. The net depletion evaluation identifies the rate and timing of the net depletion volume already identified in the consumptive use estimate analysis. However, an applicant must include all of the information required by 85-2-361, MCA, in its hydrogeologic assessment.

COMMENT 66
ARM 36.12.120(6)(b)(i)(H): Please edit this to read "…, as determined by estimation or measurements of static water…" These rules appear to be commingling "direct surface water influence" determination with net stream depletion. I would expect the vast majority of submittals will calculate stream depletion based on consumptive use and a simple stream-aquifer model. There is no need for much of the hydraulic continuity work under this condition. It will not be necessary in many cases to have measurements. DNRC could require measurements if someone is trying to make a case of no connection to surface water, but should not require them if this condition is not being challenged.

RESPONSE 66
ARM 36.12.120(6)(b)(i)(H) has been deleted. Also, please see Response 1.

COMMENT 67
ARM 36.12.120(6)(b)(i)(I) and (J): Please add immediately before semicolon to both (I) and (J) "…, as available or as appropriate;" It is not imperative that these data be available in order to assess how a well will affect surface water in many cases. In most cases this information does not exist. There needs to be more flexibility in these data requirements written into the rules. As above, if someone is presenting a case of no hydraulic continuity then they have more data needs than someone who is not.

RESPONSE 67
ARM 36.12.120(6)(b)(i)(L) and (J) have been deleted. Also, please see Response 1.

COMMENT 68
ARM 36.12.120(6)(c)(i): I am not understanding what is being asked or its purpose. This information needs to clarify what is being asked of the applicant. It seems to ask if the use of water is a beneficial use in the normal quantities of water that are normally used by the same use. If my interpretation is correct, I think this sentence could be deleted, as beneficial use is covered by 85-2-311, MCA.

RESPONSE 68
The department has revised this rule to better describe its intent.

COMMENT 69

ARM 36.12.120(6)(c)(ii): This section should ask for "estimates of the consumptive use of water" period. It is okay to say "such as from evaporation and evapotranspiration." It is not necessary to go into this at length. You have probably missed some consumptive uses. What about beverage plants? And other non-evaporative consumptive uses? This section needs to be more general.

RESPONSE 69
The department agrees and has revised the rule language.

COMMENT 70
ARM 36.12.120(6)(c): In general, this entire section appears to presume that consumptive use and water projects in general will be domestic or municipal. I suggest you write the section much more generally to be inclusive of many other types of projects.

RESPONSE 70
The department did not intend to make the presumption about specific purposes. The department has revised the rule to be general in nature to any type of project.

COMMENT 71
For your consideration, we offer the following definition: "hydrogeologist, a qualified scientist, or a qualified licensed professional engineer is a scientist or engineer who has received a baccalaureate or post-graduate degree in the natural sciences or engineering and has sufficient training and experience in ground water hydrology and related fields as may be demonstrated by state registration, professional certifications, or completion of accredited university programs that enable that individual to make sound professional judgments regarding ground water hydrology."

RESPONSE 71
The department believes "hydrogeologist, a qualified scientist, or a qualified licensed professional engineer" adequately describes who should collect data for the hydrogeologic assessment. The required data to be submitted and described in subsequent statutes may be inadequate if not collected by, or under the guidance of a person knowledgeable in data collection and evaluation of the results.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

/s/ Mary Sexton
MARY SEXTON
Director
Natural Resources and Conservation

/s/ Anne Yates
ANNE YATES
Rule Reviewer

Certified to the Secretary of State on January 22, 2008.

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

In the matter of the adoption of New Rules I through IV and the amendment of ARM 37.8.102, 37.8.103, 37.8.104, 37.8.109, 37.8.116, 37.8.126, 37.8.127, 37.8.128, 37.8.129, 37.8.301, 37.8.801, 37.8.804, and 37.8.816 and repeal of 37.8.106 pertaining to vital statistics	)))))))))	CORRECTED NOTICE OF ADOPTION, AMENDMENT, AND REPEAL

TO: All Interested Persons

1. On November 8, 2007, the Department of Public Health and Human Services published MAR Notice No. 37-421 pertaining to the proposed amendment, adoption, and repeal of the above-stated rules at page 1768 of the 2007 Montana Administrative Register, issue number 21, and on December 20, 2007 published notice of the adoption, amendment, and repeal at page 2127 of the 2007 Montana Administrative Register, issue number 24.

2. This corrected notice is being filed to correct an error in the effective date of the rule actions and to correct the deletion of statutory citations to 50-15-112, 50-15-113, and 50-15-201, MCA in the implementation citations for ARM 37.8.301. These citations should have remained as implementation citations as a part of the permanent rule history for research purposes. The other citations underlined in the rule history below indicate the actual authority and implementation citations for the rule changes made in the rule text pursuant to ARM 1.3.206(3)(a)(i)(B).

3. The effective date of January 1, 2008 had been specified in the proposal notice but was inadvertently left out of the notice of adoption. The department intends the rule changes to be applied effective January 1, 2008.

4. The rule 37.8.301 is corrected as follows:

37.8.301 CERTIFICATE OF BIRTH (1) through (14) remain as amended.

AUTH: 50-15-102, 50-15-103, MCA
IMP: 50-15-102, 50-15-103, 50-15-109, 50-15-112, 50-15-113, 50-15-201, 50-15-124, 50-15-202, 50-15-221, MCA

5. Replacement pages for the corrected notice were submitted to the Secretary of State on December 31, 2007.

6. All other rule changes adopted, amended, and repealed remain the same.

/s/ Russell Cater
Rule Reviewer

/s/ Russell Cater for
Director, Public Health and
Human Services

Certified to the Secretary of State January 22, 2008.

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

In the matter of the adoption of New Rules I through VIII pertaining to newborn hearing screening	)))	NOTICE OF ADOPTION

TO: All Interested Persons

1. On December 20, 2007, the Department of Public Health and Human Services published MAR Notice No. 37-424 pertaining to the public hearing on the proposed adoption of the above-stated rules, at page 2082 of the 2007 Montana Administrative Register, issue number 24.

2. The department has adopted New Rules I (37.57.401), II (37.57.403), III (37.57.406), IV (37.57.407), V (37.57.410), VI (37.57.413), VII (37.57.414) and VIII (37.57.415) as proposed.

3. No comments or testimony were received.

/s/ Kimberly Kradolfer
Rule Reviewer

/s/ John Chappuis for
Director, Public Health and Human Services

Certified to the Secretary of State January 22, 2008.

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

In the matter of the amendment of ARM 37.78.102, 37.78.206, 37.78.208, 37.78.420, 37.78.425, 37.78.506, and 37.78.508, pertaining to Temporary Assistance for Needy Families (TANF)	)))))	CORRECTED NOTICE OF AMENDMENT

TO: All Interested Persons

1. On September 6, 2007, the Department of Public Health and Human Services published MAR Notice No. 37-411 pertaining to the proposed amendment of the above-stated rules at page 1296 of the 2007 Montana Administrative Register, issue number 17, and on November 8, 2007, published notice of the amendment on page 1818 of the 2007 Montana Administrative Register, issue number 21.

2. This corrected notice is being filed to correct an error in ARM 37.78.206(3)(m). The department is correcting a typographical error that resulted from using the wrong rule material in ARM 37.78.206(3)(m). The most current text for ARM 37.78.206(3)(m) was not used in the proposal notice filed September 6, 2007. The department discovered after the adoption notice was filed November 8, 2007 that the wrong rule text was used for ARM 37.78.206(3)(m). The department is taking this opportunity to correct the text for ARM 37.78.206(3)(m).

3. The rule text used for ARM 37.78.206(3)(m) that was filed September 6, 2007 should have been as follows:

(m) an individual who is serving an intentional program violation as outlined in ARM 37.78.505; and

The amendment for ARM 37.78.206(3)(m) and should have been amended as follows:

(m) an individual who is serving an intentional program violation as outlined in ARM 37.78.505; ~~and~~

4. The rule is corrected as follows:

<u>37.78.206 TANF: GENERAL ELIGIBILITY REQUIREMENTS</u> (1) through (3)(l)(ii) remain as amended.

~~(m) an individual who is sanctioned for noncompliance in employment and training activities negotiated in the Family Investment Agreement and/or WoRC Employability Plan or sanctioned for failure to accept and maintain employment without good cause;~~

(m) an individual who is serving an intentional program violation as outlined in ARM 37.78.505;

(n) through (6)(a)(i) remain as amended.

AUTH: 53-2-201, 53-4-212, MCA
IMP: 53-2-201, 53-4-211, MCA

5. Replacement pages for the corrected notice were submitted to the Secretary of State on December 31, 2007.

6. All other rule changes remain as amended.

/s/ Russell Cater
Rule Reviewer

/s/ Russell Cater
Director, Public Health and Human Services

Certified to the Secretary of State January 22, 2008.

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

In the matter of the amendment of ARM 37.80.101, 37.80.201, 37.80.205, 37.80.206, and the repeal of ARM 37.80.601, 37.80.602, 37.80.603, and 37.80.604 pertaining to the child care assistance program	))))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Interested Persons

1. On November 8, 2007, the Department of Public Health and Human Services published MAR Notice No. 37-420 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules, at page 1758 of the 2007 Montana Administrative Register, issue number 21.

2. The department has amended ARM 37.80.101, 37.80.205, and 37.80.206 and repealed ARM 37.80.601, 37.80.602, 37.80.603, and 37.80.604 as proposed.

3. The department has amended the following rule as proposed with the following changes from the original proposal. New matter to be added is underlined. Matter to be deleted is interlined.

37.80.201 NONFINANCIAL REQUIREMENTS FOR ELIGIBILITY AND PRIORITY FOR ASSISTANCE (1) through (10)(b) remain as proposed.

(11) ~~Any licensed or registered child care provider is not eligible for child care assistance while a child attends a public or private school, including kindergarten in any circumstance. The department will not pay for care while a child who is of legal school age attends a private or public school or kindergarten. The department will not pay for a child to be home schooled.~~ Any licensed or registered child care provider is not eligible for child care assistance for children who fall within the age groups traditionally serviced by the public school system, or alternately a private or home school and who are attending said school for educational purposes during traditional school hours are not eligible for child care payments. The department will not pay for a child during normal school hours when a child is home schooled.

AUTH: 52-2-704, 53-4-212, MCA
IMP: 52-2-704, 52-2-713, 52-2-721, 52-2-722, 52-2-723, 52-2-731, 53-2-201, 53-4-211, 53-4-601, 53-4-611, MCA

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

Comment #1: Regarding MAR Notice No. 37-420, reasonable necessity is not stated for changes to ARM 37.80.201(4) and (11).

Response: Regarding ARM 37.80.201(4), the reasonable necessity for this rule is to allow families to demonstrate they are in the process of CSED compliance. This is an important change because of deadlines involved or the compliance confirmation with CSED, or the details of the case within CSED determination. Many times, cases are held up at CSED in processing. In order to ensure consistency in child care scholarship eligibility regarding cooperation with CSED, this rule is modified to allow parents to prove they have submitted all necessary information to CSED to determine compliance and therefore, are recognized as being in cooperation.

Regarding ARM 37.80.201(11), the reasonable necessity for this rule centers around prioritizing of available dollars for child care services. While the anticipated fiscal impact isn't directly known, children who fall within the age groups traditionally serviced by the public school system or alternately a private or home school and who are receiving such schooling for educational purposes during traditional school hours are not eligible for child care payments. If payment were allowed for this population, the potential obligation for costs of private, public, or home school that choose to be licensed or registered according to the state of Montana would exceed greatly the funding authority of the Best Beginnings Scholarship program. Additionally this proposed rule provides needed clarification of the intent of the federal Child Care & Development Fund to provide payments for child care to eligible families. According to 45 CFR 98.2, "an eligible child care provider means: (1) a center-based child care provider, a group home child care provider, an in-home child care provider, or other provider of child care services for compensation that- (i) is licensed, regulated, or registered under applicable State or local law as decribed in 98.40…" Further, child care services are defined federally as the "care given to an eligible child by an eligible child care provider." Additional rationale from 45 CFR 98.54 (3)(c) related to restricted use of funds for tuition provides, "Funds may not be expended for students enrolled in grades 1 through 12 for: (1) Any service provided to such students during the regular school day; Any service for which such students receive academic credit toward graduation; or (3) any instructional services that supplant or duplicate the academic program of any public or private school."

Comment #2: Regarding ARM 37.80.201(11), legal school age should be defined in this rule as there is some confusion among staff members and the public and law exists that specifically defines legal school age. Additionally, the final sentence reads "the department will not pay for a child to be home schooled." As this rule is specifically about child care, the agency believes the rule would be clearer as well as more equitable if it read "the department will not pay for child care during the normal school hours when a child is home schooled." This meets the intent of not paying for child care Monday through Friday, 8:00 a.m. - 3:30 p.m. A parent may chose to home school and also be employed nights and weekends. In such a case, if other eligibility requirements are met, the family should be eligible for child care scholarships during nonschool hours while the parent(s) works.

Response: The department agrees the proposed rule is unclear and has modified the rule to read as follows, "Any licensed or registered child care provider is not

eligible for child care assistance for children who fall within the age groups traditionally serviced by the public school system, or alternately a private or home school and who are attending said school for educational purposes during traditional school hours are not eligible for child care payments. The department will not pay for child care during normal school hours when a child is home schooled."

Comment #3: I support the clarification of ARM 37.80.201(11) that a licensed or registered child care provider is not eligible to be reimbursed for child care services provided while a child attends a public or private school, including kindergarten.

Response: The department appreciates the comment and the support.

Comment #4: ARM 37.80.205(6)(a) strikes the language that allows for the higher reimbursement to Star Quality programs if private pay families do not pay at the same rate. The Missoula region is home to the most Star Quality programs of any region in the state. Many of these programs do not charge an hourly or daily rate to private pay families, they charge a monthly rate. Private pay families pay when the child is not in care, which is not always the case for scholarship families. But, an hourly rate and a monthly/slot rate are not comparable; therefore, this would be difficult to interpret and some high quality facilities may lose Star Quality incentive pay.

Response: As stated in the rationale for the language repeal in the proposal notice, this language is duplicated in the child care policy manual, which is incorporated into administrative rule by reference pursuant to the Montana Administrative Procedure Act (MAPA), therefore this does not constitute a substantive change.

Comment #5: The proposed change to ARM 37.80.206(4) eliminates the possibility of a ten day closure payment unless the provider informs the Child Care Resource & Referral Agency within five days of the child's unexpected absence from the facility. Department rule precludes payment at more than one facility. The family may have switched enrollment to another facility. This rule would be strengthened by rephrasing "the department is not required when applicable, to pay for any care from the date the child last attended the facility."

Response: The department believes the intent of this rule is clear and concise without modification.

Comment #6: In regard to ARM 37.80.101(13), Section 1-3 of the Child Care Policy Manual dealing with court ordered child support payments, the language regarding the necessity of providing documentation of receipt of court ordered child support payments is needed to implement this change.

Response: The department agrees and will add similar language to this definition in the Child Care Policy Manual as follows:

"In-Compliance with Child Support-the parent has an open case and maintains an

open case while receiving a Best Beginnings Child Care Scholarship with the Montana Child Support Enforcement Division (CSED) or has complied with all requests by CSED to open a case, the parent is receiving child support through a court order and this can be verified by documentation of receipt of court ordered child support payments, or the parent must have appropriate reasons and documentation to apply for good cause not to pursue child support as outlined in the Child Care Policy Manual, Section 2-2."

Comment #7: Comments were in support of the proposed change regarding Child Care Policy Manual Section 2-6, related to the Income Table.

Response: The department appreciates the comments and the support.

Comment #8: Regarding Child Care Policy Manual Section 6-6, comments received were in support of this proposed change.

Response: The department appreciates the comment and the support.

Comment #9: Regarding Child Care Policy Manual Section 6-7, comments were in support of this proposed change.

Response: The department appreciates the comments and the support.

Comment #10: Regarding Child Care Policy Manual Section 7-5b, related to Higher Education Merit Pay, there were four comments in relation to this section. Comments were not in favor of this policy change. Those who commented felt the policy on higher education merit pay being available to only provider services staff is not desirable.

Response: The department agrees and repeals the proposed language.

/s/ Francis X. Clinch
Rule Reviewer

/s/ John Chappuis for
Director, Public Health and Human Services

Certified to the Secretary of State January 22, 2008.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I (42.15.206), amendment of ARM 42.15.108, 42.15.205, 42.15.314, 42.15.315, 42.15.316, 42.15.319, 42.15.321, 42.15.322, 42.15.524, 42.15.525, and repeal of ARM 42.15.406 relating to individual income taxes	)))))))))	NOTICE OF ADOPTION, AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On November 21, 2007, the department published MAR Notice No. 42-2-789 regarding the proposed adoption, amendment, and repeal of the above-stated rules at page 1905 of the 2007 Montana Administrative Register, issue no. 22.

2. A public hearing was held on December 14, 2007, to consider the proposed adoption, amendment, and repeal. No one appeared at the hearing to testify and no written comments were received.

3. For further clarification, the department believes it is necessary to amend the proposed language of New Rule I (42.15.206) to add an example relating to a capital loss. The additional language illustrates that a filer who has already reported a loss in an earlier year on their federal return but could not claim it on their state return for that year because of the prior law, can now report the loss on the state return to the extent allowed joint filers under the federal calculations. It also clarifies that the state return will ultimately show the net amount and it will be attributed to one or both spouses depending on the ownership of the underlying asset. The amended language that reflects this concept is as follows, stricken matter interlined, new matter underlined:

NEW RULE I (42.15.206) ADDITIONS AND SUBTRACTIONS FOR MARRIED TAXPAYERS FILING SEPARATE RETURNS (1) remains the same.

(2) The following items are exceptions to (1) as provided for in 15-30-111, MCA:

(a) Married taxpayers filing a joint federal return allowed a capital loss deduction under section 1211 of the Internal Revenue Code, 26 U.S.C. 1211, and who file separate Montana returns may claim the same amount of capital loss deduction allowed on the federal return. If the allowable capital loss is clearly attributable to one spouse, the loss must be shown on that spouse's return. If the loss is not clearly attributable to one spouse, the loss must be split equally between each return. ~~Under no circumstances can the total capital loss claimed exceed the amount allowed for taxpayers filing a joint federal return.~~ The aggregate loss of spouses attributable to a capital loss can never exceed the amount of losses allowable for federal income tax purposes to spouses filing a joint federal income tax return for that loss. For example, spouse A has a $5,000 current year capital gain

and spouse B has a $9,000 capital loss carried over from prior years for state purposes but which had been absorbed on their federal return in a prior year. If the spouses file in Montana as "married filing separately," spouse A should report the $5,000 capital gain on the appropriate line of the "Federal Income" portion of the return and report $5,000 as a "Capital Loss Adjustment" on Schedule II, Montana Subtractions from Federal Adjusted Gross Income. Spouse B should report $3,000 on the same line on Schedule II since the capital loss is attributable to them. Spouse B will then have a remaining capital loss carryover of $1,000 ($9,000 current capital loss less $8,000 used).

(b) Married taxpayers filing a joint federal return allowed passive and rental income losses are not required to recompute allowable losses according to the federal rules for married taxpayers filing separately under section 469 of the Internal Revenue Code, 26 U.S.C. 469. If the allowable loss is clearly attributable to one spouse, the loss must be shown on that spouse's return. If the loss is not clearly attributable to one spouse, the loss must be split equally between each return. ~~Under no circumstances can the total passive and rental income losses claimed exceed the amount allowed for taxpayers filing a joint federal return.~~ The aggregate losses of spouses attributable to a passive loss or rental loss can never exceed the amount of losses allowable for federal income tax purposes to spouses filing a joint federal income tax return for that loss.

(c) through (e) remain the same.

AUTH: 15-30-305, MCA
IMP: 15-30-111, MCA

4. Therefore, the department adopts New Rule I (42.15.206) with the amendments listed above, amends ARM 42.15.108, 42.15.205, 42.15.314, 42.15.315, 42.15.316, 42.15.319, 42.15.321, 42.15.322, 42.15.524, and 42.15.525, and repeals ARM 42.15.406 as proposed.

5. An electronic copy of this Adoption Notice is available through the department's site on the World Wide Web at www.mt.gov/revenue, under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this Adoption Notice 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 web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State January 22, 2008

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

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

Economic Affairs Interim Committee:

- Department of Agriculture;
- Department of Commerce;
- Department of Labor and Industry;
- Department of Livestock;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

Education and Local Government Interim Committee:

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

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

- Department of Public Health and Human Services.

Law and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration and Veterans' Affairs Interim Committee:

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

Environmental Quality Council:

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

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

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is P.O. 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 or Register) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the Attorney General (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject

1. Consult ARM Topical Index.
   Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute

2. Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 2007. This table includes those rules adopted during the period September 1, 2007, through December 31, 2007, and any proposed rule action that was pending during the past six-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 2007, 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 2006, 2007, and 2008 Montana Administrative Register.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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BOARD APPOINTEES AND VACANCIES

Section 2-15-108, MCA, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees, and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of 2-15-108, MCA, is that the Secretary of State publish monthly in the ***Montana Administrative Register*** a list of appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments effective in December 2007 appear. Vacancies scheduled to appear from February 1, 2008, through April 30, 2008, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of January 1, 2008.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES FROM DECEMBER 2007

Appointee	Appointed by	Succeeds	Appointment/End Date
9-1-1 Advisory Council (Administration)			
Ms. Janet Boisvert	Director	Brumley	12/20/2007
Harlem			5/1/2009
Qualifications (if required): Montana Emergency Medical Service Association representative			
Board of Athletic Trainers (Labor and Industry)			
Mr. Brian Coble	Governor	not listed	12/18/2007
Helena			10/1/2011
Qualifications (if required): athletic trainer in a postsecondary school			
Mr. George Harper	Governor	not listed	12/18/2007
Helena			10/1/2009
Qualifications (if required): public representative			
Mr. Christopher Heard	Governor	not listed	12/18/2007
Butte			10/1/2011
Qualifications (if required): athletic trainer in a health care facility			
Mr. Timothy McCue	Governor	not listed	12/18/2007
Missoula			10/1/2011
Qualifications (if required): physician			
Mr. Shawn Ruff	Governor	not listed	12/18/2007
Great Falls			10/1/2009
Qualifications (if required): athletic trainer in a secondary school			

BOARD AND COUNCIL APPOINTEES FROM DECEMBER 2007

Appointee	Appointed by	Succeeds	Appointment/End Date
Board of Barbers and Cosmetologists (Labor and Industry)			
Ms. Maggie Burton-Blize Missoula Qualifications (if required): barber	Governor	reappointed	12/17/2007 10/1/2012
Ms. Angela Printz Livingston Qualifications (if required): cosmetologist	Governor	Battaiola	12/17/2007 10/1/2012
Board of Medical Examiners (Labor and Industry)			
Rep. Mary Anne Guggenheim Helena Qualifications (if required): doctor of medicine	Governor	Salisbury	12/17/2007 9/1/2011
Dr. James D. Upchurch Crow Agency Qualifications (if required): doctor of medicine	Governor	reappointed	12/17/2007 9/1/2011
Board of Nursing (Labor and Industry)			
Ms. Sharon L. Dschaak Wolf Point Qualifications (if required): licensed practical nurse	Governor	reappointed	12/17/2007 7/1/2011
Mr. Jeoffrey Lanfear Kalispell Qualifications (if required): registered nurse	Governor	Pike	12/17/2007 7/1/2011

BOARD AND COUNCIL APPOINTEES FROM DECEMBER 2007

Appointee	Appointed by	Succeeds	Appointment/End Date
Board of Nursing Home Administrators (Labor and Industry)			
Mr. Joshua Brown	Governor	not listed	12/17/2007
Columbia Falls			5/28/2012
Qualifications (if required): nursing home administrator			
Mr. Ken Chase	Governor	Nikolaisen	12/17/2007
Billings			5/28/2011
Qualifications (if required): public representative			
Ms. Carla Neiman	Governor	reappointed	12/17/2007
Plains			5/28/2012
Qualifications (if required): representative of an institution caring for the aged			
Board of Physical Therapy Examiners (Labor and Industry)			
Ms. Robin Peterson Smith	Governor	Lamb	12/18/2007
Billings			7/1/2010
Qualifications (if required): physical therapist			
Board of Realty Regulation (Labor and Industry)			
Mr. Larry Milless	Governor	not listed	12/18/2007
Corvallis			5/9/2011
Qualifications (if required): Republican			
Ms. Connie Wardell	Governor	not listed	12/18/2007
Billings			5/9/2011
Qualifications (if required): Democrat			

BOARD AND COUNCIL APPOINTEES FROM DECEMBER 2007

Appointee	Appointed by	Succeeds	Appointment/End Date
Crime Victims Advisory Council (Corrections)			
Ms. Mikie Baker-Hajek	Director	not listed	12/1/2007
Great Falls			12/1/2009
Qualifications (if required): Crime Victim and Cascade County victim/witness advocate			
Ms. Tanya Campbell	Director	not listed	12/1/2007
(City not listed.)			12/1/2009
Qualifications (if required): Crime Victim and Missoula County victim/witness advocate			
Ms. Mardi Elford	Director	not listed	12/1/2007
(City not listed.)			12/1/2009
Qualifications (if required): mother of a negligent homicide (DUI) victim			
Ms. Rose Everett	Director	not listed	12/1/2007
(City not listed.)			12/1/2009
Qualifications (if required): Victim and professional mediator			
Ms. Darla Gillespie	Director	not listed	12/1/2007
(City not listed.)			12/1/2009
Qualifications (if required): Victim and Dawson County victim/witness advocate			
Ms. Cathy Johnson	Director	not listed	12/1/2007
(City not listed.)			12/1/2009
Qualifications (if required): Victim Services staff/Board of Pardons and Parole			
Ms. Eve Malo	Director	not listed	12/1/2007
(City not listed.)			12/1/2009
Qualifications (if required): Victim/professor of Restorative Justice at UM-Dillon			

BOARD AND COUNCIL APPOINTEES FROM DECEMBER 2007

Appointee	Appointed by	Succeeds	Appointment/End Date
Crime Victims Advisory Council (Corrections) cont.			
Ms. Linda Moodry	Director	not listed	12/1/2007
(City not listed.)			12/1/2009
Qualifications (if required): Montana State Prison Victim Information Officer			
Ms. Linda Paulsen	Director	not listed	12/1/2007
(City not listed.)			12/1/2009
Qualifications (if required): Victim of attempted deliberate homicide			
Ms. Anita Richards	Director	not listed	12/1/2007
Seeley Lake			12/1/2009
Qualifications (if required): Victim			
Ms. Lise Rousseau	Director	not listed	12/1/2007
Polson			12/1/2009
Qualifications (if required): Crime Victim and Missoula County victim/witness advocate			
Ms. Lori Ruttenbur	Director	not listed	12/1/2007
(City not listed.)			12/1/2009
Qualifications (if required): Victim			
Ms. Annamae Siegfried-Derrick	Director	not listed	12/1/2007
(City not listed.)			12/1/2009
Qualifications (if required): Montana Women's Prison Victim Information Officer			
Ms. Wendy Sturn	Director	not listed	12/1/2007
(City not listed.)			12/1/2009
Qualifications (if required): Board of Crime Control staff			

BOARD AND COUNCIL APPOINTEES FROM DECEMBER 2007

Appointee	Appointed by	Succeeds	Appointment/End Date
Crime Victims Advisory Council (Corrections) cont.			
Ms. Dawn Wakefield	Director	not listed	12/1/2007
(City not listed.)			12/1/2009
Qualifications (if required): Victim			
Mr. Jeff Walter	Director	not listed	12/1/2007
(City not listed.)			12/1/2009
Qualifications (if required): Victim Services staff/Board of Pardons and Parole			
Montana Consensus Council (Administration)			
Sen. Lorents Grosfield	Governor	Not Afraid	12/17/2007
Big Timber			7/1/2009
Qualifications (if required): public representative			
Mr. Nickolas C. Murnion	Governor	reappointed	12/17/2007
Jordan			7/1/2009
Qualifications (if required): public representative			
Mr. Van Wolverton	Governor	reappointed	12/17/2007
Alberton			7/1/2009
Qualifications (if required): public representative			
Ms. Eleanor Yellowrobe	Governor	reappointed	12/17/2007
Havre			7/1/2009
Qualifications (if required): public representative			

BOARD AND COUNCIL APPOINTEES FROM DECEMBER 2007

Appointee	Appointed by	Succeeds	Appointment/End Date
Montana Noxious Weed Seed Free Forage Advisory Council (Agriculture)			
Mr. Keith Brophy Valier	Director	reappointed	12/10/2007 9/17/2010
Qualifications (if required): pellets cubes or related products processor			
Mr. Dennis Cash Bozeman	Director	reappointed	12/10/2007 9/17/2010
Qualifications (if required): ex-officio nonvoting member representing Montana State University Extension			
Mr. Miles Hutton Turner	Director	reappointed	12/10/2007 9/17/2010
Qualifications (if required): outfitter or guide			
Mr. Richard Maki Belt	Director	reappointed	12/10/2007 9/17/2010
Qualifications (if required): forage producer			
Mr. Charles Miller Hamilton	Director	reappointed	12/10/2007 9/17/2010
Qualifications (if required): forage producer			
Mr. David Wichman Moccasin	Director	reappointed	12/10/2007 9/17/2010
Qualifications (if required): ex-officio nonvoting member representing Montana State University Agriculture			

BOARD AND COUNCIL APPOINTEES FROM DECEMBER 2007

Appointee	Appointed by	Succeeds	Appointment/End Date
Postsecondary Scholarship Advisory Council (Higher Education)			
Ms. Margaret Bird Browning	Governor	Brockie	12/11/2007 6/20/2008
Qualifications (if required): having experience in financial aid at a postsecondary institution			
Ms. Connie Wittak Flaxville	Governor	Colburg	12/11/2007 6/20/2010
Qualifications (if required): having experience in secondary education			
State Employee Group Benefits Advisory Council (Administration)			
Ms. Kelly DaSilva Helena	Director	Campbell	12/10/2007 12/31/2008
Qualifications (if required): Legislative branch agency representative			
Vocational Rehabilitation Council (Public Health and Human Services)			
Ms. Nina Cramer Missoula	Governor	Boyd	12/17/2007 10/1/2010
Qualifications (if required): representative of organized labor			
Ms. Mary Hall Missoula	Governor	reappointed	12/17/2007 10/1/2010
Qualifications (if required): parent organization representative			
Rep. Carol Lambert Broadus	Governor	reappointed	12/17/2007 10/1/2010
Qualifications (if required): statewide independent living council representative			

BOARD AND COUNCIL APPOINTEES FROM DECEMBER 2007

Appointee	Appointed by	Succeeds	Appointment/End Date
Vocational Rehabilitation Council (Public Health and Human Services) cont.			
Mr. Dick Trerice	Governor	reappointed	12/17/2007
Helena			10/1/2010
Qualifications (if required): state education agency representative			
Ms. Claudette Vance	Governor	reappointed	12/17/2007
Kalispell			10/1/2010
Qualifications (if required): community rehabilitation program representative			
Mr. Lynn Winslow	Governor	Jones	12/17/2007
Helena			10/1/2010
Qualifications (if required): advocacy program representative			

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2008 through APRIL 30, 2008

Board/current position holder	Appointed by	Term end
Board of Athletics (Labor and Industry)		
Ms. Jana Smith-Streitz, Butte Qualifications (if required): public representative	Governor	4/25/2008
Mr. John Paul Noyes, Kalispell Qualifications (if required): public representative	Governor	4/25/2008
Board of Dentistry (Labor and Industry)		
Dr. George Olsen, Missoula Qualifications (if required): dentist	Governor	3/29/2008
Board of Public Education (Education)		
Mr. John Fuller, Whitefish Qualifications (if required): Republican representing District 1	Governor	2/2/2008
Board of Regents (Education)		
Mr. Clayton Christian, Missoula Qualifications (if required): resident of District 1	Governor	2/1/2008
MSU Billings Executive Board (University System)		
Ms. Tauzha Rukstad, Shepherd Qualifications (if required): public representative	Governor	4/15/2008
MSU Great Falls College of Technology Executive Board (University System)		
Mr. Dave Warner, Great Falls Qualifications (if required): public representative	Governor	4/15/2008

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2008 through APRIL 30, 2008

Board/current position holder	Appointed by	Term end
MSU Northern Local Executive Board (University System)		
Ms. Pamela A. Hillery, Havre Qualifications (if required): public representative	Governor	4/15/2008
Montana Arts Council (Education)		
Ms. Ann Cogswell, Great Falls Qualifications (if required): public member	Governor	2/1/2008
Mr. Rick Halmes, Billings Qualifications (if required): public member	Governor	2/1/2008
Ms. Jackie Parsons, Browning Qualifications (if required): public member	Governor	2/1/2008
Ms. Betti C. Hill, Helena Qualifications (if required): public member	Governor	2/1/2008
Ms. Kathleen Schlepp, Miles City Qualifications (if required): resident of Montana	Governor	2/1/2008
Montana Pulse Crop Advisory Committee (Agriculture)		
Ms. Shauna Farver, Scobey Qualifications (if required): Producer	Director	2/14/2008
Montana State University Executive Board (University System)		
Mr. Bill Bryan, Bozeman Qualifications (if required): public representative	Governor	4/15/2008

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2008 through APRIL 30, 2008

Board/current position holder	Appointed by	Term end
Montana-Canadian Provinces Relations Advisory Council (Commerce)		
Rep. Hal Jacobson, Helena Qualifications (if required): Legislative representative	Governor	4/6/2008
Lt. Governor John Bohlinger, Helena Qualifications (if required): Lieutenant Governor	Governor	4/6/2008
Sen. Sam Kitzenberg, Glasgow Qualifications (if required): Legislative representative	Governor	4/6/2008
Sen. Trudi Schmidt, Great Falls Qualifications (if required): Legislative representative	Governor	4/6/2008
Rep. John L. Musgrove, Havre Qualifications (if required): Legislative representative	Governor	4/6/2008
Rep. Wayne Stahl, Saco Qualifications (if required): Legislative representative	Governor	4/6/2008
Peace Officers Standards and Training Advisory Council (Justice)		
Sheriff Tony Harbaugh, Miles City Qualifications (if required): law enforcement representative	Governor	2/9/2008
Mr. Christopher Miller, Deer Lodge Qualifications (if required): County Attorney	Governor	2/9/2008
Captain Dennis McCave, Billings Qualifications (if required): representative of a Criminal Justice Agency	Governor	2/9/2008

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2008 through APRIL 30, 2008

Board/current position holder	Appointed by	Term end
Peace Officers Standards and Training Advisory Council (Justice) cont.		
Mr. John Strandell, Helena Qualifications (if required): representative of Law Enforcement	Governor	2/9/2008
Mr. Raymond Murray, Missoula Qualifications (if required): Public Member	Governor	2/9/2008
Ms. Winnie Ore, Helena Qualifications (if required): representative of a Criminal Justice Agency	Governor	2/9/2008
Commissioner Mike Anderson, Havre Qualifications (if required): Board of Crime Control representative	Governor	2/9/2008
Mr. Mike Mehn, Helena Qualifications (if required): representative of Law Enforcement	Governor	2/9/2008
Sergeant Mike Reddick, Helena Qualifications (if required): representative of Law Enforcement	Governor	2/9/2008
Officer Levi Talkington, Lewistown Qualifications (if required): representative of Law Enforcement	Governor	2/9/2008
Ms. Hannah Tillman, Crow Agency Qualifications (if required): tribal law enforcement representative	Governor	2/9/2008
Private Alternative Adolescent Residential or Outdoor Programs Board (Labor and Industry)		
Rep. Paul Clark, Trout Creek Qualifications (if required): representative of outdoor adolescent treatment programs (small size)	Governor	4/19/2008

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2008 through APRIL 30, 2008

Board/current position holder	Appointed by	Term end
Private Alternative Adolescent Residential or Outdoor Programs Board (Labor and Industry) cont.		
Commissioner Carol Brooker, Plains	Governor	4/19/2008
Qualifications (if required): public member		
Ms. Michele Manning, Thompson Falls	Governor	4/19/2008
Qualifications (if required): representative of residential adolescent treatment programs (large size)		
Ms. Mary Alexine, Eureka	Governor	4/19/2008
Qualifications (if required): representative of residential adolescent treatment programs (medium size)		
Mr. Daniel Bidegaray, Bozeman	Governor	4/19/2008
Qualifications (if required): public member		
Public Employees' Retirement Board (Administration)		
Mr. Troy W. McGee Jr., Helena	Governor	4/1/2008
Qualifications (if required): retired public employee		
Colonel Robert Griffith, Helena	Governor	4/1/2008
Qualifications (if required): public member		
UM Helena College of Technology Executive Board (University System)		
Mr. Ray Peck, Helena	Governor	4/15/2008
Qualifications (if required): public representative		
UM Montana Tech Executive Board (University System)		
Mr. Doug Peoples, Butte	Governor	4/15/2008
Qualifications (if required): public representative		

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2008 through APRIL 30, 2008

Board/current position holder	Appointed by	Term end
UM Western Executive Board (University System) Ms. Mary Ann Sharon, Dillon Qualifications (if required): public representative	Governor	4/15/2008
University of Montana Local Executive Board (University System) Mr. Bill Woody, Missoula Qualifications (if required): public representative	Governor	4/15/2008