

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 5

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

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

In the matter of the proposed) NOTICE OF PUBLIC HEARING
amendment of ARM 8.39.804) ON PROPOSED AMENDMENT
and the proposed adoption of) AND ADOPTION
NEW RULE I, pertaining to)
net client hunter use)

TO: All Concerned Persons

1. On April 7, 2003, at 9:00 a.m., a public hearing will be held in Room 438, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Labor and Industry 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 Department no later than 5:00 p.m., March 28, 2003, to advise us of the nature of the accommodation that you need. Please contact Dan Dellinger, Department of Labor and Industry, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2370; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsout@state.mt.us.

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

8.39.804 DETERMINATION OF NET CLIENT HUNTING HUNTER USE AND REVIEW OF NEW OPERATIONS PLAN AND PROPOSED EXPANSION OF NET CLIENT HUNTING HUNTER USE UNDER EXISTING AND NEW OPERATIONS PLAN(S) (1) An outfitter shall not expand net client hunting hunter use without first applying for and receiving approval from the board for such expansion.

(2) Except as provided in (4) and (5) below, net client hunting hunter use for outfitters shall be determined by taking the highest total number of hunting clients served by the outfitter and any guides working under the endorsement of the outfitter in a year during which the outfitter was licensed in the state of Montana, with a categorical breakdown of hunting clients served using licenses issued no later than December 31, 1995 as follows:

(a) category 1+, consisting of nonresident deer or elk clients holding B-10 or B-11 licenses ("big game outfitter sponsored");

(b) category 2, ~~deer or elk clients not holding outfitter sponsored licenses, antelope, mountain lion, mountain sheep, mountain goat, moose, or bear clients~~ ("big game non-outfitter sponsored") consisting of all non-outfitter sponsored big game species clients; and

(c) category 3+, consisting of upland game bird, turkey, and migratory game bird (waterfowl) clients ("non-big game").

(3) The outfitter shall designate net client hunting hunter use for each of the following categories, under affirmation by oath on a form provided by the board. The outfitter shall specify the year or years from which the use is designated. If use is designated from any year prior to 1988, the outfitter claiming such use must submit documentation of such use, which shall be subject to approval of the board. The use designated by the outfitter shall be subject to random audit by the board's investigators. Submission of false information regarding net client hunting hunter use is specifically designated as unprofessional conduct, and shall may result in revocation of the outfitter's license.

(4) When an existing outfitter purchases an outfitting business or any portion thereof in the state of Montana and makes application to the board for an expansion, the outfitter may designate net client hunting hunter use in an amount equal to his or her historical use, plus the net client hunting hunter use transferred from the selling outfitter to the applicant outfitter. For proposed new use by a newly licensed outfitter, net client hunting hunter use shall be determined by the board as part of its order under this rule.

(5) In cases where a federal agency limits ~~net-client hunting~~ use on federal lands, ~~net-client hunting hunter~~ use of the outfitter providing authorized services on such lands shall be ~~taken from the use designated~~ regulated by such federal agency. In all other cases, net client hunting hunter use on federal lands shall be determined under either (2), (3) or (4) as applicable.

(6) ~~An outfitter shall not exchange, trade or substitute between the categories of net client hunting use. Net client hunting use of each outfitter shall be specific as to the category designated by the outfitter (big game outfitter sponsored, big game non-outfitter sponsored and non big game). Net client hunter use of each outfitter must be specific as to the category designated by the outfitter (big game outfitter sponsored, big game non-outfitter sponsored and non-big game). An outfitter may, in any one year which the outfitter has unserved category one clients (outfitter sponsored), serve the unserved clients under category 2. An outfitter shall not exchange, trade or substitute between any other category of net client use.~~

(7) An application for proposed expansion in net client hunting hunter use under an existing operations plan, and applications by license applicants proposing new operations plans involving hunting use, shall be made on forms provided by the board. The board shall maintain a copy of the proposal in the board's office.

(8) and (9) remain the same.

AUTH: 37-1-131, 37-47-201, MCA
IMP: 37-1-131, 37-47-201, 37-47-316, MCA

REASON: The Board of Outfitters has determined that it is reasonable and necessary to make these amendments regarding "Net Client Hunter Use" to be consistent with the terminology used in sections 37-47-101, 37-47-201, 37-47-316, 37-47-317 and 37-47-318, MCA. It is reasonable and necessary to amend ARM 8.39.804(2)(b) because it will allow outfitters a method of adjusting to game management changes implemented by the Montana Department of Fish, Wildlife and Parks (MFWP) as the result of changing populations of game animals. MFWP frequently closes hunting of certain species in an area and opens hunting for other species that have not been hunted in the area previously. Regarding ARM 8.39.804(2)(c), the board has determined that it is reasonable and necessary to remove the "turkey" provision because turkey is considered to be an upland game bird as defined under MFWP statute 87-2-101(15), MCA. The board has also determined that it is reasonable and necessary to amend ARM 8.39.804(3) to allow the board needed discretionary authority for disciplinary action against licensees who submit false or incorrect information regarding net client hunter use. ARM 8.39.804(5) is reasonably necessary because it clarifies federal authority over federal lands. It is reasonable and necessary to amend ARM 8.39.804(6) because this amendment will allow outfitters to take pressure away from the Category 1, Big Game Outfitter Sponsored Licenses.

4. The proposed new rule provides as follows:

NEW RULE I EFFECT OF FEE FOR EXPANSION OF NET CLIENT HUNTER USE (1) Upon approval by the board of an expansion on net client hunter use, the expansion will not become effective until the date payment is received pursuant to the provisions of 37-47-318, MCA.

AUTH: 37-1-131, 37-47-201, MCA
IMP: 37-1-131, 37-47-201, 37-47-316, MCA

REASON: The Board of Outfitters has determined that it is reasonable and necessary to establish the effective date of an expansion in Net Client Hunter Use, following approval of the expansion by the Board.

5. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Outfitters, 301 South Park, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsout@state.mt.us and must be received no later than 5:00 p.m., April 11, 2003.

6. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at <http://discoveringmontana.com/dli/bsd> under the Board of Outfitters rule notice section. 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 a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the comment forum does not excuse late submission of comments.

7. The Board of Outfitters maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding the Board of Outfitters administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Outfitters, 301 South Park, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsout@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

8. The Board of Outfitters will meet via a telephone conference call at 9:00 a.m. on April 30, 2003, to consider the comments made by the public, on the proposed responses to those comments, and take final action on the proposed amendment and adoption. Members of the public are welcome to come to the Board's offices on the fourth floor of the Park Avenue Building, 301 South Park, Helena, Montana and listen to the Board's deliberations, but the Board cannot accept any comments concerning the proposed amendments beyond the April 11, 2003 deadline.

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

10. Lon Mitchell, attorney, has been designated to preside over and conduct the hearing.

BOARD OF OUTFITTERS
RAY RUGG, CHAIRMAN

/s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State March 3, 2003.

BEFORE THE BOARD OF CLINICAL LABORATORY
SCIENCE PRACTITIONERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed) NOTICE OF PUBLIC HEARING ON
amendment of ARM 24.129.401,) PROPOSED AMENDMENT
pertaining to fees)

TO: All Concerned Persons

1. On April 14, 2003, at 1:00 p.m., a public hearing will be held in Room 438 of the Park Avenue Building, 301 South Park Avenue, Helena Montana to consider the proposed amendment of the above-stated rule.

2. The Department of Labor and Industry 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 Clinical Laboratory Science Practitioners no later than 5:00 p.m., April 7, 2003, to advise us of the nature of the accommodation that you need. Please contact Cheryl Smith, Board of Clinical Laboratory Science Practitioners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2393; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdcsls@state.mt.us.

3. The rule proposed to be amended provides as follows: (new material underlined, deleted material interlined)

24.129.401 FEES (1) Fees shall be ~~transmitted by check payable~~ paid to the board of clinical laboratory science practitioners. The board assumes no responsibility for loss in transit of such remittances. Applicants not submitting the proper fees will be notified by the department. Fees are non-refundable.

- (2) The fees ~~shall be~~ are as follows:
 - (a) original application fee:
 - (i) clinical laboratory scientist \$100
 - (ii) clinical laboratory specialist 100
 - (iii) clinical laboratory technician 100
 - (b) temporary license fee 25
 - (c) active renewal fee 45 60
 - (d) inactive renewal fee 25
 - (e) late renewal fee (in addition to renewal fee) 50
 - (f) license by endorsement fee 100
 - (g) duplicate license fee 25
 - (h) reactivation of license fee 45
 - ~~(i) educational course approval 25~~

AUTH: 37-1-134, 37-34-201, MCA

IMP: 37-1-134, 37-34-201, 37-34-305, MCA

REASON: The Board of Clinical Laboratory Science Practitioners (Board) finds there is reasonable necessity to delete the wording referring to the transmittal of payment by check because of new technology that now allows payment of some fees via other means, such as credit card, debit card, etc.

Section 37-1-134, MCA requires that boards set fees commensurate with program costs. There is reasonable necessity to eliminate the charge for educational course approval because the Board believes, based on recent experience, the cost for approving educational courses is minimal and can be absorbed within the current fee structure.

Cash projections for the Board indicate that it is reasonably necessary to make the proposed changes in the fees in order to comply with the provisions of section 37-1-134, MCA. The Board estimates that approximately 824 persons, all active status licensees, will be affected by the proposed renewal fee change. A legislative audit of the Business Standards Division required that all boards pay their portion of the conversion to the Oracle database systems. The Oracle reallocation for the Board for fiscal year 2003 is \$8,210.00, and is in addition to the appropriation for the Board. The reallocation is required to be paid in fiscal year 2003. The estimated annual increase in revenue is approximately \$12,360.00. Under the proposed fee schedule the Board's projected annual revenue for fiscal year 2003 is \$37,080.00, for fiscal year 2004 is \$49,440.00, and for fiscal 2005 is \$49,440.00. The Board's budget for fiscal year 2003 is \$39,278.00, for fiscal year 2004 is \$50,375.00, and fiscal year 2005 is \$50,982.00. The Board last raised its fees in 1999.

Finally, there is reasonable necessity to amend ARM 24.129.401 to identify the citations of additional statutes that are 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 Clinical Laboratory Science Practitioners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdcsls@state.mt.us and must be received no later than 5:00 p.m., April 14, 2003.

5. The Board of Clinical Laboratory Science Practitioners maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this Board. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies

that the person wishes to receive notices regarding all Board of Clinical Laboratory Science Practitioners administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Clinical Laboratory Science Practitioners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsdcsls@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

6. The Board of Clinical Laboratory Science Practitioners will meet in May, 2003, to consider the comments made by the public, the proposed responses to those comments, and take final action on the proposed amendments. Members of the public are welcome to attend the meeting and listen to the Board's deliberations, but the Board cannot accept any comments concerning the proposed amendments beyond the April 14, 2003, deadline.

7. Anne O'Leary, attorney, has been designated to preside over and conduct this hearing.

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

BOARD OF CLINICAL LABORATORY
SCIENCE PRACTITIONERS
Karen McNutt, PRESIDENT

/s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State March 3, 2003.

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

In the matter of the)	NOTICE OF PUBLIC HEARING
amendment of ARM 37.85.207,)	ON PROPOSED AMENDMENT
37.85.406, 37.86.606,)	
37.86.1102, 37.86.1806,)	
37.86.1807, 37.86.2405,)	
37.86.2801 and 37.86.2905)	
pertaining to medicaid)	
reimbursement and reductions)	
in medicaid rate)	
reimbursement and services)	

TO: All Interested Persons

1. On April 2, 2003, at 3:00 p.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed amendment of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on March 24, 2003, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

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

37.85.207 SERVICES NOT PROVIDED BY THE MEDICAID PROGRAM

(1) remains the same.

(2) The following medical and nonmedical services are explicitly excluded from the Montana medicaid program except for those services covered under the health care facility licensure rules of the Montana department of public health and human services when provided as part of a prescribed regimen of care to an inpatient of a licensed health care facility, except for those services specifically available, as listed in ARM 37.40.1406, to persons eligible for home and community based services; and except for those medicare covered services, as listed in ARM 37.83.812 to qualified medicare beneficiaries for whom the Montana medicaid program pays the medicare premiums, deductible and coinsurance:

(a) through (l) remain the same.

(m) treatment services for infertility, including sterilization reversals; and

- (n) experimental services;
- (o) all gastric bypass related services (including initial bypass and revisions); and
- (p) circumcisions not authorized by the department as medically necessary.

(3) Effective February 1, 2003, until June 30, 2003, the following services will no longer be covered for individuals age 21 and over:

- (a) audiology;
- (b) eyeglasses;
- (c) routine eye exams provided by optometrists and ophthalmologists;
- (d) hearing aids;
- (e) orthotic devices;
- (f) prosthetic devices;
- (g) dental, excluding emergency services for the treatment of pain; and
- (h) denturist.

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

AUTH: Sec. 53-2-201, 53-6-113 and 53-6-402, MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-103, 53-6-116,
53-6-131, 53-6-141 and 53-6-402, MCA

37.85.406 BILLING, REIMBURSEMENT, CLAIMS PROCESSING, AND PAYMENT (1) through (20) remain the same.

(21) There is an emergency reimbursement reduction in effect for the following provider types for services provided January ~~10, 2002~~ 2003 through June 30, ~~2002~~ 2003:

- (a) inpatient hospital;
- (b) outpatient hospital;
- (c) early periodic screening;
- (d) diagnostic and treatment;
- (e) nutritional services;
- (f) chiropractic;
- (g) podiatry;
- (h) physical therapy;
- (i) speech-language pathology;
- (j) occupational therapy;
- (k) audiology;
- (l) optometry;
- (m) public health clinic;
- (n) dental;
- ~~(o) outpatient drugs;~~
- ~~(p)~~(o) prosthetic devices;
- ~~(q)~~(p) durable medical equipment and supplies;
- ~~(r)~~(q) non-emergency transportation;
- ~~(s)~~(r) ambulance;
- ~~(t)~~(s) physician;
- ~~(u)~~(t) ambulatory surgical center;
- ~~(v)~~(u) non-hospital lab and x-ray;
- ~~(w)~~(v) denturist;
- ~~(x)~~(w) mid-level practitioner;
- ~~(y)~~(x) qualified medicare beneficiary (QMB) services;

~~(z)(y)~~ QMB chiropractic; and
~~(aa)(z)~~ freestanding dialysis clinics.

(22) The net pay reimbursement for the provider types listed in ~~ARM 37.85.406(21)~~ is ~~2.6%~~ 7% less than the amount provided in the following rules: ARM 37.83.811, 37.83.812, 37.83.825, 37.85.212, 37.86.105, 37.86.205, 37.86.506, 37.86.610, 37.86.705, 37.86.1004, 37.86.1005, ~~37.86.1105,~~ 37.86.1406, 37.86.1806, 37.86.1807, 37.86.2005, 37.86.2207, 37.86.2209, 37.86.2211, ~~37.86.2217,~~ 37.86.2405, 37.86.2505, 37.86.2605, 37.86.2801, 37.86.2905, 37.86.3005, 37.86.3007, 37.86.3009, 37.86.3011, 37.86.3014, 37.86.3016, 37.86.3018, 37.86.3020, 37.86.3022, 37.86.3205 and 37.86.4205.

(a) For purposes of this rule, "net pay reimbursement" means the allowed amount minus third party liability payments, copayments, coinsurance, incurments, and other deductions.

~~(b) Providers affected by this rule may be eligible for a rebate if there are sufficient funds available in the medicaid appropriation at the end of state fiscal year 2002.~~

~~(c) The department will define a process for calculating and issuing any rebate.~~

(23) remains the same.

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

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

37.86.606 THERAPY SERVICES, SERVICE REQUIREMENTS AND RESTRICTIONS (1) through (6) remain the same.

(7) The following limits apply to therapy services:

(a) Occupational therapy services are limited to ~~70~~ 40 hours per state fiscal year per recipient without prior authorization and up to an additional 30 hours per state fiscal year per recipient as prior authorized by the department. No more than 100 hours of occupational therapy services per state fiscal year per recipient may be reimbursed by the Montana medicaid program. Individuals age 21 or older are not eligible to receive additional hours over 40.

(b) Speech therapy services are limited to ~~70 units~~ 40 hours of service per state fiscal year per recipient without prior authorization and up to an additional 30 units of service per state fiscal year per recipient as prior authorized by the department. No more than 100 units of service of speech therapy services per state fiscal year per recipient may be reimbursed by the Montana medicaid program. Individuals age 21 or older are not eligible to receive additional hours over 40.

(i) remains the same.

(c) Physical therapy services are limited to ~~70 units~~ 40 hours of service per state fiscal year per recipient without prior authorization and up to an additional 30 units of service per state fiscal year per recipient as prior authorized by the department. No more than 100 units of physical therapy services per state fiscal year per recipient may be reimbursed by the Montana medicaid program. Individuals age 21 or older are not eligible to receive additional hours over 40.

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

37.86.1102 OUTPATIENT DRUGS, REQUIREMENTS (1) through (4) remain the same.

(5) Each prescription shall be dispensed in the quantity ordered except that:

(a) remains the same.

(b) Notwithstanding the above, prescriptions may not be dispensed in quantities greater than ~~100 dosages or~~ a 34-day supply, ~~whichever is greater.~~

(6) remains the same.

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

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

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

(a) through (b) remain the same.

(c) A prior authorization is required for the following:

(i) for any line item of prosthetic device, durable medical equipment, medical supplies and related maintenance, repair and services on which the department's fee is equal to or greater than \$1,000; and

~~(ii) purchase of wheelchairs and wheelchair accessories if the combined charges for the wheelchair and accessories exceed \$1,500 or if the provisions of (1)(c)(i) apply;~~

~~(A) All prior authorization requests for wheelchairs and wheelchair accessories must include submission to the department of the pertinent manufacturer's price list pages for the requested item; and~~

~~(iii) (ii) all other items identified as requiring prior authorization in the department's fee schedule referenced in ARM 37.86.1807(2).~~

(d) through (6) remain the same.

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

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

(2) Prosthetic devices, durable medical equipment and medical supplies shall be reimbursed in accordance with the department's fee schedule effective ~~July 2002~~ February 1, 2003, which is hereby adopted and incorporated by reference. A copy of the department's fee schedule may be obtained from the Department of Public Health and Human Services, Health Policy Services Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

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

(a) remains the same.

(b) Upon review of the aggregate number of billings as provided in (3)(a), the department will establish a fee for each item which has been billed at least 50 times by all providers in the aggregate during the previous 12-month period. The department shall set each such fee at ~~90~~ 80% of the average charge billed by all providers in the aggregate for such item during such previous 12-month period. For purposes of determining the number of billings and the average charge, the department will consider only those billings that comply with ARM 37.86.1806(1)(b).

(i) remains the same.

(c) Except as provided in (4), for all items for which no fee has been set under the provisions of (3)(b), the department's fee schedule amount shall be ~~90~~ 80% of the provider's usual and customary charge.

(i) through (5)(b) remain the same.

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

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

37.86.2405 TRANSPORTATION AND PER DIEM, REIMBURSEMENT

(1) remains the same.

(2) The department hereby adopts and incorporates by reference the department's fee schedule effective ~~July 2002~~ February 1, 2003 which sets forth the reimbursement rates for transportation, per diem and other medicaid services. A copy of the department's fee schedule may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(3) No payment is available for personal vehicle mileage or per diem costs that total less than ~~\$10~~ \$5 in a calendar month.

(4) remains the same.

(5) Mileage for transportation in a personally owned vehicle is reimbursed: at the rate of \$.13 per mile.

~~(a) at the rate specified in 2-18-503, MCA, for the first 500 miles in a calendar month; and~~

~~(b) at the rate of \$.15 per mile for all miles in excess of 500 miles in a calendar month.~~

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

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

37.86.2801 ALL HOSPITAL REIMBURSEMENT, GENERAL

(1) remains the same.

(2) Allowable costs will be determined in accordance with generally accepted accounting principles as defined by the

American institute of certified public accountants. Such definition of allowable costs is further defined in accordance with the Medicare Provider Reimbursement Manual, HCFA Pub. 15 (referred to as "Pub. 15"), subject to the exceptions and limitations provided in the department's administrative rules. The department hereby adopts and incorporates herein by reference Pub. 15, which is a manual published by the United States department of health and human services, health care financing administration, which provides guidelines and policies to implement medicare regulations which set forth principles for determining the reasonable cost of provider services furnished under the Health Insurance for Aged Act of 1965, as amended. A copy of Pub. 15 may be obtained through the Department of Public Health and Human Services, Health Policy and Services Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(a) Hospitals located in the state of Montana providing inpatient and outpatient hospital services reimbursement under the retrospective cost-based methodology for a hospital that is identified by the department as a distinct part rehabilitation unit or an isolated hospital are subject to the provisions regarding cost reimbursement and coverage limits and rate of increase ceilings specified in 42 CFR 413.30 through 413.40 (1992), except as otherwise provided in these rules. This provision applies to distinct part rehabilitation units only through January 31, 2003. The department hereby adopts and incorporates herein by reference 42 CFR 413.30 through 413.40 (1992). A copy of 42 CFR 413.30 through 413.40 (1992) may be obtained through the Department of Public Health and Human Services, Health Policy and Services Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(b) through (8) remain the same.

AUTH: Sec. 2-4-201, 53-2-201 and 53-6-113, MCA

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

37.86.2905 INPATIENT HOSPITAL SERVICES, REIMBURSEMENT

(1) For inpatient hospital services, the Montana medicaid program will reimburse providers as follows:

(a) For inpatient hospital services, including inpatient rehabilitation services and services provided in a setting that is identified by the department as a distinct part rehabilitation unit, provided within the state of Montana, providers will be reimbursed under the diagnosis related groups (DRG) prospective payment system described in (2) except as otherwise specified in these rules. Medicare certified rehabilitation units (through January 31, 2003 only), isolated hospitals and critical access hospitals will be reimbursed their actual allowable costs determined on a retrospective basis, with allowable costs determined according to ARM 37.86.2801(2). Except as otherwise specified in these rules, facilities reimbursed under the DRG prospective payment system will be reimbursed, in addition to the prospective DRG rate, for the following:

(i) through (c)(i) remain the same.

(2) The department's DRG prospective payment rate for inpatient hospital services is based on the classification of inpatient hospital discharges to DRGs. The procedure for determining the DRG prospective payment rate is as follows:

(a) through (b) remain the same.

(c) The department computes a Montana average base price per case. This average base price per case is \$2070 excluding capital expenses, effective for services provided on or after July 1, 2002. For services provided on or after February 1, 2003 through June 30, 2003, the base price per case is \$1967 excluding capital expenses.

(d) through (8) remain the same.

(9) Inpatient hospital service providers shall be subject to the billing requirements set forth in ARM 37.85.406. At the time a claim is submitted, the hospital must have on file a signed and dated acknowledgment from the attending physician that the physician has received the following notice: "Notice to physicians: medicaid payment to hospitals is based in part on each patient's principal and secondary diagnoses and the major procedures performed on the patient, as attested to by the patient's attending physician by virtue of his or her signature in the medical record. Anyone who misrepresents, falsifies or conceals essential information required for payment of federal funds, may be subject to fine, imprisonment or civil penalty under applicable federal laws." The acknowledgment must be completed by the physician at the time that the physician is granted admitting privileges at the hospital, or before or at the time the physician admits his or her first patient to the hospital. Existing acknowledgments signed by physicians already on staff remain in effect as long as the physician has admitting privileges at the hospital. The provider may, at its discretion, add to the language of this statement the word "medicare" so that two separate forms will not be required by the provider to comply with both state and federal requirements. In addition, except for ~~distinct part rehabilitation units and~~ hospital resident cases, a provider may not submit a claim until the recipient has been either:

(a) through (17) remain the same.

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

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

3. On January 10, 2003 the Department of Public Health and Human Services adopted emergency rule changes to ARM 37.85.207.

On January 31, 2003 the Department adopted emergency rule changes to ARM 37.85.406, 37.86.606, 37.86.1102, 37.86.1806, 37.86.1807, 37.86.2405, 37.86.2801 and 37.86.2905. By statute (2-4-303, MCA) emergency rule changes are only effective for 120 days. The amendments in this notice are proposed to either extend the emergency rule change to June 30, 2003, or make the change permanent. Whether the change is extended until June 30, 2003 or will remain in effect after June 30, 2003 is indicated

with each rule discussed below.

The Department projects substantial budget deficits in the Montana Medicaid program for State Fiscal Year (SFY) 2003. The projected deficits require the Department to adjust reimbursement policies and services for the Montana Medicaid program.

The Department has considered and will adopt all feasible measures to eliminate the budget deficit for SFY 2003. Making up more of the deficit through Medicaid service reductions was considered but rejected because cost-shifting occurs when elimination of non-federally mandated services causes additional use of more expensive mandatory services. In addition, the elimination of groups of currently eligible individuals was rejected due to the potential for adverse financial and health effects on individuals currently receiving Medicaid services.

The estimated financial impact of the amendments to ARM 37.85.207 is to reduce total state and federal expenditures for Medicaid services in Montana by approximately \$3.2 million in SFY 2003. Of the total, state general fund expenditures are reduced approximately \$877,000. The estimated financial impact of the amendments to ARM 37.85.406, 37.86.606, 37.86.1102, 37.86.1806, 37.86.1807, 37.86.2405, 37.86.2801 and 37.86.2905 is to reduce total state and federal expenditures for Medicaid Services in Montana by approximately \$5,200,000 in SFY 2003. Of the total, state expenditures are reduced approximately \$1,413,000. The Department believes the savings from these and other cost-saving measures will allow it to stay within legislative appropriations.

42 U.S.C. 1396a(a)(30)(A) requires that a state plan for medical assistance must provide such methods and procedures related to payment for care and services that are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area. The Department believes the rate cuts adopted in this notice will not have a substantial detrimental effect on Medicaid recipients' access to services.

The Department cannot spend more than its appropriation and with the increases in enrollment and utilization, more demand has been placed on the program. The Department has reviewed alternatives to these rules to contain costs in the Medicaid program. The Department recognizes the impact of these rules on providers and needy Montanans, and has adopted measures that attempt to minimize the negative impact on providers and clients. In order to stay within the budget, the Department must adopt these rules, which are a combination of reducing eligibility, limiting services and reducing payments to health care providers.

The amendments provide the following changes:

ARM 37.85.207(1)(o) is amended to exclude all gastric bypass surgery. ARM 37.85.207(1)(p) is amended to exclude any circumcisions not preauthorized by the Department. This change will remain in effect after June 30, 2003. It will result in a general fund savings of \$41,700 from reduced expenditures for SFY 2003.

ARM 37.85.207(3) is amended to temporarily eliminate optional services not required by the federal government for individuals age 21 and over. These optional services include audiology, eyeglasses, routine eye exams provided by optometrists and ophthalmologists, hearing aids, dental, denturist, orthotics and prosthetics. These temporary eliminations will be in effect from February 1, 2003, until June 30, 2003. SFY 2003 general fund savings equal \$485,281.

ARM 37.85.406 is amended to reduce by 7% the Medicaid reimbursement rates for the specified provider types identified in ARM 37.85.406(21). This is effective until June 30, 2003.

ARM 37.86.606(7) is amended to reduce the current occupational, speech and physical therapy hours from a maximum of 100 hours to 40 hours for adults age 21 and over. This change will remain in effect after June 30, 2003. SFY 2003 general fund savings equal \$4,583.

ARM 37.86.1102(5) is amended to provide for a maximum 34-day supply on all prescription drug benefits. The current rule provides for either a 34-day supply or 100 tablets, whichever is greater. This change will remain in effect after June 30, 2003. SFY 2003 general fund savings equal \$20,593.

ARM 37.86.1806(1) is amended to expand the prior authorization requirements for wheelchairs and wheelchair accessories. All wheelchairs and wheelchair accessories will now require prior authorization regardless of charge. This change will remain in effect after June 30, 2003.

ARM 37.86.1807(2) is amended to refer to the Department's fee schedule current as of February 1, 2003, for durable medical equipment. The changes in the fee schedule reflect the services that now require prior authorizations and the new "by-report" percentages. This change will remain in effect after June 30, 2003.

ARM 37.86.1807(3) is amended to reduce the current fee for durable medical equipment based on a percentage of billed charges from 90% to 80%. SFY 2003 general fund savings equal \$20,000. This change will remain in effect after June 30, 2003.

ARM 37.86.2405 is amended to adopt the standard mileage rate of \$.13, which is the amount allowed by the IRS for computing the

tax deduction for medical related travel. Concurrently, the Department will lower the minimum payment allowed for a calendar month of travel from \$10 to \$5. This change will remain in effect after June 30, 2003.

ARM 37.86.2801(2) and 37.86.2905(1)(a) are amended to provide for cost settlement of hospital distinct part rehabilitation units (HDPRU) based on cost-based methodology through January 31, 2003. HDPRU will be reimbursed under the diagnosis related group (DRG) prospective payment system effective February 1, 2003. Interim payment of HDPRU is based on a cost-based methodology through January 31, 2003. Effective February 1, 2003 reimbursement will be under the DRG prospective payment system. This change will remain in effect after June 30, 2003.

The Department has considered and will adopt feasible measures to eliminate the budget deficit for SFY 2003. In addition to these rule changes, the Department has implemented program and policy changes that will reduce total medicaid expenditures by \$2,253,000 to the appropriated funding level. The Department will be proposing other rule changes to re-examine the treatment and evaluation of recipient resources for purposes of determining medical eligibility.

The number of persons affected by these rule changes is 11,600 providers enrolled in Montana Medicaid and approximately 17,000 Medicaid recipients that utilized these services in SFY 2002. These rule changes could impact the entire Medicaid recipient population of 78,000 should they have need of these services during the period of February 1, 2003 through June 30, 2003.

There is an adverse impact on Medicaid recipients from the elimination of optional services. Clients will not be able to obtain these services or will be required to pay privately for their needed services. However, some of these services will be cost shifted to other services such as hospitals or physicians services. In addition, the combination of these cuts and previous cuts will impact access to health care for some clients if providers choose to discontinue their participation in the Medicaid program.

4. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Kathy Munson, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than 5:00 p.m. on April 10, 2003. Data, views or arguments may also be submitted by facsimile (406)444-9744 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

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

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and
Human Services

Certified to the Secretary of State March 3, 2003.

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

In the matter of the)
amendment of ARM 37.37.108,)
37.37.111, 37.37.115 and)
37.97.524 pertaining to)
staffing of therapeutic youth)
group homes)

NOTICE OF PUBLIC HEARING
ON PROPOSED AMENDMENT

TO: All Interested Persons

1. On April 2, 2003, at 1:30 p.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed amendment of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on March 24, 2003, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

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

37.37.108 THERAPEUTIC YOUTH GROUP HOMES, MEDICAL NECESSITY, STAFFING OF MODERATE LEVEL HOMES (1) remains the same.

~~(2) Each program manager shall be responsible for no more than eight children.~~

~~(3) There must be adequate staff to allow the LCS, or the program manager who is providing services under the supervision of a masters or higher level clinician, to conduct the following on a weekly basis:~~

- ~~(a) two group treatment sessions per child;~~
- ~~(b) one individual treatment session per child;~~
- ~~(c) one treatment team meeting; and~~
- ~~(d) family therapy when appropriate and medically necessary.~~

~~(4) Each LCS shall be responsible for no more than 16 children.~~

(2) Moderate level therapeutic youth group home providers must meet additional minimum staffing requirements to provide a therapeutic environment and treatment interventions identified in the child's individual treatment plan. For the purpose of licensing:

(a) Child to staff ratio must be no more than 4:1 each day for a 15-hour period beginning at, or between, 7 a.m. and 7:30 a.m., (or beginning at or between some other reasonable morning half hour which is approximately 15 hours prior to the bedtime of the children), when children are in care.

(b) Child to awake staff ratio must be no more than 8:1 each night for a nine-hour period beginning no earlier than 15 hours from the time daytime staffing of 4:1 is initiated.

(c) Each program manager shall be responsible for no more than eight children.

(d) Each LCS shall be responsible for no more than 16 children.

(e) There must be adequate staff to allow the LCS or the program manager who is providing services under the supervision of a master's or higher level clinician, to implement individualized treatment plans developed by the treatment team. Documentation of individual, group and family therapy must be completed for each session and be included in quarterly treatment summaries. Treatment plans shall include, but are not limited to:

(i) specific treatment plan objectives and interventions which are carried out in the treatment environment and documented by daily charting;

(ii) two group treatment sessions per child;

(iii) one individual treatment session per child;

(iv) one treatment team meeting; and

(v) family therapy when appropriate and medically necessary.

AUTH: Sec. 41-3-1103, 41-3-1142, 52-2-111, 52-2-602, 52-2-603, 52-2-622 and 53-4-212, MCA

IMP: Sec. 41-3-1103, 41-3-1142, 52-2-111, 52-2-602, 52-2-603, 52-2-622 and 53-2-201, MCA

37.37.111 THERAPEUTIC YOUTH GROUP HOMES, MEDICAL NECESSITY, STAFFING OF CAMPUS BASED LEVEL HOMES (1) remains the same.

~~(2) Each program manager shall be responsible for no more than four children.~~

~~(3) There must be adequate staff to allow the LCS, the program manager and/or professional support staff who provide services under the supervision of a masters or higher level clinician, to implement individualized treatment plans developed by the treatment team. Documentation of individual, group and family therapy must be completed for each session and be included in quarterly treatment summaries. Treatment plans shall include, but are not limited to:~~

~~(a) specific treatment plan objectives and interventions which are carried out in the treatment environment and documented by daily charting;~~

~~(b) one age-appropriate individual therapy session per week;~~

~~(c) two age-appropriate group therapy sessions per week; and~~

~~(d) family therapy sessions when appropriate and medically necessary.~~

~~(4) Individualized treatment plans are monitored weekly by the treatment team which includes but is not limited to, the directors of clinical services, operational services, and educational services, and the consulting child psychiatrist.~~

~~(5) Each LCS shall be responsible for no more than eight children.~~

(2) Campus based level therapeutic youth group home providers must meet additional minimum staffing requirements to provide a therapeutic environment and treatment interventions identified in the child's individual treatment plan. For the purpose of licensing:

(a) Child to staff ratio must be no more than 4:1 each day for a 15-hour period beginning at, or between 7 a.m. and 7:30 a.m., (or beginning at or between some other reasonable morning half hour which is approximately 15 hours prior to the bedtime of the children), when children are in care.

(b) Child to awake staff ratio must be no more than 8:1 each night for a nine-hour period beginning no earlier than 15 hours from the time daytime staffing of 4:1 is initiated.

(c) Each program manager shall be responsible for no more than four children.

(d) Each LCS shall be responsible for no more than eight children.

(e) There must be adequate staff to allow the LCS, the program manager or professional support staff who provide services under the supervision of a master's or higher level clinician to implement individualized treatment plans developed by the treatment team. Documentation of individual, group and family therapy must be completed for each session and be included in quarterly treatment summaries. Treatment plans shall include, but are not limited to:

(i) specific treatment plan objectives and interventions which are carried out in the treatment environment and documented by daily charting;

(ii) one age-appropriate individual therapy session per week;

(iii) two age-appropriate group therapy sessions per week;

(iv) family therapy sessions when appropriate and medically necessary; and

(v) one treatment team meeting.

~~(6) (f) Each campus based level therapeutic youth group home shall either employ or contract for a .25 full-time social worker for each eight children in care. The social worker shall meet the minimum qualifications of a bachelor's degree and 2 two years of related experience. Under this subsection, .25 full-time social worker means a social worker working a minimum of 10 hours per week.~~

~~(7) (g) Each campus based therapeutic youth group home shall either employ or contract for a .25 full-time clinical director for each eight children in care. The clinical director shall be licensed by the Montana board of psychologists. Under this subsection, .25 full-time clinical director means a~~

clinical director working a minimum of 10 hours per week.

(8) (h) Each campus based level therapeutic youth group home shall either employ or contract for a .25 full-time director of operations for each eight children in care. The director of operations position is a master's level position. Under this subsection, .25 full-time director of operations means a director of operations working a minimum of 10 hours per week.

(9) (i) Each campus based level therapeutic youth group home shall either employ or contract for a .20 full-time registered nurse for each eight children in care. The registered nurse shall be licensed by the Montana board of nursing. Under this subsection, .20 full-time registered nurse means a registered nurse working a minimum of 8 eight hours per week.

AUTH: Sec. 41-3-1103, 41-3-1142, 52-2-111, 52-2-602, 52-2-603, 52-2-622 and 53-4-212, MCA

IMP: Sec. 41-3-1103, 41-3-1142, 52-2-111, 52-2-602, 52-2-603, 52-2-622 and 53-2-201, MCA

37.37.115 THERAPEUTIC YOUTH GROUP HOMES, MEDICAL NECESSITY, STAFFING OF INTENSIVE LEVEL HOMES (1) remains the same.

~~(2) Each program manager shall be responsible for no more than four children.~~

~~(3) There must be adequate staff to allow the LCS, or the program manager who is providing services under the supervision of a masters or higher level clinician, to conduct the following on a weekly basis:~~

~~(a) three group treatment sessions per child;~~

~~(b) two individual treatment sessions per child;~~

~~(c) two treatment team meetings; and~~

~~(d) family therapy when appropriate and medically necessary.~~

~~(4) Each LCS shall be responsible for no more than 12 children.~~

(2) Intensive level therapeutic youth group home providers must meet additional minimum staffing requirements to provide a therapeutic environment and treatment interventions identified in the child's individual treatment plan. For the purpose of licensing:

(a) An intensive group home with four or fewer children must have a child to staff ratio of no more than 2:1 each day for a 15-hour period beginning at, or between 7 a.m. and 7:30 a.m., (or beginning at or between some other reasonable morning half hour which is approximately 15 hours prior to the bedtime of the children), when children are in care. Child to awake staff ratio must be no more than 4:1 each night for a nine-hour period beginning no earlier than 15 hours from the time that daytime staffing is initiated, when children are in care.

(b) An intensive group home with five or six children must have a child to staff ratio of no more than 3:1 each day for a 15-hour period beginning at, or between, 7 a.m. and 7:30 a.m.,

(or beginning at or between some other reasonable morning half hour which is approximately 15 hours prior to the bedtime of the children), when children are in care. Child to awake staff ratio must be no more than 6:1 each night for a nine-hour period beginning no earlier than 15 hours from the time that daytime staffing is initiated, when children are in care.

(c) An intensive group home with seven or eight children must have a child to staff ratio of no more than 8:3 each day for a 15-hour period beginning at, or between 7 a.m. and 7:30 a.m., (or beginning at or between some other reasonable morning half hour which is approximately 15 hours prior to the bedtime of the children), when children are in care. Child to awake staff ratio must be no more than 8:1.5 each night for a nine-hour period beginning no earlier than 15 hours from the time that daytime staffing is initiated, when children are in care.

(d) Each intensive therapeutic youth group home shall have one or more program managers with responsibility as follows:

(i) in a four to six bed facility, one full-time program manager for up to six children in care. Under this subsection, a full-time program manager means a program manager working a minimum of 40 hours per week; and

(ii) in a seven or eight bed facility, 1.5 full-time program managers for up to eight children in care. Under this subsection, 1.5 full-time program managers means program managers working a combined minimum of 60 hours per week.

(e) Each LCS shall be responsible for no more than 12 children.

(f) There must be adequate staff to allow the LCS, the program manager or professional support staff who provide services under the supervision of a master's or higher level clinician to implement individualized treatment plans developed by the treatment team. Documentation of individual, group and family therapy must be completed for each session and be included in quarterly treatment summaries. Treatment plans shall include, but are not limited to:

(i) specific treatment plan objectives and interventions which are carried out in the treatment environment and documented by daily charting;

(ii) three group treatment sessions per child;

(iii) two individual treatment sessions per child;

(iv) two treatment team meetings; and

(v) family therapy when appropriate and medically necessary.

AUTH: Sec. 41-3-1103, 41-3-1142, 52-2-111, 52-2-602, 52-2-603, 52-2-622 and 53-4-212, MCA

IMP: Sec. 41-3-1103, 41-3-1142, 52-2-111, 52-2-602, 52-2-603, 52-2-622 and 53-2-201, MCA

37.97.524 YOUTH GROUP HOME: STAFF (1) through (4) remain the same.

~~(5) Moderate level therapeutic youth group home providers must meet additional minimum staffing requirements to provide a therapeutic environment and treatment interventions identified~~

~~in the child's individual treatment plan as set out in ARM 11.13.104 in regard to medical necessity, and as follows for the purpose of licensing:~~

~~(a) Child/staff ratio must be no more than 4:1 each day for a 15-hour period beginning at, or between, 7 a.m. and 7:30 a.m., (or beginning at or between some other reasonable morning half hour which is approximately 15 hours prior to the bedtime of the children), when children are in care.~~

~~(b) Child/awake staff ratio must be no more than 8:1 each night for a 9-hour period beginning no earlier than 15 hours from the time daytime staffing of 4:1 is initiated.~~

~~(6) Campus based level therapeutic youth group home providers must meet additional minimum staffing requirements to provide a therapeutic environment and treatment interventions identified in the child's individual treatment plan as set out in ARM 11.13.106 in regard to medical necessity and as follows for the purpose of licensing:~~

~~(a) Child/staff ratio must be no more than 4:1 each day for a 15-hour period beginning at, or between, 7 a.m. and 7:30 a.m., (or beginning at or between some other reasonable morning half hour which is approximately 15 hours prior to the bedtime of the children), when children are in care.~~

~~(b) Child/awake staff ratio must be no more than 8:1 each night for a 9-hour period beginning no earlier than 15 hours from the time daytime staffing of 4:1 is initiated.~~

~~(7) Intensive level therapeutic youth group home providers must meet additional minimum staffing requirements to provide a therapeutic environment and treatment interventions identified in the child's individual treatment plan as set out in ARM 11.13.108 in regard to medical necessity and as follows for the purpose of licensing:~~

~~(a) Child/staff ratio must be no more than 2:1 each day for a 15-hour period beginning at, or between, 7 a.m. and 7:30 a.m., (or beginning at or between some other reasonable morning half hour which is approximately 15 hours prior to the bedtime of the children), when children are in care.~~

~~(b) Child/awake staff ratio must be no more than 4:1 each night for a 9-hour period beginning no earlier than 15 hours from the time that daytime staffing of 4:1 is initiated, when children are in care.~~

AUTH: Sec. 41-3-503, 41-3-1103, 41-3-1142, 52-2-111, 52-2-603, 52-2-622, 53-4-111 and 53-4-212, MCA

IMP: Sec. 41-3-503, 41-3-1103, 41-3-1142, 52-2-113, 52-2-603, 52-2-622, 53-2-201 and 53-4-113, MCA

3. The proposed rule changes are intended to be effective retroactive to January 15, 2003. The proposed rules have no effect on Medicaid benefits or provider reimbursement. The changes in staffing requirements do not significantly change the standard of care to Medicaid recipients in therapeutic youth group homes. Therefore, no adverse impact will result from retroactive applicability. There would be no fiscal impact resulting from retroactive application of the proposed rule

changes.

4. The Department of Public Health and Human Services is proposing these amendments to implement changes in the staffing requirements for therapeutic youth group homes. On January 15, 2003 the Department proposed temporary emergency rule amendments that implemented a revised fee schedule for mental health services provided to Medicaid recipients and MHSP beneficiaries. When it adopted those rules, the Department promised to review staffing requirements for therapeutic youth group homes. The Department's review included consultations among Medicaid program administrators, Medicaid facility licensing administrators and representatives of the therapeutic youth group home service provider's industry.

The Department finds that the staffing requirements for therapeutic youth group homes were unnecessarily stringent and is proposing these amendments. The proposed staffing adjustments will allow therapeutic youth group home providers to continue to operate within the reduced reimbursement schedule without compromising the quality of care or safety afforded Medicaid recipients.

The proposed amendments adjust the minimum child to awake staff ratios for moderate, campus and intensive level therapeutic youth group homes. The amendments establish the maximum number of youth for a program manager and lead clinical staff at each level of therapeutic group home. Finally, the proposed amendments differentiate requirements within the intensive therapeutic group home based upon the number of youth in the home: four or fewer, five and six, or seven and eight.

The alternative to these amendments would be either not to reduce the reimbursement rates or not to modify the staffing requirements. If the reimbursement were not reduced, the department would be forced to identify other services for reduction or elimination in order to realize the savings necessary for the balance of State fiscal year 2003. If the rates were reduced without these provisions for staffing changes, the providers would be forced to close their doors because the reimbursement rate was substantially below the cost of operating a facility. This would result in approximately 275 youth being displaced from therapeutic group home care and would create substantial access difficulties, resulting in hardship to families and custodial agencies who would be forced to identify an alternative facility for the youth involved.

The cost savings of the rate reductions were identified in the Department's temporary emergency rule amendments adopted January 15, 2003. No additional savings are projected from these proposed amendments.

5. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written

data, views or arguments may also be submitted to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on April 10, 2003. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

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

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and
Human Services

Certified to the Secretary of State March 3, 2003.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the proposed) NOTICE OF PROPOSED ADOPTION
adoption of New Rules I)
through VI relating to)
certification requirements) NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On May 9, 2003, the department proposes to adopt New Rules I through VI relating to certification requirements for department appraisers.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Revenue no later than 5:00 p.m. on March 26, 2003, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 5805, Helena, Montana 59604-5805; telephone (406) 444-2855; fax (406) 444-3696; e-mail canderson@state.mt.us.

3. The proposed new rules do not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rules provide as follows:

NEW RULE I DEFINITIONS The following definitions apply to this sub-chapter:

(1) "Agricultural appraiser" means a person who has completed the necessary training and is certified to appraise agricultural and forest property in Montana.

(2) "Agricultural land classification/appraisal (ALCA) training" means specific training outlined by the department to meet the certification requirements necessary to appraise agricultural and forest property in Montana.

(3) "Agricultural timber classifier" means a person who has completed the necessary training and is certified to appraise agricultural and forest property in Montana.

(4) "Commercial appraiser" means a person who has completed the necessary training and is certified to appraise commercial property in Montana.

(5) "Failure to perform the appraisal work satisfactorily" refers to the work that is completed by the appraiser and is determined to be unsatisfactory by the unit manager and/or regional lead. At a minimum, that determination will include areas such as:

(a) continued inability by the employee to complete the planned amount of appraisal work;

(b) consistently making errors in following the appraisal process;

(c) failing to consider all approaches to value; and

(d) inability to defend appraisal work before taxpayers and appeal boards.

(6) "Industrial appraiser" means a person who has completed the necessary training and is certified to appraise industrial property in Montana.

(7) "International association of assessing officers (IAAO)" means the professional organization for advancement of appraisers.

(8) "Multiple certification" means holding more than one type of certification to appraise property.

(9) "On-the-job appraisal work" means conducting the actual work required to complete the job for appraisers who are new to a specific appraisal classification.

(10) "Residential appraiser" means a person who has completed the necessary training and is certified to appraise residential property in Montana.

(11) "Successful completion" means satisfactorily passing the written examination conducted at the conclusion of the training sessions.

AUTH: Sec. 15-1-201, MCA

IMP: Sec. 15-7-107 and 15-7-111, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule I because 15-7-107, MCA, allows the department to develop rules establishing the education courses, rules, and methods required to be a residential property appraiser in Montana. This rule defines terms that are used in New Rules II through VI.

NEW RULE II RESIDENTIAL PROPERTY CERTIFICATION REQUIREMENTS

(1) All residential appraisers must receive specific training and testing to certify that they possess the required knowledge, skills, and abilities to perform residential property appraisals as outlined in this rule.

(2) Training and testing criteria shall be as follows:

(a) International association of assessing officers (IAAO) certified training sessions will be offered annually if funding is available and if there are sufficient numbers of field staff who require the course.

(b) Employees shall attend the first residential training session offered by the department after commencement of employment. Satisfactory completion of the residential training session shall include successful completion of the written residential examination. If the employee fails to successfully complete the first written examination, attendance at the next residential training session shall be required. Failure to successfully complete the second written examination shall result in the immediate termination of employment.

(3) After successful completion of the residential training session, the employee shall prepare a written residential demonstration appraisal narrative report (residential narrative report). Employees will be granted a maximum of 40 hours of administrative leave to complete the report. The report must be submitted to the department within six months after successful completion of the training

session, or within 30 days after using the administrative leave granted, whichever occurs first.

(a) The residential narrative report must include:

- (i) title page;
- (ii) letter of transmittal;
- (iii) table of contents;
- (iv) assumptions and limiting conditions;
- (v) photographs of subject property;
- (vi) identification of property;
- (vii) purpose of appraisal;
- (viii) definition of market value;
- (ix) date of appraisal;
- (x) assessment and taxes;
- (xi) city data;
- (xii) neighborhood data;
- (xiii) site data;
- (xiv) plot plan;
- (xv) zoning;
- (xvi) description of improvements;
- (xvii) construction features;
- (xviii) property history;
- (xix) highest and best use;
- (xx) estimate of remaining economic life;
- (xxi) cost approach with summary;
- (xxii) market data approach with summary;
- (xxiii) income approach with summary;
- (xxiv) correlation and final estimate of value;
- (xxv) certification;
- (xxvi) qualification of appraiser; and
- (xxvii) addenda and exhibits.

(b) Within two months after submission of the residential narrative report, the department shall advise the employee, in writing, whether the report is satisfactory. If the report is unsatisfactory, the employee shall have two months from the date of notification to correct and resubmit the report to the department. Additional administrative leave will not be granted for this purpose. Failure to successfully complete a written narrative report shall result in immediate termination of employment. Upon final acceptance, the residential narrative report shall become the property of the department.

(c) The required timeframes for submitting reports may be extended upon written request by the employee's direct supervisor. Written requests shall be directed to the appropriate region lead for consideration. The region lead will approve or deny the request. Copies of the region lead's determination will be distributed to the employee, the employee's immediate supervisor, and appropriate process lead.

(4) Upon commencement of employment with the department, the employee shall undertake a one-year period of on-the-job appraisal work. During this period, in order to ensure that the employee has the aptitude for appraisal work, the employee shall be in a probationary status. Failure to perform the appraisal work satisfactorily at any time during the one-year

probationary period shall result in immediate termination of employment.

(5) The department may waive the criteria set forth in (2), (3), or (4) if sufficient proof is provided that the employee has previously fulfilled those requirements. For example, the employee may have completed a course of instruction from the society of real estate appraisers whose complexity was equal to or greater than that of IAAO course I.

AUTH: Sec. 15-1-201, MCA

IMP: Sec. 15-7-107 and 15-7-111, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule II because 15-7-107, MCA, allows the department to develop rules establishing the education courses, rules, and methods required to be a residential property appraiser in Montana. These requirements may differ in some regard to those of other states, and potential employees may need additional training in order to be eligible for various appraisal positions within the department.

NEW RULE III AGRICULTURAL PROPERTY CERTIFICATION REQUIREMENTS (1) The employee must be previously certified as a residential appraiser by the standards set forth in [NEW RULE II].

(2) Training and testing criteria shall be as follows:

(a) Department training sessions will be offered annually if funding is available and if there are sufficient numbers of field staff who require the courses.

(b) The employee shall attend the first scheduled agricultural land classification/appraisal (ALCA) training session after being assigned ALCA responsibilities. Satisfactory completion of the ALCA training session shall include successful completion of the written examination conducted at the conclusion of the ALCA training session. If the employee fails to successfully complete the first written examination, attendance at the next ALCA training session shall be required. Failure to successfully complete the second written examination shall result in immediate termination of employment or demotion to a residential appraisal position, if the position is available and the individual is certified to perform in that position.

(3) After successful completion of the ALCA training session, the employee shall prepare a written ALCA demonstration narrative report (agricultural narrative report) as specified by the department's requirements. The department will allow up to 40 hours of administrative leave to each employee in order to complete each required report. The report shall be submitted to the department within six months after successful completion of the training session, or within 30 days after using the administrative leave granted, whichever occurs first.

(a) The report must consist of at least one completed appraisal (classification) of an ownership large enough and diverse enough to adequately demonstrate the ability to

differentiate between classes and productive grades of land. The report may be completed on an ownership containing many different agricultural land classifications. At a minimum, the report must consider an ownership with at least two different agricultural land classifications, one of which must be grazing. Materials submitted for this demonstration appraisal shall include:

- (i) a copy of ownership plat in which property is situated;
- (ii) a copy of property record card (AB-9) properly completed;
- (iii) a copy(ies) of field notes properly completed;
- (iv) copies of soil survey information utilized;
- (v) a copy of mylar overlay or GIS map of area (ownership) and comparable adjoining properties. This will show the number of acres in each class and grade of land by 40-acre tract or fractional lot for both the subject property and comparables;
- (vi) copies of other pertinent data utilized in classifying and grading the property, including precipitation information; and
- (vii) a detailed narrative explaining and justifying the classifications and grading established.

(b) Within two months after submission of the report by the employee, the department shall advise the employee in writing whether the report is satisfactory. If the report is unsatisfactory, the employee shall have two months from the date of notification to correct and resubmit the report. No additional administrative leave shall be granted for this purpose. Failure to successfully complete a written narrative report shall result in immediate termination of employment or demotion to a residential appraisal position, if the position is available and the individual is certified to perform in that position. Upon final acceptance, the agricultural narrative report shall become the property of the department.

(c) Extensions of the timeframes for submitting the reports may be requested in writing by the employee's direct supervisor. The written request shall be directed to the appropriate region lead for consideration. The region lead will then be responsible for approving or denying the request, with copies of the action taken being distributed to the employee, the employee's immediate supervisor, and appropriate process lead.

(4) Upon successful attainment of the criteria set forth in (1), (2), and (3), the employee shall undertake a one-year period of on-the-job ALCA work. The commencement of the year experience requirement will coincide with the employee's notification of being assigned ALCA responsibilities. All work will be supervised by the department. Failure to perform the classification/appraisal work satisfactorily at any time during the one-year period shall result in immediate termination or demotion to a residential appraisal position, if the position is available and the individual is certified to perform in that position.

(5) The department may waive the criteria set forth in (1), (2), (3), or (4) if sufficient proof is presented that the employee has previously fulfilled such criteria. For example, the employee may have previously worked as an agricultural fee appraiser and prepared demonstration agricultural appraisal reports for clients. A copy of one of those reports would suffice for the criteria in (3).

AUTH: Sec. 15-1-201, MCA

IMP: Sec. 15-7-107 and 15-7-111, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule III because 15-7-107, MCA, allows the department to develop rules establishing the education courses, rules, and methods required to be an agricultural land appraiser in Montana. These requirements may differ from those of other states, and potential employees may need additional training in order to be eligible for various appraisal positions within the department.

NEW RULE IV COMMERCIAL PROPERTY CERTIFICATION REQUIREMENTS (1) The employee must be previously certified in the appraisal of residential property and agricultural land.

(2) Training and testing criteria shall be as follows:

(a) International association of assessing officers (IAAO) certified training sessions will be offered annually if funding is available and if there are sufficient numbers of field staff who require the course.

(b) The employee shall attend the first scheduled commercial training session after being assigned commercial appraisal responsibilities. Satisfactory completion of the commercial training session shall include successful completion of the written examination conducted at the conclusion of the commercial training session. If the employee fails to successfully complete the first written examination, attendance at the next commercial training session shall be required. Failure to successfully complete the second written examination shall result in immediate termination of employment or demotion to a residential appraisal position or a residential/agricultural appraisal position, if such a position is available and the individual is certified to perform the duties necessary for that position.

(3) After successful completion of the commercial training session, the employee shall prepare a written commercial demonstration appraisal narrative report (commercial narrative report). The department will allow up to 40 hours of administrative leave to each employee in order to complete the report. The report must be submitted to the department within six months after successful completion of the training session, or within 30 days after using the administrative leave granted, whichever occurs first.

(a) The commercial narrative report must include:

(i) title page;

- (ii) letter of transmittal;
- (iii) table of contents;
- (iv) assumptions and limiting conditions;
- (v) photographs of subject property;
- (vi) identification of property;
- (vii) purpose of appraisal;
- (viii) definition of market value;
- (ix) date of appraisal;
- (x) assessment and taxes;
- (xi) city data;
- (xii) neighborhood data;
- (xiii) site data;
- (xiv) plot plan;
- (xv) zoning;
- (xvi) description of improvements;
- (xvii) construction features;
- (xviii) property history;
- (xix) highest and best use;
- (xx) estimate of remaining economic life;
- (xxi) cost approach with summary;
- (xxii) market data approach with summary;
- (xxiii) income approach with summary;
- (xxiv) correlation and final estimate of value;
- (xxv) certification;
- (xxvi) qualification of appraiser; and
- (xxvii) addenda and exhibits.

(b) The commercial narrative report can be completed on any commercial property, including apartment buildings, but if done on an apartment building, the structure must be a four-plex or larger.

(c) Extensions of the timeframes for submitting the reports may be requested in writing by the employee's direct supervisor. The written request shall be directed to the appropriate region lead for consideration. The region lead will then be responsible for approving or denying the request, with copies of the action taken being distributed to the employee, the employee's immediate supervisor, and appropriate process lead.

(d) Within two months after submission of the report by the employee, the department shall advise the employee in writing whether the report is satisfactory. If the report is unsatisfactory, the employee shall have two months from the date of notification to correct and to resubmit the report. No additional administrative leave shall be granted for this purpose. Failure to successfully complete a written commercial narrative report shall result in immediate termination of employment or demotion to a residential appraisal position or a residential/agricultural appraisal position, if the position is available and the individual is certified to perform the duties of that position. Upon final acceptance, the commercial narrative report shall become the property of the department.

(4) Upon successful attainment of the criteria set forth in (1), (2), and (3), the employee shall undertake a one-year

period of on-the-job commercial appraisal work. The commencement of the year experience requirement will coincide with the employee's notification of being assigned commercial appraisal responsibilities. All work will be supervised by the department. Failure to perform the appraisal work satisfactorily shall result in immediate termination or demotion to a residential appraisal position or residential/agricultural appraisal position, if such a position is available and the individual is certified to perform the duties necessary for that position.

(5) The department may waive the criteria set forth in (1), (2), (3), or (4) if sufficient proof is presented that the employee has previously fulfilled such criteria. For example, the employee may have completed a course of instruction from the appraisal institute whose complexity was equal to or greater than that of IAAO course II.

AUTH: Sec. 15-1-201, MCA

IMP: Sec. 15-7-107 and 15-7-111, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule IV because 15-7-107, MCA, allows the department to develop rules establishing the education courses, rules, and methods required to be a commercial property appraiser in Montana. These requirements may differ in some regard to those of other states, and potential employees may need additional training in order to be eligible for various appraisal positions within the department.

NEW RULE V INDUSTRIAL PROPERTY CERTIFICATION REQUIREMENTS (1) The employee must be previously certified in appraisal of residential property and appraisal of commercial property.

(2) Training and testing criteria requires the employee to successfully complete courses I and II of the appraisal institute, and write a comprehensive examination in industrial appraisal.

(3) The employee must write an abbreviated narrative appraisal report defining the particular industrial process, explaining the depreciation used, and substantiating the value conclusion. Upon acceptance, the industrial narrative report shall become the property of the department.

(4) The employee must:

(a) complete one year of responsible industrial property appraisal; and

(b) appraise or assist in the appraisal of at least three separate plants in different industrial processes.

(5) Individual steps may be waived by the department if sufficient proof is given that the employee has previously met such requirements.

AUTH: Sec. 15-1-201, MCA

IMP: Sec. 15-7-107 and 15-7-111, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule V because 15-7-107, MCA, allows the department to

develop rules establishing the education courses, rules, and methods required to be a industrial property appraiser in Montana. These requirements may differ in some regard to those of other states and potential employees may need additional training in order to be eligible for various appraisal positions within the department.

NEW RULE VI CERTIFICATION SEQUENCE (1) Specific positions within the department require multiple certifications:

Example 1: Agricultural appraiser position requires residential and agricultural certification.

Example 2: Commercial appraiser position requires residential, agricultural, and commercial certification.

Example 3: Region lead and unit manager positions require residential, agricultural, and commercial certification.

Example 4: Industrial appraiser positions require residential, commercial, and industrial certification.

(2) The following certification sequence shall be adhered to for positions requiring multiple certification:

- (a) residential certification;
- (b) agricultural certification;
- (c) commercial certification; and
- (d) industrial certification.

(3) Subject to department review and modification, each level of certification must be satisfactorily completed before the incumbent may begin to work on the requirements of the next higher level of certification.

AUTH: Sec. 15-1-201, MCA

IMP: Sec. 15-7-107 and 15-7-111, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule VI to clarify the certification sequence levels that must be met before an appraiser can move to the next level within the department.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to:

Cleo Anderson
Department of Revenue
Director's Office
P.O. Box 5805
Helena, Montana 59604-5805
no later than April 10, 2003.

5. If persons who are directly affected by the proposed action wish to express their data, views, and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Cleo Anderson at the above address no later than April 10, 2003.

6. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee; from a governmental subdivision or agency; or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

7. An electronic copy of this Proposal Notice is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. The Department strives to make the electronic copy of this Proposal 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 website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

8. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notice regarding particular subject matter or matters. Such written request may be mailed or delivered to the person in 4 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

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

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme
KURT G. ALME
Director of Revenue

Certified to Secretary of State March 3, 2003

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the proposed) NOTICE OF PUBLIC HEARING
adoption of New Rule I) ON PROPOSED ADOPTION
relating to access to property)
for the purpose of appraising)
the property for tax purposes)

TO: All Concerned Persons

1. On April 14, 2003, at 10:00 a.m., a public hearing will be held in the Fourth Floor Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the adoption of New Rule I relating to access to property for the purpose of auditing and appraising the property for tax purposes.

Individuals planning to attend the hearing shall enter the building through the east doors of the Sam W. Mitchell Building, 125 North Roberts, Helena, Montana.

2. The Department of Revenue 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 Department of Revenue not later than 5:00 p.m., March 26, 2003, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 5805, Helena, Montana 59604-5805; telephone (406) 444-2855; fax (406) 444-3696; or e-mail canderson@state.mt.us.

3. The proposed new rule does not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rule provides as follows:

NEW RULE I EXTENSION OF TIME FOR LANDOWNERS TO RESPOND TO ACCESS NOTICES FROM DEPARTMENT (1) Prior to November 30 of each year, the department shall publish in a newspaper of general circulation in each county a notice stating that the department may be entering private property for the purpose of appraising or auditing property. Each county treasurer shall annually include that same notification with the property tax bills when they are mailed to the registered landowner.

(2) The landowner or the landowner's agent has a right to be present when the property valuation staff conducts the audit or appraisal work. Except for the provision stated in (4), the landowner or landowner's agent must assert that right by mailing notification to the local department field office within 30 days following the date of publication in the newspaper.

(3) The written notice must provide the following information:

- (a) landowner or landowner's agent's full name;
- (b) mailing address;
- (c) property address; and

(d) a telephone number that the appraiser or auditor can call to contact the landowner or landowner's agent during normal business hours.

(4) The notification may be made any time prior to a property valuation staff's visit to the private property. If notification is mailed after the 30-day period specified in (2), it must be received by the local department field office prior to the date of the visit.

(5) Upon receipt of the written notice from the landowner or the landowner's agent, property valuation staff shall contact the landowner or the landowner's agent and schedule an appointment during normal business hours.

AUTH: Ch. 5, L. 2003 and Title 15, chapter 7, part 1, MCA

IMP: Ch. 4, L. 2003 and Title 15, chapter 7, part 1, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule I because HB 188 of the 2003 legislative session requires the department to adopt a rule clarifying the procedure the department will follow when notifying private property owners that the department intends to conduct audits and appraisals throughout the state. The rule further clarifies the fact that the landowner or landowner's agent may request to be present during these appraisals and the necessary requirements for notifying the department of these requests.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to:

Cleo Anderson
Department of Revenue
Director's Office
P.O. Box 5805
Helena, Montana 59604-5805

and must be received no later than April 18, 2003.

5. Cleo Anderson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

6. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or

technical problems.

7. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding particular subject matter or matters. Such written request may be mailed or delivered to the person in 4 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

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

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme
KURT G. ALME
Director of Revenue

Certified to Secretary of State March 3, 2003

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the) NOTICE OF AMENDMENT
amendment of ARM 10.20.106)
relating to students placed)
in education programs)

TO: All Concerned Persons

1. On December 26, 2002, the Superintendent of Public Instruction published MAR Notice No. 10-20-109 regarding the public hearing on the proposed amendment of a rule concerning students placed in education programs, at page 3457 of the 2002 Montana Administrative Register, Issue Number 24.

2. The Superintendent of Public Instruction has amended ARM 10.20.106 exactly as proposed.

3. The Superintendent of Public Instruction has thoroughly considered the comments and testimony received on the proposed amendment. The following is a summary of the comments received and responses that do not result in a change to the proposed amendment.

COMMENT 1: Mark Latrielle, Superintendent of Clinton School District #32, and Shirley Day, Principal of DeSmet Public School submitted written comments in favor of the proposed rule change.

RESPONSE: The State Superintendent thanks Mr. Latrielle and Ms. Day for their comments.

COMMENT 2: William Parker, Superintendent of Malta Public Schools, submitted a written comment stating that he was in favor of a district receiving ANB for students placed out of district or out of state. He was not in favor of any rule moving fiscal responsibility from the state to local districts for students placed by the state.

RESPONSE: The State Superintendent thanks Mr. Parker for his comment and states that the rule amendment does not add to a district's obligations under state law or under the Individuals with Disabilities Education Act (IDEA). It allows the district to collect ANB for those students that the district places in a private facility pursuant to an individualized education program (IEP).

COMMENT 3: Kimberly Gardner and Rayelynn Connelle, representing Alternative Youth Adventures (AYA) presented oral and written testimony. Ms. Gardner stated that her organization was not in disagreement with the proposed changes, but was requesting a temporary expansion of the wording to allow the children placed at AYA to be counted for ANB. Specifically AYA

requested that the rule be expanded to include facilities that are seeking accreditation and demonstrate public accountability under the supervision of an accredited school district. Ms. Connelle stated that the rule does not go far enough because not all of the kids have IEP's. She stated that she did not feel the children would do well at Jefferson County High School and that they were in the best possible place for them to receive an education.

COMMENT 4: George Linthicum, Jefferson High School Superintendent, presented oral and written testimony. Mr. Linthicum concurred with Ms. Gardner's testimony. He feels the children are in the most appropriate place for them at this time.

COMMENT 5: Vernon R. Mummey, M.S. LAC, representing New Day, Inc., submitted written testimony concurring with AYA's position.

RESPONSE: The State Superintendent thanks commentors 3, 4, and 5 for their comments. The commentors' request that we allow ANB for those entities seeking accreditation is outside of the scope of the current rule change. The current rule provides that one of the four criteria necessary to include students for ANB could be met if the private school contractor is accredited by the Montana Board of Public Education (ARM 10.20.106(1)(c)(i)). The purpose of this rule change is to address circumstances involving students with IEP's. The purpose was not to address or consider the accreditation element of this rule. The State Superintendent declines the commentors' suggestion to broaden the purpose of this rule change. Such a change (to include "seeking accreditation") must be addressed with the Board of Public Education because the Board of Public Education does not currently recognize such a status.

/s/ Linda McCulloch
Linda McCulloch
Superintendent
Office of Public Instruction

/s/ Jeffrey A. Weldon
Jeffrey A. Weldon
Rule Reviewer
Office of Public Instruction

Certified to the Secretary of State March 3, 2003.

BEFORE THE BOARD OF LAND COMMISSIONERS
OF THE STATE OF MONTANA

In the matter of the adoption) NOTICE OF ADOPTION
of NEW RULES I through L)
relating to state forest land)
management)

TO: All Concerned Persons

1. On September 26, 2002, the Board of Land Commissioners published MAR Notice No. 36-11-91 regarding the Public Hearing on the Proposed Adoption of the above-stated rules relating to State Forest Land Management, at page 2540 of the 2002 Montana Administrative Register, issue no. 18.

The Board has adopted the following new rules exactly as proposed:

NEW RULE I	36.11.401	NEW RULE XXII	36.11.422
NEW RULE II	36.11.402	NEW RULE XXX	36.11.430
NEW RULE VI	36.11.406	NEW RULE XXXI	36.11.431
NEW RULE VIII	36.11.408	NEW RULE XXXV	36.11.435
NEW RULE IX	36.11.409	NEW RULE XXXVII	36.11.437
NEW RULE X	36.11.410	NEW RULE XXXVIII	36.11.438
NEW RULE XIII	36.11.413	NEW RULE XXXIX	36.11.439
NEW RULE XIV	36.11.414	NEW RULE XLI	36.11.441
NEW RULE XV	36.11.415	NEW RULE XLII	36.11.442
NEW RULE XVI	36.11.416	NEW RULE XLV	36.11.445
NEW RULE XX	36.11.420	NEW RULE XLIX	36.11.449

The Board has adopted the following new rules as proposed but with the following changes, stricken matter interlined, new matter underlined:

NEW RULE III	36.11.403	NEW RULE XXVII	36.11.427
NEW RULE IV	36.11.404	NEW RULE XXVIII	36.11.428
NEW RULE V	36.11.405	NEW RULE XXIX	36.11.429
NEW RULE VII	36.11.407	NEW RULE XXXII	36.11.432
NEW RULE XI	36.11.411	NEW RULE XXXIII	36.11.433
NEW RULE XII	36.11.412	NEW RULE XXXIV	36.11.434
NEW RULE XVII	36.11.417	NEW RULE XXXVI	36.11.436
NEW RULE XVIII	36.11.418	NEW RULE XL	36.11.440
NEW RULE XIX	36.11.419	NEW RULE XLIII	36.11.443
NEW RULE XXI	36.11.421	NEW RULE XLIV	36.11.444
NEW RULE XXIII	36.11.423	NEW RULE XLVI	36.11.446
NEW RULE XXIV	36.11.424	NEW RULE XLVII	36.11.447
NEW RULE XXV	36.11.425	NEW RULE XLVIII	36.11.448
NEW RULE XXVI	36.11.426	NEW RULE L	36.11.450

NEW RULE III (36.11.403) DEFINITIONS Unless the context otherwise requires, the words defined shall have the following meaning when found in these rules:

- (1) through (3) remain as proposed.

(4) "Administrative" unit means the full set of lands managed and administered by an individual field office.

(4) through (8) remain as proposed, but are renumbered (5) through (9).

~~(9)(10) "Bear management unit or BMU" means a geographic analysis an area previously designated by an interagency technical committee which is meant to accommodate meets the year long habitat needs of both male and female grizzly bears as determined by the department.~~

(10) through (16) remain as proposed, but are renumbered (11) through (17).

(18) "Coarse filter" means an approach that supports diverse wildlife habitat by managing for a variety of forest structures and compositions, instead of focusing on habitat needs for individual, selected species. A coarse filter approach assumes that if landscape patterns and processes similar to those species evolved with are maintained, then the full complement of species will persist and biodiversity will be maintained.

(17) and (18) remain as proposed, but are renumbered (19) and (20).

(21) "Cover type" means a descriptor of forest stands based upon tree species composition.

(19) through (46) remain as proposed, but are renumbered (22) through (49).

(50) "Old growth network" means an area consisting of more than one forest stand designated or deferred by license or easement from treatment for old growth related reasons, especially for spatial considerations.

(47) remains as proposed, but is renumbered (51).

(52) "Old growth set-aside" means an old growth stand(s) designated or deferred by license or easement from treatment.

(48) through (55) remain as proposed, but are renumbered (53) through (60).

~~(56) "Project analysis area" means an area selected for analysis of a proposed action for project development under the Montana Environmental Policy Act (MEPA).~~

(61) "Project level" means within the analysis of a proposed action under the Montana Environmental Policy Act (MEPA).

(57) through (58)(c)(ii) remain the same, but are renumbered (62) through (63)(c)(ii).

(iii) activities potentially beneficial to bears of duration less than two weeks that include monitoring, tree planting and prescribed burning.

~~(iii) monitoring;~~

~~(iv) tree planting; and~~

~~(v) prescribed burning.~~

(64) "Riparian management zone (RMZ)" means an additional area of streamside buffer established when forest management activities are proposed on sites with high erosion risk or on sites that are adjacent to fish bearing streams or lakes.

(59) through (79) remain as proposed, but are renumbered (65) through (84).

~~(80) "Take" means to:~~

~~(a) harass;~~

~~(b) harm;~~

~~(c) pursue;~~

~~(d) hunt;~~

~~(e) shoot;~~

~~(f) wound;~~

~~(g) kill;~~

~~(h) trap;~~

~~(i) capture;~~

~~(j) collect a threatened or endangered species; or~~

~~(k) attempt to engage in any such conduct.~~

(81) through (82)(a) remain as proposed, but are renumbered (85) through (86)(a).

(b) restricted roads; ~~or~~ and

(c) remains as proposed.

(87) "Urban/forestland interface" means lands managed by the department where proximity to human habitation warrants special consideration.

(83) through (90) remain as proposed, but are renumbered (88) through (94).

NEW RULE IV (36.11.404) BIODIVERSITY - COARSE FILTER APPROACH (1) The department shall promote biodiversity by taking a coarse filter approach thereby favoring an appropriate mix of stand structures and compositions on state lands. The department shall ~~consider the following ecological characteristics when determining appropriate stand structures and compositions~~ base appropriate stand structures and compositions on ecological characteristics such as:

(a) through (c) remain as proposed.

~~(d) cover type;~~

~~(e)~~(d) disturbance regime; and

~~(f)~~(e) unique characteristics.

(2) through (2)(a) remain as proposed.

(b) age class distributions; ~~and~~

(c) cover type; and

(d) stand structure.

NEW RULE V (36.11.405) BIODIVERSITY - DESIRED FUTURE CONDITIONS (1) The department shall use base ~~an appropriate mix of stand composition conditions on a site-specific model that incorporates ecological characteristics through habitat and cover types, to the extent data are available to describe cover type representation. Cover type is one characteristic that describes desired future conditions.~~ When run at the administrative unit level, the model describes a desired future condition in terms of cover type representation. The cover types defined are white pine, ponderosa pine, Douglas-fir, western larch/Douglas-fir, lodgepole pine, mixed conifer, and subalpine types. Where

data do not allow unit-level descriptions, then project-level data and descriptions will be utilized.

(a) remains as proposed.

(i) The following describes the model referred to in (1). Each stand is tested sequentially against the following criteria. Once a stand is assigned it does not go through any of the subsequent steps.

(A) If white pine makes up 10% or greater of any of the four main species, the white pine type is assigned.

(B) If ponderosa pine makes up over 20% of the cover, the ponderosa pine cover type is assigned.

(C) If western larch represents a minimum of 10% of the stand, or any stand that has at least 30% cover represented by western larch and Douglas-fir, the western larch/Douglas-fir type is assigned.

(D) If Douglas-fir represents 50% or greater, the Douglas-fir type is assigned.

(E) If lodgepole pine represents 40% or greater, the lodgepole pine type is assigned.

(F) If the stand is not yet assigned and the habitat type is greater than 630, the subalpine type is assigned.

(G) All remaining stands are assigned to the mixed conifer type.

~~(b) The department shall not have firm targets for age class distributions. The department shall consider stands in all age classes for treatment to promote appropriate conditions. One tenet of Achieving achieving biodiversity goals at the landscape level involves is the presence of stands in all age classes.~~

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

NEW RULE VII (36.11.407) BIODIVERSITY - MANAGEMENT ON BLOCKED LANDS (1) Within areas of large, blocked ownership, the department shall manage for a desired future condition that can be characterized by the proportion and distribution of forest types and structures historically present on the landscape. ~~The department is not committing to historical proportions or distributions of stand age classes.~~

(2) A typical analysis unit shall be the administrative unit wherein the department shall focus on maintaining or restoring a semblance range of the forest conditions that would have naturally been present given topographic, edaphic, and climatic characteristics of the area, and considering fiduciary and other obligations.

(a) through (3) remain as proposed.

(a) However, if state ownership contains rare or unique habitat elements, as previously defined in ARM 36.11.403 occurring naturally, the department shall ~~consider managing~~ manage so as to retain those elements, to the extent it is consistent with fiduciary duties owed to the beneficiary.

NEW RULE XI (36.11.411) BIODIVERSITY - SNAGS AND SNAG RECRUITS (1) through (1)(f)(iii) remain as proposed.

~~(g) The department shall consider snag quantities in adjacent, unharvested stands, on state trust lands, as substitutes for those not retained in the harvest unit as determined at the project level.~~

NEW RULE XII (36.11.412) BIODIVERSITY - MANAGEMENT AT THE URBAN/FOREST LAND INTERFACE (1) ~~In some areas, such as the urban/forest land interface, the department may diverge from other forest management rules as defined in ARM 36.11.404 through 36.11.450, if the following overriding concerns are identified at the project level:~~

~~(a) public safety, , including the potential for loss or damage to critical power or communications systems;~~

~~(b) fire hazard; or~~

~~(c) adherence to the rules would yield undesirable results due to activities of others beyond the department's control, for example snags left for biodiversity reasons near open roads or housing, are likely to be harvested by firewood gatherers thus not fulfilling department objectives.; lost revenue.~~

~~(2) remains as proposed.~~

NEW RULE XIV (36.11.414) BIODIVERSITY - RETENTION OF COARSE WOODY DEBRIS (1) Adequate CWD shall be left on site to facilitate nutrient conservation and cycling, maintenance of biodiversity, wildlife needs, and other considerations.

(2) CWD retention amounts shall be determined at the project level using appropriate scientifically accepted technical references as determined by the department.

NEW RULE XVI (36.11.416) BIODIVERSITY - MANAGEMENT ON SCATTERED LANDS (1) through (2) remain as proposed.

(3) However, if state trust lands contain rare or unique habitat elements occurring naturally (e.g., bog, patches of a rare plant), the department shall ~~consider managing~~ manage so as to retain those elements.

(4) through (6) remain as proposed.

NEW RULE XVII (36.11.417) ~~BIODIVERSTIY~~ BIODIVERSITY - COOPERATIVE PLANNING (1) through (1)(a) remain as proposed.

NEW RULE XVIII (36.11.418) ~~BIODIVERSTIY~~ BIODIVERSITY - OLD GROWTH MANAGEMENT (1) The department shall manage old growth to meet biodiversity and fiduciary objectives, ~~pursuant to 77-5-116, MCA.~~ The department shall consider the role of all stand age classes in the maintenance of biodiversity when designing harvests and other activities. Stand age distributions, including old growth, shall be evaluated and managed as described in ARM 36.11.407 through 36.11.416 based on the patterns historically present on the landscape as a result of natural disturbances. Amounts and distributions of all age classes will shift and change over time. No stands would be

permanently deferred from management, although some stands may not be entered for relatively long time periods.

(a) remains as proposed.

(b) Designation of old growth set-asides, or networks, may be made as long as the trust secures full market value pursuant to ~~77-5-116, MCA.~~

(c) remains as proposed.

(i) When utilizing old growth restoration treatments, the department shall retain sufficient large live trees to meet the ~~department's~~ old growth definition as defined in ARM 36.11.403. Such treatments shall be applicable on sites that historically had non-lethal frequent fire regimes. The department shall target shade tolerant species for removal and overall stand density shall be reduced. The department shall treat stands with periodic re-entry, and prescribed underburning when practicable, to maintain relatively low densities, open understories and dominance by shade-intolerant species. The department shall determine specific prescriptions at the project level.

(ii) When utilizing old growth maintenance treatments, the department shall retain sufficient large live trees to meet the ~~department's~~ old growth definition as defined in ARM 36.11.403. The department shall apply such treatments on sites that historically had mixed severity fire regimes, either relatively frequent or infrequent. In some cases, the department may apply these treatments to stand replacement regimes when determined reasonable at the project level. The department shall target shade tolerant species for removal and reduce stand density. For residual stands, the department shall incorporate canopy gaps of sufficient size to encourage regeneration of shade-intolerant tree species. The department shall treat stands with periodic re-entry at less frequent intervals than for restoration. Densities and representation of shade-tolerant species will be higher than in restoration treatments. Fire shall be less frequently applied than in restoration treatments. The department shall determine specific prescriptions at the project level.

(iii) The department shall consider old growth removal treatments on sites that historically had stand replacement fire regimes. The department shall make selection of this treatment at the project level ~~consistent with 77-5-116, MCA,~~ after considerations for biodiversity, and forest health. Post treatment stands shall no longer qualify as old growth. The department shall determine specific prescriptions at the project level.

(d) The department shall maintain the option to apply or to not apply old growth removal treatments, regardless of disturbance regime, when determined reasonable at the project level.

~~(e) The department shall maintain the option to not apply any treatment to old growth, regardless of disturbance regime, when determined reasonable at the project level, and when the decision would not conflict with 77-5-116, MCA.~~

NEW RULE XIX (36.11.419) BIODIVERSITY - FIELD REVIEWS

(1) through (6) remain as proposed.

(7) Results of monitoring shall be used to help plan follow-up and future activities in the evaluation area, and to improve the department's ability to predict the effects of activities in similar situations elsewhere. Monitoring shall be frequent enough to accomplish these purposes effectively.

NEW RULE XXI (36.11.421) ROAD MANAGEMENT (1) The department shall plan transportation systems ~~to minimize~~ for the minimum number of road miles.

(a) remains as proposed.

(b) The department shall ~~consider using~~ evaluate and use alternative yarding systems that ~~minimize new road construction~~ do not require roads whenever possible.

(2) The department shall conduct transportation planning as part of ~~project-level~~ landscape-level evaluations. The department shall also conduct an evaluation of existing and possible future transportation systems prior to road location and design. When planning transportation, the department shall consider:

(a) remains as proposed.

~~(b)~~ Managers shall plan road systems cooperatively with adjacent landowners whenever practicable to minimize road construction.

~~(b)~~(c) existing and probable future management needs of the tributary area, such as:

(i) through (vi) remain as proposed.

~~(e)~~(d) value(s) of resources being accessed for the proposed project as well as resources to be accessed from future road construction, road use or extension of transportation system.

(3) When planning the location, design, construction, ~~use,~~ and maintenance of all roads, the department shall:

(a) through (c) remain as proposed.

(d) relocate existing roads if reconstruction, maintenance and/or use of existing roads would produce greater undesirable impacts than new construction, ~~where practicable and when funding is available;~~ and

(e) through (7) remain as proposed.

(8) The department shall plan road density to satisfy project level objectives, ~~meet~~ landscape-level ecosystem plans and other forest management rules.

(9) remains as proposed.

(10) The department shall consider ~~possible closure or abandonment of roads accessible to motorized vehicles these public access roads that are deemed:~~

(a) non-essential for public access; that are non-essential to near-term future management plans; or

~~(b) below a standard that would accommodate unrestricted access; or~~

~~(c) in which where~~ unrestricted access would cause excessive resource damage.

(i) through (11) remain as proposed.

(12) The department shall assess road maintenance needs by inspecting conditions on both open and closed roads every five years. The department shall then prioritize maintenance operations considering the results of the inspections.

(13) through (13)(c) remain as proposed.

(14) The department shall inspect road closure structures, such as gates and earth berms, as part of ongoing administrative duties and in response to notice of ineffective road closures received from the public. The department shall repair or modify ineffective closures or consider alternative methods of closure. Inspections would occur at least every five years. Repairs would be a high priority when allocating time and budget.

NEW RULE XXIII (36.11.423) WATERSHED MANAGEMENT - CUMULATIVE EFFECTS (1) through (1)(a)(iii) remain as proposed.

(b) The department shall complete a coarse filter screening on all projects involving substantial vegetation removal or ground disturbance. Except for small-scale projects with very low potential for impacts, additional analysis shall be required.

(c) The department shall complete a preliminary watershed analysis on projects when coarse filter evaluations determine there is anything other than low potential for cumulative impacts.

(d) The department shall complete a detailed watershed analysis when coarse filter screening or preliminary analysis predict or indicate either the existence of ~~or the high risk potential for~~ unacceptable cumulative watershed effects as a result of the proposal.

~~(e)(e)~~ The department shall establish ~~acceptable levels of risk~~ threshold values for cumulative watershed effects on a ~~project watershed~~ level basis.

~~(i)(f)~~ The department shall determine ~~acceptable levels of risk~~ thresholds for cumulative watershed effects by taking into account such items as:

(A) through (C) remain as proposed, but are renumbered (i) through (iii).

~~(ii)(iv)~~ The department shall set ~~acceptable risk at a level~~ threshold values at a level that ensures compliance with water quality standards and protection of beneficial water uses with a low to moderate degree of risk.

~~(d)(g)~~ The department shall set ~~acceptable levels of risk~~ threshold values for cumulative effects associated with projects proposed in the watershed of a water quality limited water body at a level that provides for protection of beneficial water uses with a low degree of risk.

(2) remains as proposed.

NEW RULE XXIV (36.11.424) WATERSHED MANAGEMENT - MONITORING (1) through (1)(b) remain as proposed.

(c) assessments of habitat conditions on selected streams identified as supporting the fish species listed as threatened or endangered under the Endangered Species Act, 16

U.S.C. Sections 1531 through 1544, and sensitive fish species; and

(d) evaluations of the effects of forest management activities on soils at selected sites; and

(e) an inventory and analysis of watershed impacts on state trust lands as funding allows.

(i) If conducted, the analysis shall be sufficient to identify causes of watershed degradation and set priorities for watershed restoration. The department shall emphasize mitigation of existing water quality impacts in order to provide greater opportunities to produce trust income while maintaining beneficial uses.

(2) remains as proposed.

(3) The department shall participate in cooperative watershed monitoring effort with other agencies, public entities and private parties, where practical, when funding is available, and when the cooperative monitoring objectives are consistent with department monitoring objectives.

NEW RULE XXV (36.11.425) WATERHSED WATERSHED MANAGEMENT - STREAMSIDE MANAGEMENT ZONES AND RIPARIAN MANAGEMENT ZONES

(1) The department shall establish a riparian management zone (RMZ) extend the adjacent to the minimum width of the SMZ required under ARM 36.11.302 when forest management activities are proposed on sites with high erosion risk or on sites that are adjacent to fish bearing streams or lakes.

(2) through (3) remain as proposed.

(a) the department ~~extend the SMZ to~~ shall establish an RMZ with a minimum of 100 feet when activities are located on slopes greater than 25% but less than 35%;

(b) the department ~~extend the SMZ to~~ establish an RMZ with a minimum of 150 feet when activities are located on slopes greater or equal to 35%, but less than 50%;

(c) the department ~~extend the SMZ to~~ establish an RMZ with a minimum of 200 feet when forest management activities are located on slopes greater or equal to 50%; and

(d) the department may modify and shorten SMZ RMZ widths, but in no case to a width less than 50 feet, extended established for high erosion risk when topographic breaks, existing roads or other factors are present that reduce erosion risk and provide suitable sediment delivery filtration. ~~No modified~~ Modified or shortened SMZ RMZ's may be less than 50 feet in width must still meet the minimum width of the SMZ required under ARM 36.11.302.

(4) The following restrictions apply to forest management activities conducted within an ~~SMZ extended~~ an RMZ established for high erosion risk:

(a) The department shall limit new road construction within an ~~extended SMZ~~ RMZ to situations in which:

(i) ~~that require a stream crossing~~ is required;

(ii) where potential impacts can be adequately mitigated; or

(iii) remains as proposed.

(b) The department shall restrict ground based equipment operations within the ~~extended SMZ~~ RMZ.

(i) The department shall not allow the operation of wheeled or tracked equipment within an ~~extended SMZ~~ RMZ when it is located on slopes greater than 35%.

(ii) The department shall not allow the operation of wheeled or tracked equipment within an ~~extended SMZ~~ RMZ when it is located on slopes less than 35%, unless the operation can be conducted without causing excessive compaction, displacement or erosion of the soil.

(iii) The department may allow the use of wheeled or tracked equipment inside of that portion of an ~~extended SMZ~~ or RMZ, when operated from an established road on the side of the road away from the stream pursuant to ARM 36.11.304.

(c) The department shall restrict cable yarding of logs within and across an ~~extended SMZ~~. RMZ ~~Timber yarded by cable systems shall not be yarded in a manner that causes to cable systems and operations that do not cause excessive ground disturbance within the SMZ or extended SMZ~~ RMZ.

(5) The department shall design harvest prescriptions conducted in SMZ's and RMZ's located adjacent to fish bearing streams to retain adequate levels of shade and potential large woody debris recruitment to the stream channel by:

(a) ~~extending the SMZ to~~ establishing an RMZ that when combined with the SMZ has a minimum slope distance equal to the site potential tree height of the proposed harvest stand at age 100 years;

(b) through (8) remain as proposed.

(9) ~~When conducting timber~~ Timber harvests within the SMZ and RMZ of a stream, lake, or other body of water supporting bull trout or any other fish or aquatic species listed under the Endangered Species Act, 16 U.S.C Sections 1531 through 1544, the department shall act pursuant to ~~{NEW RULE VIII}~~ and ~~{NEW RULE IX}~~. ARM 36.11.427.

(10) The department shall use existing roads in the SMZ or RMZ only if potential water quality impacts are adequately mitigated and beneficial uses are fully protected.

NEW RULE XXVI (36.11.426) WATERSHED MANAGEMENT - WETLAND MANAGEMENT ZONES (1) through (7) remain as proposed.

~~(8) The department shall conduct an inventory and analysis of watershed impacts on state trust lands as funding allows.~~

~~(a) If conducted, the analysis shall be sufficient to identify causes of watershed degradation and set priorities for watershed restoration. The department shall emphasize mitigation of existing water quality impacts in order to provide greater opportunities to produce trust income while maintaining beneficial uses.~~

NEW RULE XXVII (36.11.427) FISHERIES (1) remains as proposed.

(2) The department shall review forest management activities proposed adjacent to streams, lakes, or other

bodies of water supporting bull trout or other fish and aquatic species listed as threatened or endangered under the Endangered Species Act, 16 U.S.C. Sections 1531 through 1544, pursuant to ~~{NEW RULES IV through XIX}~~ ARM 36.11.404 through 36.11.428.

(a) remains as proposed.

(i) The department shall design forest management activities to protect manage bull trout habitat by implementing conservation strategies pursuant to The Restoration Plan for Bull Trout in the Clark Fork River Basin and Kootenai River Basin, Montana (June 2000).

(3) through (4) remain as proposed.

NEW RULE XXVIII (36.11.428) THREATENED AND ENDANGERED SPECIES (1) The department ~~may~~ shall participate in recovery efforts of threatened and endangered plant and animal species. ~~to the extent it is consistent with trust law and other legal obligations, and may~~ The department shall confer in its sole discretion with the United States fish and wildlife service (USFWS) to develop habitat mitigation measures.

(a) Measures ~~may~~ differ from federal management guidelines, ~~as because the department plays a subsidiary role to federal agencies in species recovery. only possesses the legal obligation under the Endangered Species Act, 16 U.S.C Sections 1531 through 1544, to avoid the taking of a threatened or endangered species.~~ In all cases, measures to support recovery must be consistent with department responsibilities under the Endangered Species Act and Trust Law. The department shall work with the USFWS to amend such measures when, in the judgment of the forest management bureau chief, they are inconsistent with trust management obligations.

(b) remains as proposed.

(2) The department ~~may~~ shall, in its sole discretion, participate on interagency working groups established to develop guidelines and implement recovery plans for threatened and endangered species.

(a) remains as proposed.

(b) The department ~~may~~ shall, in its sole discretion, also participate in interagency groups formed to oversee management of recently de-listed species.

(3) through (3)(a) remain as proposed.

NEW RULE XXIX (36.11.429) THREATENED AND ENDANGERED SPECIES - BALD EAGLE (1) through (1)(d)(ii)(G) remain as proposed.

(H) vegetative screening from areas of both low and high intensity human activity.

(iii) through (1)(e)(iii) remain as proposed.

NEW RULE XXXII (36.11.432) GRIZZLY BEAR MANAGEMENT ON BLOCKED LANDS (1) The department shall Adhere adhere to the following when conducting forest management activities on blocked Stillwater unit lands (Stillwater and Coal Creek state

forests) within the Northern Continental Divide ecosystem (NCDE):

(a) remains as proposed.

(b) Conduct road density estimates using standardized techniques accepted by the interagency grizzly bear committee, ~~Northern Continental Divide ecosystem NCDE~~ subcommittee, or other techniques approved by the forest management bureau chief.

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

(ii) The department may allow temporary increases in road density above 1996 baseline levels for each BMU sub-unit upon approval by the forest management bureau chief. In such situations, the department shall ~~consider~~ apply alternative methods ~~of to minimization minimize~~ of impacts on grizzly bears to the maximum extent practicable.

(d) Design projects to result in no net decrease from baseline levels calculated in 1996 in the proportion of each BMU sub-unit (trust lands only) designated as security core. The department shall map security core areas. Security core areas shall remain intact for ~~long periods~~ approximating 10 years of time, to the extent practicable.

(i) The department may allow temporary decreases in security core below 1996 baseline levels for each BMU sub-unit upon approval by the forest management bureau chief. In such situations, the department shall ~~consider~~ apply alternative methods to minimize the impacts on grizzly bears to the maximum extent practicable.

(e) through (m) remain as proposed.

NEW RULE XXXIII (36.11.433) GRIZZLY BEAR MANAGEMENT ON OTHER WESTERN MONTANA LANDS (1) When conducting forest management activities on scattered lands administered by the Stillwater unit, Kalispell unit, Missoula unit and Clearwater unit, within the ~~Northern Continental Divide ecosystem (NCDE)~~, and in Plains and Libby unit lands within the Cabinet-Yaak ecosystem, the department shall adhere to the following:

(a) through (b) remain as proposed.

(c) Maintain hiding cover where available along all riparian zones. ~~to the extent practicable.~~

(d) remains as proposed.

NEW RULE XXXIV (36.11.434) GRIZZLY BEAR MANAGEMENT ON EASTERN MONTANA LANDS (1) On Bozeman unit lands within the greater Yellowstone ecosystem, and Helena unit and Conrad unit lands within the ~~Northern Continental Divide ecosystem NCDE~~, the department shall determine appropriate methods to comply with the Endangered Species Act, 16 U.S.C. Sections 1531 through 1544 and 77-5-116, MCA, on a project level basis. Factors to consider shall include, but not be limited to:

(a) cover retention;

(b) duration of activity;

(c) seasonal restrictions;

(d) hiding cover near riparian zones;

(e) food storage (where applicable); and

(f) road density.

NEW RULE XXXVI (36.11.436) SENSITIVE SPECIES

~~(1) Sensitive species usually have specific habitat requirements, and consideration of their needs is recognized as a useful fine filter for ensuring the department meets its primary goal to maintain diverse and healthy forests. Considering sensitive species in management actions ensures that the department is making decisions appropriate to the department's fundamental philosophy. The department recognizes that certain plant and animal species, both terrestrial and aquatic, are particularly sensitive to human activities in managed forests. Populations of such species are usually small and/or declining. Continued adverse impacts from land management activities may lead to their being federally listed as threatened or endangered. Because sensitive species usually have specific habitat requirements, consideration of their needs is recognized as a useful and prudent fine filter for ensuring the department meets the primary goal of maintaining diverse and healthy forests. Considering sensitive species in management actions helps ensure that decisions will be made appropriate to the fundamental philosophy and that additional federal listings will not be necessary.~~

(a) remains as proposed.

(2) The department shall manage to generally support populations of sensitive species on state trust lands. ~~to the extent consistent with emulation of natural processes and 77-5-116, MCA.~~ The department shall accomplish this by managing for site characteristics generally recognized as important for ensuring their long-term persistence. The department may accept localized adverse impacts, but only within the context of an overall strategy that ~~promotes biodiversity and supports habitat capability~~ for these species.

(a) ~~The department~~ Department staff shall report notable observations of sensitive plant and animal species to the Montana natural heritage program (MNHP) or other appropriate data repository.

~~(b) The department shall select and monitor projects with listed sensitive animal and plant species to assess implementation of mitigation measures.~~

(b) Sites identified as important on projects with identified sensitive plant species shall be monitored to assess implementation of mitigation measures. On selected department projects with listed sensitive animal species, periodic follow-up surveys would be conducted to assess how well management actions have provided for site conditions needed to support those populations. Deficiencies would be documented and used to guide future management actions and mitigations.

(3) For sensitive plant species, the department shall protect important sites and/or site characteristics with mitigation measures applied to management activities likely to have substantial long-term impacts. Prior to conducting

planned land management activities, the department, at its sole discretion, shall refer to databases maintained by the ~~Montana natural heritage program (MNHP)~~, the United States forest service (USFS) and/or other appropriate sources for information on occurrence of plant species of special concern. Where information indicates potential for sensitive plant species and their habitat to occur within project areas, field surveys and/or consultation with other qualified professionals may be required to determine the presence, location, and mitigation measures for sensitive plant species.

(4) For sensitive animal species, the department shall provide habitat characteristics recognized as suitable for individuals to survive and reproduce in situations where land ownership patterns, underlying biological conditions, and geographical conditions allow for them. ~~suggest they are appropriate given natural disturbance regimes.~~ Pursuant to ~~77-5-116, MCA,~~ The department's contribution toward conservation of wide-ranging animal species that occur in low densities and require large areas to support self-sustaining populations would be supportive of, albeit subsidiary to, the principal role played by federal agencies with larger land holdings.

(5) For proposed projects, the department shall ~~consider providing for~~ look for opportunities to provide for habitat needs of sensitive animal species, primarily through managing for the range of historically occurring conditions appropriate to the sites. In blocked ownerships this shall include consideration of such issues as connectivity and corridors. In scattered ownerships, the department shall not necessarily commit to providing all the life-requisites of individual members of sensitive species, particularly if adjacent landowners managed in ways to limit the potential for individuals on state trust lands to be part of functional populations.

(6) The forest management bureau chief shall maintain a list of sensitive animal and fish species specific to each administrative land office. The department shall develop and modify this list using information and classification systems developed by the USFS, USFWS, MNHP and, for fish species only, the FWP. The department shall use this list at the project level for identifying species appropriate to consider in project analyses at each administrative area office. The department shall base listing by land office on general geographic distribution and habitat affinities of animal species, and would not require site-specific evidence of presence on state trust lands. Additions to, or deletions from this list, of any animal not already categorized as sensitive by USFS region one, or as "fish species of special concern" by FWP, would require written justification. ~~Additions or deletions from this list would require written justification by the forest management bureau chief. The department would not routinely conduct site-specific surveys for the presence of sensitive animal species.~~

NEW RULE XL (36.11.440) SENSITIVE SPECIES - FISHER

(1) The department shall assess fisher habitat on ~~projects project analysis areas~~ that contain preferred fisher cover types for lands administered by the department's northwest land office and southwest land office. When conducting forest management activities, the department shall consider the following as consistent with 77-5-301 and 77-5-302, MCA:

(a) In blocked areas within the Stillwater, Swan River Creek, and Coal Creek state forests, the department shall use the grizzly bear BMU sub-unit as the unit of analysis. In all other areas, the department shall determine the unit of analysis at the project level.

(b) through (d) remain as proposed.

NEW RULE XLIII (36.11.443) BIG GAME (1) The

department shall promote a diversity of stand structures and landscape patterns, and rely on ~~them the stand structures and landscape patterns~~ to provide good habitat for native wildlife populations, ~~, including big game, to the extent consistent with 77-5-116, MCA. Where state ownership contains forest conditions made rare on adjacent lands due to management activities of others, the department shall not necessarily maintain those conditions in amounts sufficient to compensate for their loss when assessed over the broader landscape, except as it coincides with other department objectives.~~

~~(a) The department shall implement measures to mitigate potential impacts if they are consistent with overall management objectives, and with department biodiversity rules.~~

(a) To the extent possible, the department shall manage to provide for big game habitat. Measures to mitigate potential impacts shall be implemented if they are consistent with overall management objectives, and with ARM 36.11.404 through 36.11.418.

~~(b) The department shall consult with the FWP to determine which big game habitat values are most likely to be affected by proposed management actions, and would cooperate with FWP to limit detrimental impacts to big game. on timber sale proposals that are likely to affect big game habitat. The department shall consider comments from the FWP when determining appropriate mitigation measures to limit detrimental impacts to big game.~~

~~(2) remains as proposed.~~

(3) Biodiversity monitoring procedures described in ARM 36.11.419 shall be used to track health of forest ecosystems. This process shall be used as the primary indicator of the health of wildlife populations using these ecosystems. When necessary, corrective actions would be taken as described in ARM 36.11.419.

NEW RULE XLIV (36.11.444) GRAZING ON CLASSIFIED FOREST LANDS (1) through (3) remain as proposed.

(4) The department shall specify the number of animal unit months, type of livestock, and grazing period of use on grazing licenses for classified forest trust lands.

(5) through (13) remain as proposed.

NEW RULE XLVI (36.11.446) FINANCIAL AND ECONOMIC FINANCES AND ECONOMICS (1) through (2) remain as proposed.

(3) The department shall prepare an annual revenue/cost summary for the forest management program programs.

NEW RULE XLVII (36.11.447) CATEGORICAL EXCLUSIONS

(1) through (1)(a) remain as proposed.

(2) Categorical exclusions shall not apply where in the following extraordinary circumstances may occur. This includes, but is not limited to, activities affecting one or more of the following:

(a) through (c) remain as proposed.

(d) ~~activities within~~ the SMZ of fish bearing streams or lakes, except for modification or replacement of bridges, culverts and other crossing structures;

(e) through (v) remain as proposed.

~~(w) Timber harvests of up to 250 Mbf, or salvage harvests of up to 1,000 Mbf.~~

(w) Individual timber sales of up to 100,000 board feet, or salvage harvests of up to 500,000 board feet.

NEW RULE XLVIII (36.11.448) MANAGEMENT OF THE STATE FOREST LAND MANAGEMENT PLAN (1) through (2) remain as proposed.

(a) new legislation passes is adopted that is not compatible with the selected alternative;

(b) through (3) remain as proposed.

(a) Cumulative minor changes could result in a programmatic review of the SFLMP.

(4) through (5)(c) remain as proposed.

NEW RULE L (36.11.450) TIMBER PERMITS (1) Under the authority of 77-5-212, MCA, The the department shall may have the authority to issue commercial timber permits at commercial rates and without advertising that do not exceed 100,000 board feet of timber, or, in cases of emergency salvage, do not to exceed 200,000 board feet of timber pursuant to 77-5-212, MCA. The department shall not be required to obtain approval from the board of land commissioners to issue specific timber permits. The board shall retain administrative oversight of the timber permit program. Permits will not be subject to categorical exclusions except as stated in ARM 36.11.447.

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

General Comments:

COMMENT 1: The purpose section is supposed to describe the "rationale for the intended action" 2-4-302, MCA. The purpose section of this rule is meaningless and wholly incomplete under MAPA.

RESPONSE 1: 2-4-302(1), MCA provides that the department must provide written notice of its intended action. The notice must include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, the reasonable necessity for the intended action, and the time when, place where, and manner in which interested persons may present their views on the intended action. The reasonable necessity must be written in plain, easily understood language. The department disagrees that the rationale is meaningless and incomplete.

COMMENT 2: The department abandoned the plan and the MEPA process that was used to develop the plan. MEPA must be complied with if the department intends to abandon the SFLMP EIS.

RESPONSE 2: No abandonment of either the SFLMP or the MEPA process has occurred. The department was directed by the court to complete rule making on biodiversity implementation guidance related to the SFLMP. The department has conducted a MEPA analysis in association with adoption of these rules.

COMMENT 3: There are no guiding goals and philosophy.

RESPONSE 3: The guiding goals and guiding philosophy followed those contained in the Omega Alternative of the SFLMP.

COMMENT 4: Why were there no public announcements or public presentations?

RESPONSE 4: As required by the Montana Administrative Procedure Act, notice of proposed rulemaking was published in the Montana Administrative Register. During the public comment period, hearings were held in Missoula, Kalispell, and Helena.

COMMENT 5: The rules are arbitrary and capricious.

RESPONSE 5: The rules were developed following the SFLMP and Resource Management Standards.

COMMENT 6: Vague discretionary management prescriptions are not consistent with the state's trust obligation to protect wildlife and to maintain the trust for the benefits of all Montanans for all times.

RESPONSE 6: The rules were written to closely follow the SFLMP Resource Management Standards and Guidance. They were written to specify appropriate levels of protection with

discretionary language that is necessary to address the broad level of management situations that arise at the project level. The Department believes the rules are adequate for the intended purpose.

COMMENT 7: Without relevant specific and supportive scientific literature citations, the document is without credibility.

RESPONSE 7: MAPA does not require the use of scientific literature citations. The department believes the rules are adequate for the intended purpose.

COMMENT 8: Many of the rules are vague or virtually meaningless because they are subject to excessive discretion. Expressions such as "shall consider" or "to the extent practicable" render the rules meaningless.

RESPONSE 8: The rules were written to specify appropriate levels of protection with discretionary language that is necessary to address the broad level of management situations that arise at the project level. The department believes the rules are adequate for the intended purpose.

COMMENT 9: The rules are replete with words and phrases that constitute a confused and crafty strategy.

RESPONSE 9: The department disagrees. The inclusion of terms designed to provide flexibility represents the department's approach to balancing the needs of the general and the specific. The rules were written to specify appropriate levels of protection with discretionary language that is necessary to address the broad level of management situations that arise at the project level. Overly specific language will have unintended and undesirable consequences that are avoided by remaining flexible and using common sense.

COMMENT 10: The term "forest health" used as a rationale in the new rules is inappropriate as a management tool.

RESPONSE 10: The fundamental principle of the SFLMP was meeting our trust obligations by managing for biodiversity and forest health. The department considers maintaining forest health to be on a par with maintaining biodiversity in terms of SFLMP commitments. The fundamental principals and intent of the SFLMP are maintained in the rules.

COMMENT 11: The overall impact of these rules on the productivity of Montana's forest trust lands is not good. It is not good forest management and it is not good trust management. What is happening to the almost 80 million board feet of growth and mortality that is not being harvested? That volume at \$200 per MBF could earn the School Trust another \$16

million per year. Increased management of this trust's resource would also reduce the risk of stand replacement wildfires, and insect and disease impacts improve the productivity of the resource and bring in more revenues to the trusts in the future.

RESPONSE 11: The department will follow the SFLMP, and the department has discretion for generating reasonable and legitimate return over the long-term.

COMMENT 12: These new rules, designed to favor biodiversity and old growth, are un-mandated and will reduce the income to the Trust today as well as reducing the overall productivity of the land and income to the Trust in the future. If the people of Montana really want those lands for un-mandated purposes then they should be willing to compensate the Trust for those uses. If the federal government mandates that Montana must support the ESA then the federal government should pay for it.

RESPONSE 12: The department does not anticipate income reduction to the trusts as a result of these rules, and long-term productivity will be maintained or enhanced. Provisions contained in Section 9 of the ESA apply to state and private entities. The federal government has, indeed, mandated that the State of Montana support and abide by the strict terms of Section 9 of the ESA even if doing so reduces trust revenue. The department assumes responsibility for compliance with the ESA as it applies to school trust lands.

COMMENT 13: The benefits of trust lands, with full biological diversity, are of incalculable value to the support of public education. The rules do not protect or further these obligations. Montana's plant and animal resources, especially ever-dwindling old growth are part of Montanans' fundamental right to a clean and healthful environment and the rules do not further the state's duty to implement and uphold that constitutional goal.

RESPONSE 13: The rules maintain the fundamental philosophy of the SFLMP. Minor differences occur that do not change the department's management from what occurred prior to the rules. The issues raised by the commenter are thoroughly explained in the rules and legal obligations are fulfilled.

Comments Regarding School Funding

COMMENT 14: In reality, the monetary return via logging to support Montana schools is a fraction of funding for K through 12 education. We are continuously misled about the real economic balance sheet and the long-term conservation effects of many timber sales. Most real costs of state timber sales are hidden.

RESPONSE 14: The department appreciates the comment and recognizes that some people would rather not harvest trees from the forest to fund education. However, the department is required to manage forested trust lands for the benefit of Montana schools. The Legislature ultimately determines the level of school funding. Without the additional money generated through the management of state trust lands, K-12 education would not be funded at current levels.

Comments Regarding the Relationship to the Plan

COMMENT 15: The Rules abandon the Plan rather than implement it. The Rules are a significant departure from the original commitments made in the Plan.

RESPONSE 15: The department disagrees. The rules implement the SFLMP with only minor deviations as allowed for and encouraged in the SFLMP.

COMMENT 16: The rules throw out the commitments, science and intent of the Plan and replace it with an uncertain and unscientific management scheme.

RESPONSE 16: The rules are thoroughly grounded in science and faithfully implement the intent of the SFLMP.

COMMENT 17: The Remington paper incorporated Old Growth management into the Resource Management Standard. That management regime has changed under the new rules, without explanation as to how biodiversity is affected. These significant changes warrant analysis under MEPA.

RESPONSE 17: The department is not obligated to manage old growth according to the Remington report. It represents no change from the SFLMP. The rules implement biodiversity guidelines that the district court ruling found to represent no deviation from the SFLMP. The rules will serve as the guiding technical document for department decision making. The department has conducted a MEPA analysis in association with adoption of these rules.

COMMENT 18: DNRC told the District Court "if the Department chose to change the OG standard there is no doubt that some level of MEPA review would be triggered". MEPA analysis must be undertaken.

RESPONSE 18: The department has conducted a MEPA analysis in association with adoption of these rules.

Comments Regarding the USFWS and the ESA

COMMENT 19: Should the department decide to continue forward with the proposed Rule changes we believe that

consultation with the USFWS will be necessary for the State to meet its obligation under the Endangered Species Act.

RESPONSE 19: The department disagrees that rulemaking triggers a consultation with the USFWS. The department is under no legal obligation to consult formally or informally with the USFWS, because section 7 of the ESA does not apply to states, only the federal government. A copy of the Proposal Notice was furnished to USFWS. No comments were received.

Comments Regarding Old Growth (ARM 36.11.418)

COMMENT 20: The rules leave out any mention of preserving 50% of the old growth forests.

RESPONSE 20: 77-5-116, MCA prohibits the department from setting aside old growth, open-space, wildlife management areas, and natural areas. The RMS 6 from the SFLMP was removed from the rules.

COMMENT 21: The department is also not committing to maintaining sufficient replacement old growth stands.

RESPONSE 21: Since the department has no numerical old growth commitment, it has no replacement old growth obligation.

COMMENT 22: The recommendations of the Technical Review Team have been completely disregarded by the department.

RESPONSE 22: The Old Growth Technical Review Team's findings are incorporated to the extent appropriate in the rules, for example our old growth definition. Their primary finding that old growth retention was contrary to our trust obligations was made into law (77-5-116, MCA) by the 2001 legislature through Senate Bill 354. Consequently, suggestions by the Tech Team, made with the understanding that old growth costs the trusts to retain rather than benefiting the trusts, are no longer valid considerations for our management.

COMMENT 23: The department's criteria for old growth will allow some stands to be clearcut under the guise of restoration or maintenance. Leaving 10 trees per acre is essentially a clearcut.

RESPONSE 23: The Green definitions provide objective thresholds for identifying old-growth stands. The department agrees that the thresholds defined may not meet with everyone's interpretation of old growth. However, the department believes that objective numeric thresholds can be, and are, consistently applied on the ground.

COMMENT 24: The rules provide no real guidelines for managing old growth.

RESPONSE 24: The department disagrees. The rules provide explicit guidelines for managing old growth.

COMMENT 25: Severe thinning would degrade or eliminate its value to closed canopy old growth species in favor of open canopy old growth species that may not even be present.

RESPONSE 25: The department agrees that treatments to old growth may increase or decrease their utility for some species. This specificity is dealt with in project-level analyses. However, the fundamental principles of the SFLMP and the rules cannot be achieved if we assume all current forest conditions are desirable. The department has committed to emulate landscape patterns and processes that were likely to exist under average historic conditions. A full range of stand structures and compositions would be present.

COMMENT 26: The rules focus on short-term monetary gain to the exclusion of all else, which is short-sighted and unconstitutional.

RESPONSE 26: The rules strike the appropriate balance between short and long-term revenue.

COMMENT 27: The rules are often contradictory.

RESPONSE 27: The department strove to eliminate any contradictory rules.

COMMENT 28: There is no clear, reliable definition of what the desired future conditions of state forests should be, yet the implementation of that definition is the crux of these rules.

RESPONSE 28: See ARM 36.11.405 where desired future conditions are explicitly defined through an objective process.

COMMENT 29: The department does not provide clear guidelines for how it will make decisions. This is a marked contrast to the Plan, which was very clear on these guidelines.

RESPONSE 29: The rules explain in far greater detail and specificity how decisions will be made than did the SFLMP, for example specifying in detail that certain decisions will be made at the project level.

COMMENT 30: The rules never say how decisions will be made when inadequate data are available.

RESPONSE 30: The department disagrees. Within the new rules, adequate provisions are made for addressing this topic.

COMMENT 31: The rules never say how conflicting management objectives will be balanced.

RESPONSE 31: The rules explicitly detail how anticipated or potential conflicts may be dealt with (for example, ARM 36.11.404, Fine Filter).

COMMENT 32: The rules deviate significantly from the Plan but provide no analysis under MEPA as justification.

RESPONSE 32: The rules do not deviate from the intent of the SFLMP. Minor modifications were expected and are encouraged in the SFLMP, as is explained in the record of decision.

COMMENT 33: Contrary to statute and the constitution, the Rules transfer significant power from the Land Board to the department.

RESPONSE 33: No transfer of power is intended nor present. No change in the decision making process or authority has been instigated by the rules. Montana statutes provide that the Board may adopt rules.

Comments Regarding 77-5-116, MCA

COMMENT 34: The rules do not clarify 77-5-116, MCA. The rules do not mention how this law will be interpreted by the agency and the Land Board. The rules give the project level foresters the discretion to interpret this law on a case-by-case basis.

RESPONSE 34: See responses in ARM 36.11.404 through ARM 36.11.419. 77-5-116, MCA provides neither the Board nor the department the discretion or the mandate to adopt rules to implement its provisions. Therefore, rules have not been drafted to clarify, interpret or implement the statute.

COMMENT 35: Because the lands are intended to benefit the trust in perpetuity, the rules should clearly state that the benefits can and should go beyond short-term financial gain. Frequent reference to the 77-5-116, MCA seems to indicate the department will begin to manage for short-term profits rather than long-term profits.

RESPONSE 35: The rules were drafted consistent with the SFLMP and, therefore, with the long-term benefit to the trust corpus as a key component. By referencing the code the department recognizes that there are other legislative requirements to meet than those stated in the SFLMP. These rules are written in support of the SFLMP and, therefore, implement its strategies. The central premise of the selected management alternative of the Plan "is that the best way to

produce long-term income for the trust is to manage intensively for healthy and biologically diverse forests".

Comments Regarding Shift of Decision-Making Authority

COMMENT 36: These rules shift many of the fiduciary responsibilities to project level staff people within the department. The Land Board is the fiduciary of this trust. Department staff should not be a substitute when it comes to fundamental decision-making. Expecting foresters and wildlife biologists to understand, weigh, and implement the trustees' fiduciary obligations is unreasonable and inappropriate.

RESPONSE 36: The department disagrees that there has been a shift in responsibilities. The rules do not alter the decision-making process and structure. Economics have always been part of project level planning. As part of their professional education, foresters and wildlife biologists typically study micro, macro, and forestry economics. They are expected to use their training and experience to include economics as a consideration in planning projects, especially in an agency that has revenue generation as its mission.

Comments Regarding Landscape versus Project

COMMENT 37: Throughout the rules the department has changed the landscape level analysis for roads, watersheds and biodiversity management to project level analysis. How will DNRC consider the effects of fragmentation and connectivity at a project level? How can the department meet biodiversity goals on a landscape level with just project level analysis and no old growth network? How can the department manage its road network with project level analysis? How can water quality be protected from cumulative impacts without watershed analysis? This is a significant change to the Plan.

RESPONSE 37: There has been no change in intent from the SFLMP to the rules regarding level of analysis. The biodiversity goals at the landscape level are analyzed at the project level just as has occurred since signing of the ROD in 1996.

Comments Regarding Wildlife

COMMENT 38: Vague language in the rules render them meaningless for protecting threatened and endangered species.

RESPONSE 38: The department disagrees. The rules explicitly address threatened and endangered species.

COMMENT 39: There are not specific criteria for large logs even though these are a critical habitat feature to many wildlife.

RESPONSE 39: The rules require that coarse woody debris be retained and appropriate amounts be determined at the project level. The rule was purposely written to be flexible to allow for advances in our current understanding and allow for the broad range of conditions that exist in the field.

COMMENT 40: Over the long-term, recruitment of large snags will decline to very low levels across state lands because of continual removal of most large trees that could produce snag.

RESPONSE 40: The department disagrees. This assumption does not take into consideration the rate that small trees can mature into large trees. Further, the rules do not require most large trees be removed. The rules pertaining to snags represent a compromise that maintains an appreciable portion of an important habitat element, while recognizing the agency mandate to generate revenue.

COMMENT 41: There is no strategy identified for any sensitive old growth wildlife species in the Rules that will ensure that optimal habitat conditions will be provided anywhere in any amount on state lands.

RESPONSE 41: The department never committed in the SFLMP to maintain optimal habitat conditions for any species of wildlife. The rules are no exception. The rules and applicable SFLMP resource management standards state that "The department shall manage to generally support populations of sensitive species on state trust lands. The department shall accomplish this by managing for site characteristics generally recognized as important for ensuring their long-term persistence. The department may accept localized adverse impacts, but only within the context of an overall strategy that promotes biodiversity and supports habitat for these species."

COMMENT 42: It is unclear why the department has not incorporated provision of optimal habitat reserves for sensitive and old growth species into the rules.

RESPONSE 42: The department never committed in the SFLMP to maintain optimal habitat conditions for any species of wildlife.

COMMENT 43: With regard to Endangered Species, for example lynx and grizzly bears, your definitions are very specific. Current rules and management practices will surely change. It would be good to add to the rules a provision that allows adoption of new science without going through MAPA.

RESPONSE 43: This consideration was discussed at length by department staff while developing draft rules. It was decided that rule amendments would ultimately be necessary

following changes brought about by new science, particularly as related to direction for threatened and endangered species. Many other rules contain language that allow for advances in science and changes in methodologies without requiring rule revision.

Comments regarding silviculture (ARM 36.11.408 and 36.11.420)

COMMENT 44: Several important sections from the State Forest Management Plan's resource management standards 6, 7, 8, 10, 17, and 18 have been eliminated in the Rules. Please explain why you eliminated these resource management standards.

RESPONSE 44: See specific responses 160 through 167 within the comments on ARM 36.11.420 SILVICULTURE.

Comments Regarding Threatened Plant Species

COMMENT 45: Montana Native Plant Society (MNPS) believes there should be a new rule that governs the management of Howellia aquatilis, a federally listed threatened species that is found throughout much of the Swan Valley and is known to occur on state lands there. We recommend adopting rules based on the USFS's 1997 Howellia aquatilis Conservation Strategy.

RESPONSE 45: This plant would consistently be considered during project development. Known plant locations would be obtained from the Montana Natural Heritage Program and appropriate mitigations would be developed.

Comments Regarding Watershed (ARM 36.11.422 through 36.11.426)

COMMENT 46: The following Watershed Resource Management Standards from the Plan were omitted from the Rules with no justification or review: resource management standards 7, 11, 14, 15, 16, 17, 18, 20, 21, 23, and 24. This is a significant change from the Plan.

RESPONSE 46: The language contained in the forest management rules is different than that contained in Watershed RMS 7. SFLMP Watershed Resource Management Standards (RMS) 7 specified that threshold values for cumulative watershed effects would be established for the Stillwater, Coal Creek and Swan River state forests at a level to ensure protection of beneficial uses with a low degree of risk. The language was changed in the rules to reflect changes that have occurred within Montana Law regarding assessment of impaired bodies of water and development of Total Maximum Load Development (TMDL), since the adoption of the SFLMP.

Watershed resource management standards 14, 15, 16 and 17 were dropped from the forest management rule set because they pertain to activities that are administered under separate

department programs. The intent of the forest management rules is to address the department forest management activities as defined by rule.

The language contained in the forest management rules is different than that contained in Watershed RMS's 21 and 23. The language in WS RMS 21 was changed to incorporate only those activities administered under the Forest Management Program. The language contained in the Watershed RMS 23 was also changed in the rules. Specific references to the Flathead Basin Forest Practices and Fisheries Program Final Report Recommendations were dropped from rules. This is because the monitoring strategy outlined in this document has been superseded by the development and adoption of a Bull Trout Restoration Plan, and a Conservation Agreement for Westslope Cutthroat Trout by the State of Montana.

The revised rules contain language consistent with the other RMS's identified in the comment. Changes to these rules are explained in the responses to comments specific to individual rules. To ensure consistency with the SFLMP, the rules were revised to incorporate the remaining RMS's referred to in the comment.

Comments Regarding Fisheries (ARM 36.11.426)

COMMENT 47: The following Fisheries RMS's were omitted from the rules with no justification or review: RMS 1, 2, 4, 5, 7, and 9. It allows the degradation of sensitive and listed fish habitats by ignoring standards for sediment, allowing riparian logging with no allowance for woody debris recruitment for pool formation, and allowing fragmentation of fish habitat.

RESPONSE 47: The language contained in the forest management rule set is different than that contained in Fisheries RMS's 2, 8 and 9. Specific references to the Flathead Basin Forest Practices and Fisheries Program Final Report Recommendation 17 and the Immediate Actions for Bull Trout recommended by Governor's Bull Trout Restoration Team were dropped from rules. This is because the documents referenced in the original RMS's have been superseded by the development and adoption of a Bull Trout Restoration Plan and a Conservation Agreement for Westslope Cutthroat Trout by the State of Montana.

Fisheries RMS 7 was dropped from the forest management rules because these conservation measures have also been integrated into the State's Bull Trout Restoration Plan, and conservation strategies contained in the Westslope and Yellowstone Cutthroat Trout Conservation Agreements. The revised rules contain language consistent with the other RMS's identified in the comment. Changes to these rules are explained in the responses to comments specific to individual rules. To ensure consistency with the SFLMP, the rules were revised to incorporate the remaining RMS's referred to in the comment.

Specific Comments

Comments Regarding ARM 36.11.403 DEFINITIONS

COMMENT 48: There should be a definition for unit-level.

RESPONSE 48: See definition (4) for administrative unit. Unit-level was redefined through the added term "administrative unit".

COMMENT 49: There is no definition for sensitive species. The rules should include Montana Department of Fish Wildlife and Park's definition of species of special concern.

RESPONSE 49: The department considers language contained in the rules pertaining to sensitive species to be adequate for describing sensitive species. See ARM 36.11.436(6) Sensitive Species. The department uses several sources of information to derive and maintain a current sensitive species list. Species included on the list are tailored to the distribution of school trust lands across the state. An additional specific definition is not considered necessary to develop a defensible list or implement the rules.

COMMENT 50: There is no definition for endangered or threatened species.

RESPONSE 50: These terms refer to those species federally listed for protections under the Endangered Species Act. Existing language that clarifies this is contained in the rules. See ARM 36.11.427(2), ARM 36.11.428(1) and (2)(a). An additional specific definition is not considered necessary to implement the rules.

COMMENT 51: There should be a definition for administrative unit.

RESPONSE 51: The department concurs. The definition was added to improve clarity, and to reduce confusion with the term "unit-level".

COMMENT 52: The department is creating artificial BMU's with the use of "as determined by the department".

RESPONSE 52: The department acknowledges that the phrase "...as determined by the department" is not accurate in the context of BMU development. BMU's currently used by the department and other state and federal agencies were developed by an interagency technical committee. The department does not intend to adjust existing BMU boundaries through the adoption of these rules. The rule was revised for clarity and the phrase was deleted from the rule.

COMMENT 53: There should be a definition for coarse filter.

RESPONSE 53: The department concurs. The definition was added to improve clarity.

COMMENT 54: The department needs to include a specific, science-based definition of connectivity and what that will be in relation to grizzly bears. A strip of unharvested forest, unrelated to grizzly bear habitat needs, will not meet habitat requirements.

RESPONSE 54: Science is currently lacking, but is underway to address this important issue. The department does not consider this definition to imply that small forested patches will provide for the broad needs of grizzly bears. The department believes that this rule allows for an appropriate level of discretion for species-specific considerations.

COMMENT 55: There should be a definition for cover type.

RESPONSE 55: The department concurs. The definition (21) was added.

COMMENT 56: The definition for denning period will allow snowmobiles and logging during this time period. However, many male grizzlies don't turn in until mid-December, and are out by mid-March. This must be considered as part of motorized access management plans. The department needs to map prime denning habitat on all state lands and minimize winter impacts.

RESPONSE 56: The definition is the current accepted definition of the Grizzly Bear Northern Continental Divide Ecosystem Interagency Subcommittee. It is a science-based definition that is appropriate given the context in which it is used in the rules.

COMMENT 57: The definition of lakes should not be limited to water bodies that support fish.

RESPONSE 57: The definition contained in this rule is consistent with the definition contained in administrative rules adopted under the Streamside Management Zone Law.

COMMENT 58: The department claims they are using the Green et al old growth criteria. They have limited these criteria to one factor: the number of large trees in the stand. The green definition requires use of multiple criteria. Using a one-size-fits-all approach minimum snag retention amount is not consistent with the best science or Green et al.

RESPONSE 58: The department has adopted the minimal numeric criteria for defining old growth as described by Green et al. These minimal criteria are number and size of large trees by old-growth type; there are no other minimal criteria for old growth in western Montana. In old-growth stands in eastern Montana, there is often a minimum basal area per acre criterion as well. This definition was adopted following recommendations from the Technical Review Committee and various special interest groups.

COMMENT 59: The Green definition cannot be consistently applied to the ground, thus you are still open to interpretation for any stands that remotely resemble old growth.

RESPONSE 59: The Green definitions provide objective thresholds for identifying old-growth stands. The department agrees that the thresholds defined may not meet with everyone's interpretation of old growth. However, being objective numeric thresholds, the department believes they can be, and are consistently applied on the ground.

COMMENT 60: We are not in complete agreement with the use of the Green definition.

RESPONSE 60: The department appreciates the comment. The department agrees that the thresholds defined may not meet with everyone's interpretation of old growth. However, being objective numeric thresholds, the department believes they can be, and are consistently applied on the ground.

COMMENT 61: The definition for open road is invalid because it is not based on any known grizzly bear science. The department needs to justify this definition.

RESPONSE 61: The definition in question is the current accepted definition of the Grizzly Bear Northern Continental Divide Ecosystem Interagency Subcommittee. It is a science-based definition that is appropriate given the context in which it is used in the proposed rules. The definition originated from work associated with the South Fork Grizzly Bear Project. The definition is also accepted and applied in the USFS Flathead National Forest, Forest Plan Amendment-19.

COMMENT 62: The definition for project analysis area gives no guidance on its definition. It should be delineated on watershed boundaries whenever possible.

RESPONSE 62: The definition was not necessary and was deleted from the rules.

COMMENT 63: There should be a definition for replacement old growth.

RESPONSE 63: Definition was added to improve clarity.

COMMENT 64: Regarding the definition of restricted road, there is an abundance of recent scientific information that indicates all terrain vehicles and other recreational vehicles including 4X4s just go around the gate closures. You either close the road, re-contour it back to the landscape, or don't call it a road closure.

RESPONSE 64: The department recognizes that closure device types vary in their effectiveness for restricting different types of legal and illegal access. This is the definition accepted by the Interagency Grizzly Bear Committee Taskforce (1994). Considering the best available science and interagency acceptance, the department believes this definition is adequate for mitigating concerns involving grizzly bears.

COMMENT 65: Regarding the definition of restricted road the levels of use defined in the rules are arbitrary and capricious. This definition has the same problem as the open road definition. Under this definition you could "restrict" a sub-alpine road during the spring when there are no bears there, then open it for the rest of the year when bears were present for six passes a week, and still call it restricted. The department needs to use the best available science when creating these definitions. Under this proposed definition any road or trail open during any portion of the non-denning period for more than a few token days, is open, not restricted since open roads are far more disruptive than restricted ones, although both can displace bears.

RESPONSE 65: The last portion of this rule was edited to clarify the purpose and intent of allowable exemptions for low-level use calculations. Low use levels in question involve definitions currently accepted by the Grizzly Bear Northern Continental Divide Ecosystem Interagency Subcommittee. The definitions are also accepted and applied in the USFS Flathead National Forest, Forest Plan Amendment-19. The levels described in rule are science-based. The definitions originated from work associated with the South Fork Grizzly Bear Project.

COMMENT 66: The definition for restricted road would indicate enough traffic to anyone approaching the gate in an all terrain vehicle or 4X4 that the road was not closed.

RESPONSE 66: The department recognizes the need to manage road usage to minimize impacts to grizzly bears and other wildlife. While indications of road use (such as tracks behind gates) may imply to some individuals that a road is

"not closed," closure methods and devices in place would serve to physically and legally restrict access. The definitions contained in these rules were an attempt to tailor a broad set of existing interagency definitions and policies pertaining to grizzly bears into procedures applicable to department ownership and mandates.

COMMENT 67: Regarding the definition for restricted road non-emergency activities such as monitoring, tree planting and prescribed burning should all be considered in calculation of use levels.

RESPONSE 67: The rule was edited to clarify the purpose and intent of allowable exemptions for low-level use calculations. The department made allowances for these activities as they occur infrequently, are commonly of short duration, and typically serve to benefit bears.

COMMENT 68: There should be a definition for riparian management zone.

RESPONSE 68: The definition of riparian management zone has been added because this term has replaced the use of the term "extended SMZ". See definition (65).

COMMENT 69: Regarding the definition for road in security core areas, what are these permanent closure devices and how is their effectiveness regularly documented? Gates, rocks and signs are ineffective. If it is an effective, permanent closure, why does the department still list it as a road, especially in core areas?

RESPONSE 69: Examples of such devices were provided in rule. Monitoring and the determination of effectiveness are addressed in ARM 36.11.421, Road Management. This definition was taken directly from the Interagency Grizzly Bear Committee Taskforce Report (1994). Permanent structures are considered those intended to restrict all forms of motorized access, including commercial and administrative uses. The assigned status of any existing road varies due to factors such as location, expected use level (including non-motorized), road prism condition, and potential for future use, etc.

COMMENT 70: The definition for seasonally secure area should not be permitted. This definition is based on the faulty assumption that we know where grizzlies are and their time of use. It assumes bears can simply move protected around altitudinally as they leave one habitat and move to another. This assumption is false, and was criticized by peer reviewers as well as independent scientists. The Northern Continental Divide Ecosystem withdrew this definition.

RESPONSE 70: The department acknowledges the controversy and disagreement surrounding the concept of

seasonally secure areas. It is the department's view that the Northern Continental Divide Ecosystem Subcommittee continues to consider this approach as potentially viable. As displayed in the rules, the department believes that this definition stands on its own and accurately describes landscape elements of importance for grizzly bears.

COMMENT 71: Regarding the definition for security core areas, security core should be retained for at least 10 years per the 1994 Interagency Grizzly Bear Committee report.

RESPONSE 71: Due to constraints related to land ownership amount, location, distribution, and agency mandates differing from those of federal agencies, the department has never firmly committed to retaining grizzly bear security core for periods greater than or equal to 10 years. The 10-year period (based on one female grizzly bear generation time to replace herself) was adopted by federal agencies following its acceptance by the Interagency Grizzly Bear Task Force (1994). The department recognizes the importance of the 10-year generation time for bears and believes this definition adequately defines security core areas for its intended use in the proposed rules.

COMMENT 72: The definition for simple linear calculation is a completely outdated technique which allows the department to "average away" excessive road density by averaging it over the entire area. The accepted best science is to use a GIS "Moving Windows" analysis that calculates road densities for every square mile and tells you what percent of a BMU has open road densities exceeding one mile/square mile and total road densities exceeding two miles/square mile.

RESPONSE 72: The department believes that this definition and methodology adequately addresses road density evaluation for the intended purpose.

COMMENT 73: "Sites with high erosion risk" is not quantitatively defined.

RESPONSE 73: Quantitative assessments are done at the project level. The rule is consistent with the SFLMP.

COMMENT 74: Why the subtle word-change to the definition (86) of SMZ? Shouldn't this read exactly the same as the MCA and rules regarding SMZ's?

RESPONSE 74: The definition is consistent with Montana Code Annotated and other existing administrative rules. Inclusion of the "SMZ" acronym in rule clarifies the use of the "SMZ" term as it pertains to the rules.

COMMENT 75: The department is clearly trying to define this as narrowly as possible and claim they are prohibited

from "taking grizzlies." Unfortunately, the Supreme Court has found that harm to habitat equals harm to the species if it is likely to cause a take or jeopardy to the species. The department needs to make sure they include "harm to habitat" in the proposed definition.

RESPONSE 75: Use of the word "taking" and the definition of "take" were removed from the rules. This revision is consistent with the SFLMP.

COMMENT 76: Total road density should include all open roads, restricted roads and motorized trails.

RESPONSE 76: The department recognizes that this is an error and the definition (86) was edited. Open roads, restricted roads and motorized trails should be considered in analyses of total road density.

COMMENT 77: There should be a definition for urban forestland/interface.

RESPONSE 77: Definition for "urban forest land/interface" (89) was added to clarify the intent of the rule.

COMMENT 78: This definition for visual screening needs to be quantified to a definite standard, such as cover sufficient to hide an adult grizzly at 200 feet or some other standard.

RESPONSE 78: This definition is adapted from the Swan Valley Grizzly Bear Conservation Agreement. Its intended purpose is to address cover retention for bears along open roads. As applied in these rules, this definition is purposely intended to differ from the hiding cover definition. The department believes the definition meets the intended purpose to allow for consideration of cover retention along open roads.

Comments Regarding ARM 36.11.404 BIODIVERSITY - COARSE FILTER APPROACH

COMMENT 79: ARM 36.11.404 An important statement from the SFLMP has been left out: A coarse filter approach assumes that if landscape patterns and process (similar to those species evolved with) are maintained, then the full complement of species will persist and biodiversity will be maintained.

RESPONSE 79: The definition for "coarse filter" has been edited and includes the language identified in the comment.

COMMENT 80: ARM 36.11.404 omits the necessary step of considering stand structures and compositions on adjoining

land ownerships within an ecologically appropriate analysis area. It is necessary for the managers of adjoining forested properties to work together more closely in forming community approaches that meet multiple objectives. This is especially important in areas of checkerboard ownership where DNRC parcels are often located.

RESPONSE 80: The department concurs that conditions on adjacent ownerships influence landscape level biodiversity. The department considers conditions on adjacent ownerships in project assessments. However, in the SFLMP the department purposefully states it would not commit to retaining conditions made rare on the landscape by the actions of others. That concept is maintained in these rules. For commitments related to cooperative planning, see ARM 36.11.417.

Comments Regarding ARM 36.11.405 BIODIVERSITY - DESIRED FUTURE CONDITIONS

COMMENT 81: ARM 36.11.405(1) What is the site-specific model? Will the public get to comment on the model before it is utilized? What happens if there are no data available?

RESPONSE 81: The site-specific model described in this rule has been described and utilized in timber sales for the last six years providing dozens of opportunities for public and interest group input. The model is described in ARM 36.11.405(1)(a)(i). When data are not available at the administrative unit level, then project level data will be used.

COMMENT 82: The rule should read: "the department shall assess stand structure at the project level and track quantities of various structures at the unit level, and shall ensure that adequate data are collected demonstrating the agency can meet desired future conditions".

RESPONSE 82: The department believes the current language better describes the process and commitment.

COMMENT 83: The rule is confusing and provides too much discretion. Who will develop the larger administrative unit level and or landscape level plans that will guide individual projects?

RESPONSE 83: The rule provides specific direction for the development of unit level desired future conditions (DFC). The unit level desired future conditions are calculated and described by department staff at the project level and provide a consistent target over time.

COMMENT 84: Who will look at cumulative impacts of projects?

RESPONSE 84: Cumulative effects are analyzed and described by department staff at the project level.

COMMENT 85: How will the public know what is going on in each state forest or what the goals are for each forest?

RESPONSE 85: This information is currently disclosed in project-level environmental assessments. The rules will not change this practice.

COMMENT 86: ARM 36.11.405(1)(a) What does the department mean by local knowledge? Whose knowledge will be considered?

RESPONSE 86: Local knowledge refers to the site-specific knowledge gained by the interdisciplinary (ID) team in compiling data and information for the project-level analysis associated with MEPA. This in-depth knowledge augments or replaces the broader stand level inventory assessments.

COMMENT 87: ARM 36.11.405(1)(a) A rule should not be written so that decisions will be left to local project managers. A rule should provide the public with certainty about how decisions will be made across the landscape so arguments on individual forests projects can be avoided.

RESPONSE 87: The department believes that all decisions made that involve real actions should be made following project-level analysis and decision-making. It is at the project level that the best information and highest levels of informed public participation occur. Thus, the department's commitment to making decisions at the project level provides the public with the greatest certainty that actions will be consistent with all of the department mandates and objectives, and that the interests of the public will receive the consideration warranted.

COMMENT 88: ARM 36.11.405(1)(b) This section should be deleted.

RESPONSE 88: The department concurs and has deleted this part of the rule to accommodate inclusion of a numeric old growth commitment. Other revision clarifies intent of the rule and department philosophy.

COMMENT 89: What guidelines are the department using to promote appropriate conditions?

RESPONSE 89: See ARM 36.11.404 through 36.11.419.

COMMENT 90: ARM 36.11.405 Is the department using 77-5-116, MCA to justify its departure from the commitments in the Plan? If so, how and why does this new law justify this change?

RESPONSE 90: The department is bound to obey the law. 77-5-116, MCA specifically prevents the department or the land board from setting aside old growth, open spaces, and wildlife habitat, without receiving full market value. The rules maintain the commitments made in the SFLMP.

COMMENT 91: ARM 36.11.405 The public has a right to know how the department interprets this new law and how that interpretation complements, interferes with, or does not change the Plan. The New Rules completely fail to provide that interpretation.

RESPONSE 91: The rules describe the department's management strategies within the context of all applicable laws. See response 99. If the comment is a request that the department or the Land Board promulgate a rule to interpret 77-5-116, MCA, that statute provides neither the department nor the Land Board the authority to promulgate such a rule.

COMMENT 92: How can you achieve biodiversity goals at a landscape level when desired future conditions (DFC's) are determined at a project level?

RESPONSE 92: DFC's are defined at the landscape level using the model referred to in ARM 36.11.404. DFC's may be refined through project level analysis.

COMMENT 93: ARM 36.11.405(1)(b) Achieving biodiversity goals at a landscape level dictates the presence of stands in all age-classes. This should be stated as explicitly as possible.

RESPONSE 93: The department concurs with the suggestion, and the rule has been edited to reflect this concurrence.

COMMENT 94: ARM 36.11.405(1)(b) Will a project level staff person have free reign to decide the desired future stand structural composition?

RESPONSE 94: Project level decisions are the result of interdisciplinary team efforts, public involvement, the rules, applicable laws, etc. No single individual has total discretion over any aspect of project-level decision making.

COMMENT 95: ARM 36.11.405(1)(c) If data are not available will DNRC gather these data? Will the department assess and quantify stand structure if those data are not available?

RESPONSE 95: The department collects the necessary data at the project level to make project level decisions. The rule uses "to the extent data are available" language so that well documented, project-level analysis and decisions can be made without delays caused by lack of data on far removed or unaffected portions of state ownership.

Comments Regarding ARM 36.11.406 BIODIVERSITY - FINE FILTER APPROACH

COMMENT 96: ARM 36.11.406(1) Is the department putting 77-5-116, MCA on par with the ESA?

RESPONSE 96: The language states that our application of the fine filter must comply with the ESA, and 77-5-116, MCA.

COMMENT 97: ARM 36.11.406(1) What happens when the fine filter approach is not consistent with the ESA and 77-5-116, MCA?

RESPONSE 97: The department must obey prevailing laws. If fine filter assessments for sensitive species suggest the department should break the law to provide or protect habitat for whatever species is being assessed, the department will take the legal course.

COMMENT 98: ARM 36.11.406 How will the department settle a conflict between ESA and 77-5-116, MCA? The language should clearly state that the ESA takes precedent over state law.

RESPONSE 98: The department does not believe specific reiteration of the precedent that federal law takes over state law is necessary in the rules.

COMMENT 99: ARM 36.11.406(1) This rule should be modified to say "...to the extent consistent with the ESA sections 1531 through 1544 and 77-5-116, MCA and with conservation plans for which the state of Montana is a signatory, including but not limited to plans developed for conserving bull trout, westslope cutthroat trout, Yellowstone cutthroat trout and fluvial arctic grayling."

RESPONSE 99: The department did not include specific reference to memoranda of understanding (MOU's), or memoranda of agreement (MOA's) to which we are signatories, since each change in the language of those would invoke a new rule making process. Specific plans for sensitive and ESA listed species are discussed in the appropriate sections of these rules.

COMMENT 100: ARM 36.11.406(1) It is likely that critical habitat for one or more threatened and endangered

species will occasionally be found on department land, and that timber harvest deferrals will occasionally be necessary to perpetuate these species. It is in the State's and the School Trust's long-term interest to recover threatened and endangered species, and to prevent sensitive species from being listed, by managing key habitats to favor these species. In this manner, the State maintains its greatest opportunity to continue managing forest resources in the future, without added federal encumbrance. Therefore, the proper management of habitat for sensitive, threatened, and endangered species contributes to the department's long-term fiduciary obligations.

RESPONSE 100: The department agrees as outlined in these rules. However, the department's legal obligation is to avoid "take" of ESA listed species.

COMMENT 101: ARM 36.11.406 is vague and provides no guidance that would be useful in settling a conflict between a fine and course filter approach. If this language is intended to say that the DFC as determined at the project level will settle conflicts between the two filters, then it fails to provide guidance or certainty about how decisions will be made because the definition of DFC is vague and unpredictable at best. This means wildlife will have no consistent or reliable protections. These lands must benefit the trusts. That benefit must go beyond financial gain. Because this rule leaves it to the discretion of the project level staff person to determine what the fiduciary obligations consist of, this rule package should clearly state what is meant by fiduciary obligations. In particular it is important for project level foresters to understand that financial considerations are only one component of the overall fiduciary obligation.

RESPONSE 101: The department disagrees. The Rules as presented provide a clear mechanism for resolving apparent conflicts. Also, the department is required to manage these lands for financial gain and protection of the corpus of the trust with undivided loyalty to that mandate. Extraneous and non-trust related benefits do not fulfill our trust mandate. The department regularly reinforces and discusses with our project level personnel our fiduciary responsibilities.

COMMENT 102: ARM 36.11.406(1)(a) Why is the department managing for a desired future condition that promotes a diversity of habitat conditions beneficial to wildlife when the express legal purpose of the land is to produce income for the trust?

RESPONSE 102: The department believes that management consistent with ARM 36.11.405 to 36.11.450 provides the appropriate balance between current revenue maximization and protection of the corpus of the trust, thus providing for the express legal purpose of the trust.

COMMENT 103: Moving towards the conditions defined in ARM 36.11.406(1)(a) (towards biodiversity) when the coarse and fine filters are at odds is not the purpose of Trust Lands.

RESPONSE 103: See response to comment 102.

Comments Regarding ARM 36.11.407 BIODIVERSITY - MANAGEMENT ON BLOCKED LANDS

COMMENT 104: The department has determined that the final sentence of 36.11.407(1) is unnecessary.

RESPONSE 104: The department has made the change.

COMMENT 105: ARM 36.11.407(2)(a) The department gives itself wide latitude to emulate forest conditions. How will the project staff person make these decisions about maintaining a semblance of historic forest conditions when neither has been defined? What other obligations will be considered?

RESPONSE 105: The department specifically describes how these decisions will be made throughout ARM 36.11.405 through 36.11.450. These rules better inform the public regarding our management philosophy by being more descriptive than the SFLMP. In addition, the process for public involvement that currently occurs at the project level will continue. This project-level participation is where the public can contribute informed and meaningful comments on activities that affect the environment.

COMMENT 106: ARM 36.11.407(3)(a) The language of this rule needs to be altered to clarify department intent.

RESPONSE 106: The department concurs and has made the change.

COMMENT 107: ARM 36.11.407(3) The rules authorize impromptu management with no consistent or mandatory reliance on scientific direction.

RESPONSE 107: The rules provide consistent direction and rely both on science and public involvement. Since project-level decisions occur after the appropriate level of public involvement and analysis, no impromptu management can or does occur.

COMMENT 108: ARM 36.11.407(3) The plan said "we would manage", not "shall consider managing to the extent consistent with fiduciary duties..." This altered language considerably weakens the original commitment, leaving the public with no understanding about how these types of management decisions will be made.

RESPONSE 108: The department does not believe the language weakens the commitment since all commitments must comport to applicable laws. The commitment is consistent with the SFLMP. The language clarifies and puts the commitment in context of the laws the department must abide by. The department meets its legal fiduciary obligations while also complying with MEPA. The rule adequately describes that public involvement will occur during project planning. The rule does not commit the department to conducting these assessments over the broader landscape.

COMMENT 109: ARM 36.11.407(3) If you are not going to maintain rare and unique elements, why go through all the analysis?

RESPONSE 109: The rule makes no decisions on whether certain elements will not be retained. The analysis is required to make the site-specific decision.

Comments Regarding ARM 36.11.408 BIODIVERSITY - SELECTION OF SILVICULTURAL SYSTEMS

COMMENT 110: ARM 36.11.408(3) This statement contains no guidelines, no parameters, and no restrictions to guide the department.

RESPONSE 110: ARM 36.11.405 through 36.11.450 provide specific guidelines, parameters, and restrictions to guide the department. The rules provide the public with substantially greater detail in how the department will manage school trust lands than did the SFLMP. Biodiversity goals will not be achieved by artificially restricting the range of possible conditions on the landscape such that common conditions are ignored.

COMMENT 111: ARM 36.11.408(4) What does this mean? It appears that the department gives itself discretion to emulate any type of disturbance.

RESPONSE 111: In the course of project development the department may potentially choose treatments that deviate from predominant disturbance regimes, for example. Although, predominant does not mean something occurs all the time, the department will consider the predominant regime when determining treatments. Nearly all forested sites can and have burned over the range of severities. Limiting treatments to only the predominant regime will have negative consequences to maintaining biodiversity and is contrary to the philosophy of the SFLMP.

COMMENT 112: ARM 36.11.408(4) This is inconsistent with the goal of preserving biodiversity.

RESPONSE 112: The department believes that biodiversity goals cannot be achieved without a diversity of forest conditions on the landscape. Ignoring disturbances that frequently occurred on the landscape will decrease biodiversity, not enhance it.

COMMENT 113: ARM 36.11.408(5)(a) The rule should be changed so that the department "shall retain" a patchy distribution... "consider" leaves too much discretion.

RESPONSE 113: The rule purposefully places the onus on considering the potential conditions to be emulated rather than uniformly and inflexibly forcing an undefined level of patchy retention applied under all circumstances.

COMMENT 114: ARM 36.11.408(5)(c) A stand-replacing fire regime does not always imply large proportions of early seral stands - such as moist grand fir/western red cedar habitat types on the Swan. Managing those types in early seral condition will change the structure and seral stage composition and may alter ecosystem functions from what plants and animals in the area are adapted to.

RESPONSE 114: The department agrees that exceptions exist. However, generally speaking, the forests of Montana developed higher proportions of old age stands under the frequent, non-lethal fire regimes, and would also have lower proportions of early successional stands than would the stand-replacement regimes. The comment correctly identifies the perils of relying on excessive levels of specificity in rules with broad applicability. As specificity is increased, the likelihood of real world exceptions increases. The department believes the levels of specificity displayed in the rules strike the appropriate balance between the general and the specific.

COMMENT 115: ARM 36.11.408(6)(a) How will the department determine what trees would most likely survive an event? Because of provisions in this rule it is not certain that fiduciary obligations will follow prudent scientific forestry management practices with long-term objectives.

RESPONSE 115: There is a large body of literature that discusses the likelihood of tree survival following disturbance. Additionally, the department's foresters have considerable first-hand experience and training in assessment of which trees would likely survive a disturbance. The rule explicitly states meeting fiduciary objectives, which by definition requires prudent action.

COMMENT 116: ARM 36.11.408(6)(a) The department should describe how biodiversity objectives will be met with the second entry on shelterwood cuts.

RESPONSE 116: The department believes the level of detail requested represents project-specific detail that is not appropriate for broadly applicable rules.

COMMENT 117: ARM 36.11.408(6)(a) The rule should not include reference to fiduciary and project level objectives.

RESPONSE 117: Considerations of fiduciary and project-level objectives are part of an iterative process of information gathering, disclosure, and decision-making. They are not adequately dealt with in a linear decision making process. It is impossible to ensure the department is meeting its fiduciary responsibilities without assessing the consequences of its decisions when an action may be taken, that is, at the project level.

COMMENT 118: ARM 36.11.408(7)(c) "Generally avoid" is a meaningless management objective. The department should state in clearer terms what specific conditions merit specific actions.

RESPONSE 118: These rules have broad applicability and terms such as "generally avoid" accurately describe the intent of the rule. The department does not wish to limit the potential to make the correct site-specific decision as could happen with more restrictive language.

COMMENT 119: ARM 36.11.408(9)(b) Clearcuts should never exceed one acre.

RESPONSE 119: One of the characteristic conditions associated with our forests is the large opening. However, there are practical limits to the size of openings we would create as would be determined at the project level, through the MEPA process.

Comments Regarding ARM 36.11.409 BIODIVERSITY - SALVAGE HARVESTING

COMMENT 120: ARM 36.11.409(1) The three qualifications for salvage harvest might be applied anywhere. Standing dead are important for black-backed woodpeckers and shouldn't all be salvaged.

RESPONSE 120: Refer to ARM 36.11.438 where black-backed woodpeckers are addressed.

COMMENT 121: ARM 36.11.409(1) The importance of dead and dying material to long-term forest productivity should be considered. Coarse woody debris supports nitrogen-fixing lower plants and returns nitrogen to the soil.

RESPONSE 121: This topic is adequately addressed in ARM 36.11.410 through 36.11.414.

Comments Regarding ARM 36.11.411 BIODIVERSITY - SNAGS AND SNAG RECRUITS

COMMENT 122: ARM 36.11.411(1)(c) The rule should be changed to say you will retain the largest snags available.

RESPONSE 122: Snags often have both biologic and economic value. The department believes the rule strikes an appropriate balance between the two. However, when no trees over 21" DBH are available the rule states retention of the next largest snag.

COMMENT 123: ARM 36.11.411(1)(c) If the department is willing to put numbers to snag recruits why not put numbers to old growth retention?

RESPONSE 123: It is a great deal easier to put numbers on snag recruits than it is on old growth retention. A snag is a fixed point on the landscape, while "old growth" is a live stand structure that evolves and can be managed in various ways.

COMMENT 124: ARM 36.11.411(1)(g) The language of this rule needs to be altered to clarify department intent.

RESPONSE 124: The department has deleted 36.11.411(1)(g).

COMMENT 125: ARM 36.11.411(1)(g) Precise numbers should be based on a variety of site-specific factors such as: habitat, existing cover, and wildlife species relevant to the site.

RESPONSE 125: The department has deleted 36.11.411(1)(g).

COMMENT 126: ARM 36.11.411(1)(g) In what instance would this be applicable? What does it mean that trees can be considered a substitute? Does it mean that the snags in the un-harvested stands will count towards the snag numbers in the harvested sections?

RESPONSE 126: The department has deleted 36.11.411(1)(g).

COMMENT 127: ARM 36.11.411(1)(g) This rule is ecologically inappropriate.

RESPONSE 127: The department has deleted 36.11.411(1)(g).

COMMENT 128: ARM 36.11.411(1)(g) The department should modify this rule to ensure the biological value of snag retention is more meaningful by ensuring some green trees are also retained in cutting units.

RESPONSE 128: The department has deleted 36.11.411(1)(g).

COMMENT 129: ARM 36.11.411(1)(g) It is not clear if the department includes other ownerships that have snags in adjacent un-harvested stands when determining the number of snags or snag recruits to be retained on trust lands.

RESPONSE 129: The department has deleted 36.11.411(1)(g).

COMMENT 130: ARM 36.11.411(1)(f) provides that "cull trees shall qualify as [snag] recruits." However, cull trees may be unlikely to reach sufficient size and form to serve the purpose of a snag in the wildlife community. We recommend that language be added to indicate that all snags and snag recruits will be permanently marked in the field. These conservative standards provide for minimal wildlife diversity. The department's willingness to consider snags in adjacent stands contrasts with the decision not to consider successional diversity on adjoining ownerships. We suggest that reviews of salvage harvesting should evaluate effects on aquatic habitats, and standards should be included to maintain benefits within salvage units.

RESPONSE 130: Please see responses to comments above to this rule. The department agrees that some cull trees may be unlikely to reach large size. The department also recognizes that cull trees are often among the largest trees on site, and often receive the most use from various wildlife species. The department does not permanently mark snags or recruits since no department actions take place that could remove those elements without further site-specific analysis. Consideration of snags in adjacent stands, on state ownership, is not comparable to burdening the trust to make up for the actions of other owners. Project level analyses evaluate effects on aquatic habitats in both green timber and salvage harvesting.

Comments Regarding ARM 36.11.412 BIODIVERSITY - MANAGEMENT AT THE URBAN/FOREST LAND INTERFACE

COMMENT 131: ARM 36.11.412(1) The language of this rule should be revised to clarify department intent.

RESPONSE 131: The department concurs and has made the change.

COMMENT 132: ARM 36.11.412(1) The department does not define what "urban/forest land interface" means. What is this boundary? How far does it extend into the forest? How many homes need to be present to constitute an urban interface? The language: "In some areas, such as..." implies that there are other areas that would fall into this category.

RESPONSE 132: The department has added a definition for "urban/forestland interface". This rule is meant to indicate one circumstance where prevailing site-specific considerations may prevent adherence to these rules. In the interest of

allowing for appropriate and informed decision making, the department leaves open the potential that other circumstances may dictate some divergence from the rules as written. In doing so, we acknowledge the inability of broadly applicable rules to account for every possible situation that may occur in the real world. Thus, with any action-related activity the department will base its decisions on site-specific analysis, informed public involvement, and consideration of the sideboards provided by these rules.

COMMENT 133: ARM 36.11.412(1) Where else can the department diverge from the forest management rules? If this language is supposed to apply to something other than the urban/forest interface, it should define what types of areas are included in this statement.

RESPONSE 133: See response to Comment 132.

COMMENT 134: ARM 36.11.412(1) What does "lost revenue" mean and how will it be factored into a decision to diverge from these rules? How much lost revenue will allow the project staff person to ignore these rules? How will that lost revenue be calculated? Will the lost revenue be balanced against any other considerations?

RESPONSE 134: The term lost revenue has been deleted from the rule.

COMMENT 135: ARM 36.11.412(1) If more than one of these factors are present, how will they be weighed against each other?

RESPONSE 135: The rule states these factors may override application of the rules, not that they represent competing interests. The department does not believe that explicit language is needed to describe how to assess these factors, only that, when considered with the full information available at the project-level, no one is under the impression we will ignore public safety, for example, in order to achieve a particular forest condition.

COMMENT 136: ARM 36.11.412(1) Public safety and fire hazards may override rules, but they need clear definition. Does the SMZ law pertain in these situations?

RESPONSE 136: The SMZ law still applies, but within the SMZ rules an alternative practices process is explicitly described. If any factors exist that warrant over-riding of these rules they will be thoroughly analyzed and disclosed in the event any action is planned. This will include public involvement pursuant to MEPA.

Comments Regarding ARM 36.11.414 BIODIVERSITY - RETENTION OF COARSE WOODY DEBRIS

COMMENT 137: ARM 36.11.414(2) The rule does not provide enough detail. What are adequate amounts? What technical references are you planning to use? Will the many functions of coarse woody debris be considered in your determination of "appropriate"?

RESPONSE 137: The department believes the rule contains adequate detail.

COMMENT 138: ARM 36.11.414(2) Does this rule include woody debris for stream channels?

RESPONSE 138: This rule is not intended to account for woody material in stream channels. That topic is covered in ARM 36.11.415(5).

Comments Regarding ARM 36.11.415 BIODIVERSITY - PATCH SIZE AND SHAPE

COMMENT 139: ARM 36.11.415(1) What does it mean to say: "to the extent practicable..."?

RESPONSE 139: The phrase "to the extent practicable" allows the department the flexibility needed to avoid impractical measures. For example, while stand replacement disturbances of tens of thousands of acres play an integral role in maintaining biodiversity at the landscape and local levels, the department considers it impracticable to pursue treatments emulating disturbances of that magnitude.

COMMENT 140: ARM 36.11.415(2) What other factors will the department consider besides public sentiment and other resources? What "other resources" will be considered?

RESPONSE 140: The many resources that derive from healthy forests are considered as outlined in ARM 36.11.405 through 36.11.450.

COMMENT 141: ARM 36.11.415(2) How will public sentiment be weighed in agency decision-making? How can public sentiment change the ability to emulate natural spatial patterns?

RESPONSE 141: Public sentiment and issues are incorporated through the MEPA process.

COMMENT 142: ARM 36.11.415(1) Fragmentation and connectivity must be assessed at the unit level in cooperation with adjoining landowners.

RESPONSE 142: Actions occur only at the project level, thus the requirement is to assess the effects at that level.

COMMENT 143: ARM 36.11.415(1) The department should say exactly what it intends to do to avoid fragmentation.

RESPONSE 143: The department believes the rules clearly state our resource objectives. The department considers the effects of fragmentation at the project level prior to any actions occurring. Simply avoiding fragmentation does not adequately deal with the inherent diversity present in our forests.

COMMENT 144: ARM 36.11.415(2) This statement is confusing, and it appears to say that the department will bow to public sentiment at the expense of the Trust.

RESPONSE 144: The MEPA process may identify issues through public involvement that the department had not considered. The department believes that informed decision-making at the project level incorporates the factors required of the department.

COMMENT 145: ARM 36.11.415(1) Semblance is simply a token, a bare minimum. This is weak language that provides no guidelines, parameters or restrictions upon which the public can depend.

RESPONSE 145: This language was contained in the SFLMP. The department does not view this as a weak commitment.

Comments Regarding ARM 36.11.416 BIODIVERSITY - MANAGEMENT ON SCATTERED LANDS

COMMENT 146: ARM 36.11.416(2) Does this reference to "broader landscapes" mean watersheds? The phrase "extent practicable" should be defined here and elsewhere, wherever it is used in the document. The SFLMP reads: "if our ownership contained rare or unique habitat elements occurring naturally (e.g., bog, patches of a rare plant), we would manage so as to retain those elements."

RESPONSE 146: Broader landscape is a general term implying a larger landscape than just state land. The rule does not commit the department to conducting these assessments over the broader landscape. The department believes it would be irrational to commit to impracticable activities. The department does not believe the minor language change reflects any departure from the SFLMP. Such minor changes to the SFLMP are explicitly authorized in the ROD.

COMMENT 147: ARM 36.11.416(5) What happens if data are not available? Will the department do the necessary research to acquire the data before making any decisions on the ground?

RESPONSE 147: The phrase "to the extent data are available" is included so that the department bases its decisions on data, and does not commit to exhaustive data collection efforts when adequate data can be obtained at the project-level. When data are not available at the administrative unit level, then project level data will be used.

Comments Regarding ARM 36.11.418 BIODIVERSITY - OLD GROWTH MANAGEMENT

COMMENT 148: This rule needs to be edited to clarify the department's old growth commitment.

RESPONSE 148: The department has edited the rule.

COMMENT 149: This whole rule should be deleted, as there is no legal mandate for managing old growth. It is not in the Enabling Act, the Constitution, or Trust Law, and it certainly violates the principle of maintaining the productivity of the Trust.

RESPONSE 149: The department agrees there is no legal mandate for managing, or preserving old growth, and that setting old growth aside without management is contrary to the trust mandate, intent of the SFLMP, and 77-5-116, MCA. However, the department believes the rules represent the best way to achieve the short and long term requirements of trust management. Managing old growth, rather than setting it aside is the focus of these rules.

COMMENT 150: What are the biodiversity objectives? Will the public have an opportunity to comment on these objectives since they will be fundamental to agency decision making across the landscape? What are the specific legal criteria that will be considered? If biodiversity goals are to be made at the project level, how will the department guarantee consistency across the landscape? How will the public be informed of these specific objectives and goals?

RESPONSE 150: Biodiversity objectives are explained in ARM 36.11.404 through 36.11.450 and reflect the department's implementation of the SFLMP. The rule-making process provides the public with a structured and legal means of comment. The programmatic MEPA process associated with the SFLMP provided the opportunity for public involvement. Please refer to other biodiversity rules for explanation of landscape considerations of biodiversity, in particular ARM 36.11.405 through 36.11.419.

COMMENT 151: The rules do not interpret 77-5-116, MCA. It does not clarify it. How will full market value be determined? Will it be based on timber production, the value

of subdivided lands for homes, some other value? Can the department still manage for old growth or would that be considered a set-aside? Please define terms like set-aside and networks. If the department cannot manage for old growth than how will it guarantee the integrity of the corpus of the trust?

RESPONSE 151: The department is developing rules for setting old growth aside. The department believes that managed stands do not conflict with legal requirements provided our fiduciary obligations are being met. However, the department believes the law is clear in that old growth set-asides must receive full market value compensation to the trust. The method for establishing full market value will be determined as part of the process of creating an old growth set-aside. The department has added definitions for "old growth set-aside" and "old growth network".

COMMENT 152: Are you saying you will have to be paid to leave old growth?

RESPONSE 152: See response to comment 151.

COMMENT 153: Will the department consider biodiversity and forest health before 77-5-116, MCA? What happens if the project level interprets 77-5-116, MCA in a manner that is inconsistent with the obligations of the fiduciary of the trust?

RESPONSE 153: The department cannot ignore its fiduciary obligations to the trusts by engaging in certain revenue restricting activities that do not benefit the designated beneficiaries. The rule has been revised. The rule is consistent with the SFLMP.

COMMENT 154: What are the guidelines that the project level must follow to determine what is reasonable? Project staff could decide that removing all the old growth is reasonable.

RESPONSE 154: The department believes that project decisions should be made following project-level analysis. It is at the project-level that the best information and highest levels of informed public participation occur. The department's commitment to making decisions at the project level provides the public with the greatest certainty that actions will be consistent with all of the department mandates and objectives, and that the interests of the public will receive the consideration warranted. The rules explicitly describe to department staff, the Board of Land Commissioners, special interest groups, and the public the factors to be considered in relation to old growth.

COMMENT 155: What guidance do project level staff people have to interpret what's reasonable? How will the department guarantee consistent interpretations of what is reasonable across the landscape?

RESPONSE 155: The rules describe the department's interpretation of its many legal obligations. We recognize that the commenter does not agree with that interpretation, but believe the rules thoroughly and explicitly detail how old growth may be treated. They also provide the public with much greater detail and information regarding how the department will manage old growth than did the SFLMP by describing implementation procedures. Any actions will undergo full public involvement at the project level, in compliance with MEPA.

COMMENT 156: Eliminating old growth increases long-term management costs. Lost revenue includes harvesting medicinal plants, native seed harvesting, and recreational uses.

RESPONSE 156: "...the more land that is tied up in old growth management schemes the higher the costs in revenues foregone as stand ages go beyond economic rotation ages..." This is a quote from the Tech Team Report (Pfister et al.) The obligation to retain old growth is consistent with the SFLMP.

Comments Regarding ARM 36.11.419 BIODIVERSITY - FIELD REVIEWS

COMMENT 157: ARM 36.11.419(6) No indication is given how you will evaluate your performance. The only DFC mentioned is cover type, and even that is inadequately described.

RESPONSE 157: ARM 36.11.419(3)(a) through (d) describe the factors we will track for trends (i.e., changes toward or away from desired future conditions), and in ARM 36.11.419(4) (a) through (e), the department clearly states landscape level considerations useful in evaluating performance. Old growth retention strategies are described in ARM 36.11.418. Evaluation of these multiple forest conditions over time provides the department with extensive information with which to evaluate its performance.

COMMENT 158: ARM 36.11.419(6) A monitoring report should be done immediately to address the situation.

RESPONSE 158: Results of the 2000 assessment are available for review.

COMMENT 159: ARM 36.11.419(7) This section should be added: "(7) Results of monitoring shall be used to help plan follow-up and future activities in the evaluation area, and to improve the department's ability to predict the effects of activities in similar situations elsewhere. Monitoring shall

be frequent enough to accomplish these purposes effectively." It is consistent with the SFLMP.

RESPONSE 159: The department concurs and has made the change.

Comments Regarding ARM 36.11.420 SILVICULTURE

COMMENT 160: ARM 36.11.420(1) The SFLMP contained several important provisions under this topic that have been omitted from the new rules. For example, the new rule omits the following requirement of the SFLMP: "Silvicultural prescriptions would be prepared for all planned treatments. These prescriptions would be written to accomplish the following objectives in a clear and organized manner:... Document conformity of the prescribed silvicultural treatments with requirements of the State Forest Land Management Plan and relevant department Resource Management Standards." SFLMP Record of Decision (ROD)-15. Why has this section been omitted? By deleting this section, does the department excuse itself from conforming to the SFLMP and any of the RMS standards? What are the implications of these omissions?

RESPONSE 160: This language is now in ARM 36.11.420(7). The RMS's of the SFLMP are clarified, refined, and replaced to the extent necessary with these rules without resulting in any change in commitment or intent from the SFLMP. The rules reflect the intent of the SFLMP more completely, and describe the department's management more thoroughly and explicitly than did the RMS's. The RMS's in the SFLMP were attempts to apply the concepts of biodiversity management. After six years of application the department has indications regarding what has and what has not worked. These rules reflect that adaptive management through the slight wording changes from the language of the SFLMP. Such a process of change was anticipated, and explicitly acknowledged and allowed for in the SFLMP. It would be irresponsible for the department to continue impracticable and inconsistent commitments when we know they are inappropriate.

COMMENT 161: ARM 36.11.420(1) The entire financial section of the Silviculture section has been omitted (SFLMP ROD-15). Why?

RESPONSE 161: This information is now contained in ARM 36.11.446.

COMMENT 162: ARM 36.11.420(1) The proposed rules omit the SFLMP Integration with Other Resource Management Standards. Why? Have the references been updated? If so, what are the new references? What guidance will the department now use to implement these standards?

RESPONSE 162: The department removed reference to the 1991 silvicultural guidelines just as it removed all references

to guidance and guidelines. The department believes the rules clearly and explicitly lay out our philosophy and commitments.

COMMENT 163: ARM 36.11.420(1) The rule should describe in more detail the type of management objectives that will produce "long term productivity of the site" for ensuring "long term capability to produce trust revenue".

RESPONSE 163: The department believes this level of specificity to be inappropriate in a broad planning document such as rules.

COMMENT 164: ARM 36.11.420(1) There is no reference to designing silvicultural prescriptions that maximize growth potential. The requirement of the Enabling Act mandates that growth be maximized. The rules must be more definitive in this area. The sustained yield of 42.2 million bf will most certainly be changed by the legislature in the future and you must be prepared for that change.

RESPONSE 164: The Enabling Act does not mandate maximized growth. It does however, mandate protection of the corpus of the trust, providing revenue to the beneficiaries, and undivided loyalty to the trust beneficiaries on the part of the trust managers (the department and the Board of Land Commissioners). The department believes the rules strike the appropriate balance between short-term revenue and long-term protection of revenue production capability.

COMMENT 165: ARM 36.11.420(9)(c) The language in this section of the proposed rules has been changed from the SFLMP. The proposed rules omit language in the SFLMP Monitoring section. Since the proposed rules have deleted all the language that references the Silvicultural Treatment Guidelines, the public can only assume that there is new reference material to use as a guideline. These references are not anywhere in the proposed rule. Please explain what guidelines are being used.

RESPONSE 165: The rules replace previous guidelines. The language mentioned from the SFLMP Monitoring Section is retained in ARM 36.11.420.

COMMENT 166: ARM 36.11.420(14)(d) This section has been changed from the SFLMP. The SFLMP says that information on revenues and costs would be maintained for all treatments. Why has this provision been omitted and what is the implication of this omission?

RESPONSE 166: Reference to costs is retained in the rule. The revenue portion of the RMS was dropped because these projects are investments in the future, not revenue generating activities.

COMMENT 167: ARM 36.11.420(14)(d) The proposed rules omit two other sections that appear in the SFLMP. They are: A record would be maintained of all conditions and events that occur during the course of treatment that have a significant potential to affect the treatment outcome. On selected sites, soils effects would be monitored for implementation of mitigation measures and effectiveness to guide future harvest practices. Why have these sections been omitted from the proposed rule? Will soils no longer be monitored for this purpose? If not, why? If so, please specify how that will occur.

RESPONSE 167: The soils references have been moved to the watershed section where other soils issues were addressed. The clauses outlined in RMS 17 are addressed in the rules in various items under ARM 36.11.420.

Comments Regarding ARM 36.11.421 ROAD MANAGEMENT

COMMENT 168: ARM 36.11.421(1)(a) The language has changed from the SFLMP. The resource management standards of the SFLMP differ and are much stronger in regards to conservation commitments than these rules.

RESPONSE 168: This rule has been revised. The remaining minor differences in wording between this rule and the SFLMP are necessary to recognize the other rules that are applicable to road management. This rule is consistent with the SFLMP.

COMMENT 169: ARM 36.11.421(1)(a) There is no standard to deal with listed carnivore species or elk.

RESPONSE 169: The SFLMP did not address road standards for elk. Forest management rules were included for various carnivore species and are contained in rules for threatened and endangered species. For some, road standards are included, and for others they are not. These rules are considered adequate and are consistent with the SFLMP.

COMMENT 170: ARM 36.11.421(1)(d) The rule should say "The department shall use...when possible."

RESPONSE 170: The rule has been revised and is consistent with SFLMP.

COMMENT 171: ARM 36.11.421(2) The language has changed from the SFLMP.

RESPONSE 171: The rule has been revised and is consistent with the SFLMP.

COMMENT 172: ARM 36.11.421(3)(a) The language has changed from the SFLMP. The department has changed the language in the proposed rule and omitted a requirement for

roads to be consistent with BMP's, SMZ rules, Watershed Standards, State Land Resource Standards, and the condition of all permits. The change from requiring "consistency with" to simply "comply as necessary" or "as funding is available" is a fundamental shift and has serious implications for resource protection.

RESPONSE 172: The rule has been revised and is consistent with SFLMP, as stated in the Resource Management Standards (Watershed RMS 4 and Road Management RMS 3).

COMMENT 173: ARM 36.11.421(3)(a) Existing roads need to be brought up to BMP standards and a plan developed to fund this effort.

RESPONSE 173: Identification and remediation of existing road maintenance and BMP improvement needs are addressed in ARM 36.11.421(12) and ARM 36.11.422.

COMMENT 174: ARM 36.11.421(3)(e) The language has changed from the SFLMP. The department has weakened this rule by adding "where practicable and when funding is available." Why were these changes made and what impact will they have on resource protection?

RESPONSE 174: This rule has been revised and is consistent with SFLMP. This information has been reorganized from the RMS's in the SFLMP for the sake of clarity.

COMMENT 175: ARM 36.11.421(6) The department should add language that requires the agency to disclose its maintenance schedule and how it will be funded for new or existing roads when proposing a project.

RESPONSE 175: See ARM 36.11.421(12), (13) regarding road monitoring. Maintenance needs are identified through road inspections; see ARM 36.11.421(12) and (13). We prioritize road maintenance needs identified and fund them through the forest improvement budget. Emergency road maintenance needs are addressed on an as-needed basis. Road management needs identified during project planning are incorporated as part of project design.

COMMENT 176: ARM 36.11.421(6) The rule should include abandoned roads and determine maintenance frequency.

RESPONSE 176: The department has committed to abandoning roads in a condition that provides adequate drainage and stabilization; see ARM 36.11.421(11).

COMMENT 177: ARM 36.11.421(8) The language has changed significantly from the SFLMP and many of the standards in the SFLMP have been eliminated. Why do the proposed rules change the focus of road density from the landscape level ecosystem

plans to the project level objectives? What are the implications of this fundamental shift? Why do the rules eliminate any standards that would determine road density decisions?

RESPONSE 177: The rule has been revised to include landscape-level plans. The remaining minor differences in wording reflect the use of other forest management rules that are applicable to road density decisions. The rule is consistent with the SFLMP.

COMMENT 178: ARM 36.11.421(8) The rule sets absolutely no road density or security core standards for grizzly bear habitat management, other than to comply with the Swan agreement. Without standards, definitions are meaningless.

RESPONSE 178: The road density standards for grizzly bears are located in ARM 36.11.431.

COMMENT 179: ARM 36.11.421(9) The rule should be clearer.

RESPONSE 179: This rule is adequate for the intended purpose, and is consistent with the SFLMP.

COMMENT 180: ARM 36.11.421(10)(c) The rule says "consider" rather than using the language of RMS 11. In order to be consistent with the USFWS August 1, 2002 biological opinion on federal agencies' road management in bull trout habitat all culverts must be removed from obliterated roads to protect water quality and fisheries.

RESPONSE 180: This rule has been revised and is consistent with the SFLMP. The department has committed to abandoning roads in a condition that provides adequate drainage and stabilization (see ARM 36.11.421(11)).

COMMENT 181: ARM 36.11.421(10)(c) The rule should also include "...those public access roads that are deemed: (d) contributing to unacceptable harm to water quality, wildlife and fish when considered cumulatively with nearby roads on private and other public lands".

RESPONSE 181: This rule as stated addresses excessive resource damage which includes unacceptable harm to water quality, wildlife, and fish.

COMMENT 182: ARM 36.11.421(10)(c) The proposed rules significantly alter SFLMP road management RMS 11, the latter requiring stronger consideration for obliteration of unneeded roads. There also needs to be road density limitations in the rules.

RESPONSE 182: The SFLMP emphasizes obliteration through re-vegetation and slash obstruction rather than the commonly interpreted meaning of re-contouring or reshaping of the road prism. The SFLMP also emphasized leaving the road prisms intact in order to maintain capital investment. This rule is consistent with the SFLMP.

COMMENT 183: ARM 36.11.421(11) Road prism left in place and drainage/stabilization assured suggests few real road decommissionings or revegetation.

RESPONSE 183: In the SFLMP the department used the word "obliterate" to describe activities that would emphasize revegetation and slash obstruction while leaving the road prism intact to preserve capital investment. A more appropriate term to describe this road management strategy is "abandonment", as utilized in this rule. This rule is consistent with the SFLMP.

COMMENT 184: ARM 36.11.421(11) The rule should be clearer.

RESPONSE 184: The rule is adequate as written for the intended purpose.

COMMENT 185: ARM 36.11.421(11) If a road is to be abandoned in accordance with the definition under ARM 36.11.403(1), why is it necessary to leave intact the road prism? Adequate drainage and stabilization of abandoned roads need not include intact road prisms and culverts at stream crossings. All culverts and associated fill on all stream crossings should be removed prior to abandonment. This is necessary to reduce sedimentation and degradation of stream habitat.

RESPONSE 185: The SFLMP emphasizes road abandonment ("obliteration" is the term used in plan) through revegetation and slash obstruction rather than re-contouring of the road prism. The SFLMP also places an emphasis on leaving the road prisms intact in order to maintain road construction capital investments. The rule requires that abandoned roads be left in a condition that provides adequate drainage and stabilization.

COMMENT 186: ARM 36.11.411(12) needs to be reworded.

RESPONSE 186: The rule has been revised and is consistent with the SFLMP.

COMMENT 187: ARM 36.11.421(14) The sentence should be re-worded as follows to insure on-the-ground repair or closure modification not be replaced with just the "consideration" of alternative methods of closure: "The department shall repair

or modify ineffective closures or replace them with alternative, more effective methods of closure."

RESPONSE 187: The rule has been revised and is consistent with the SFLMP.

Comments Regarding ARM 36.11.422 WATERSHED MANAGEMENT

COMMENT 188: ARM 36.11.422(2)(a) The whole section on watershed is concerned with water quality with no mention of water quantity other than its effect on quality. Rules must have provisions that allow for management activities that will promote definite quantities of water. Ever increasing numbers of trees per acre are reducing the water yield.

RESPONSE 188: The rule is consistent with the SFLMP. The SFLMP addressed water quantity only as it relates to water quality. Increasing water yield (water quantity) was not addressed as a management objective in the SFLMP and is currently not a forest management objective of the department.

Comments Regarding ARM 36.11.423 WATERSHED MANAGEMENT - CUMULATIVE EFFECTS

COMMENT 189: ARM 36.11.423(1) The rule should read "state, federal, and private activities...initiated or which are in process or are completed."

RESPONSE 189: Under existing administrative rules (ARM 36.2.642(7)) cumulative impacts must include considerations for related future actions when these actions are under concurrent consideration by any state agency through pre-impact statement studies, separate impact statement evaluation, or permit processing procedures.

COMMENT 190: ARM 36.11.423(1) Define substantial. There are no hard and fast numbers, and every statement has enough qualifiers that anything can be done with rationalization.

RESPONSE 190: This rule is consistent with the language used in the SFLMP. The rule includes factors that will be used to determine when and at what level cumulative effects assessments are conducted.

COMMENT 191: ARM 36.11.423(1)(b) The rule should include a requirement for fine filter analysis.

RESPONSE 191: The detailed watershed analysis included in the rule is a fine filter analysis. This is consistent with the SFLMP.

COMMENT 192: ARM 36.11.423(1)(c) The term "acceptable levels of risk" should be replaced with the term "thresholds for cumulative watershed effects".

RESPONSE 192: The term "acceptable levels of risk" has been replaced with the term "thresholds for cumulative watershed effects". This is consistent with the SFLMP.

COMMENT 193: ARM 36.11.423(1)(c) should read "watershed and stream conditions, including bedload, embedded sediment total suspended solids, woody debris recruitment, fish migration barriers, and other measures of aquatic system health."

RESPONSE 193: The criteria used for determining the thresholds contained in the rule are consistent with those in the SFLMP. The parameters listed in the Comment are commonly included in evaluations of the items listed in this rule (stream channel stability and existing watershed conditions).

COMMENT 194: ARM 36.11.423(1)(c) What does the department consider excessive relative to acceptable levels of cumulative effects, and under what standards?

RESPONSE 194: The department considers excessive levels to be those conditions that exceed the cumulative watershed effects thresholds determined using the process contained in this rule. Thresholds are designed to ensure compliance with water quality standards and protection of beneficial water uses.

COMMENT 195: ARM 36.11.423(1)(c) What are "acceptable levels of risk?" What standards and methods will be utilized to make this determination?

RESPONSE 195: The term "acceptable levels of risk" has been replaced with the term "thresholds for cumulative watershed effects". This is consistent with the SFLMP. The term as well as the items used when making these determinations are described in this rule.

COMMENT 196: ARM 36.11.423(1)(c)(ii) The term "acceptable levels of risk" should be replaced with the term "thresholds for cumulative watershed effects". This is consistent with the SFLMP.

RESPONSE 196: See response to comment 195.

COMMENT 197: ARM 36.11.423(1)(c)(ii) "Moderate" should be stricken as a degree of risk. The department should be required on all projects to accept no more than a low degree of risk, which should be defined as "having a high degree of probability for producing predicted results of little or no harm to water quality or beneficial uses".

RESPONSE 197: Language contained in this rule is consistent with the language adopted under the SFLMP.

COMMENT 198: ARM 36.11.423(1)(c)(ii) Projects that pose a moderate risk should not be conducted.

RESPONSE 198: The rule is consistent with SFLMP. The SFLMP also incorporated low to moderate levels of risk. The rules require low levels of acceptable risk for all water quality limited water bodies.

COMMENT 199: Low to moderate is not measurable. DNRC should define and accept only low-level risks, especially to habitats of sensitive, threatened and endangered species for the reasons mentioned previously.

RESPONSE 199: See response to the comment above. ARM 36.11.427 ensures that forest management activities are designed to protect and maintain threatened, endangered and sensitive fish species.

COMMENT 200: ARM 36.11.423(1)(d) The term "acceptable levels of risk" should be replaced with the term "thresholds for cumulative watershed effects". This is consistent with the SFLMP.

RESPONSE 200: See response to comment 195.

COMMENT 201: ARM 36.11.423(1)(d) The SFLMP specified that on the Stillwater, Coal Creek and Swan River state forests, the department would establish thresholds at a level that ensured protection of beneficial uses with a low degree of risk. Under the proposed rule the department would complete a detailed watershed analysis when coarse filter or preliminary analysis indicates either the existence of or high risk potential for unacceptable cumulative watershed effects. This is a major departure from the conservative watershed management approach of the SFLMP. Instead of managing for low degree of risk, the rule proposes to conduct a watershed analysis when a high risk potential exist, and even then the rule provides no direction for the appropriate risk level for the three state forests.

RESPONSE 201: The rule addresses water resource protection for sensitive watersheds state-wide regarding threshold levels for cumulative watershed effects. Under the rules, the department would manage all water quality limited watersheds as identified by the Department of Environmental Quality on the Montana 303(d) with a low degree of risk, not only those watersheds located in the Stillwater, Swan and Coal Creek State Forests. Watershed analysis will be conducted on all activities involving substantial canopy removal or ground disturbance. Detailed analysis would be completed unless

screening or preliminary analysis indicates low risk of impacts due to cumulative watershed effects.

Comments Regarding ARM 36.11.424 WATERSHED MANAGEMENT - MONITORING

COMMENT 202: ARM 36.11.424(1) This proposed rule has changed from the SFLMP. Why has the department eliminated the final sentence appearing in the SFLMP? Why would the department eliminate the requirement that its monitoring strategy be peer reviewed and reviewed by the Land Board?

RESPONSE 202: A watershed monitoring strategy was developed with peer and Land Board review as part of SFLMP implementation. Under this rule, the department is maintaining the monitoring strategy.

COMMENT 203: ARM 36.11.424(1) Delaying the creation of a watershed monitoring strategy to some later date does not demonstrate commitment on the part of the department to understand the impact of their forest management on water quality and fisheries.

RESPONSE 203: A watershed monitoring strategy was developed with peer and Land Board review as part of SFLMP implementation. Under this rule, the department is maintaining the monitoring strategy.

COMMENT 204: ARM 36.11.424(1)(a) Why has the requirement that the department would remedy problems noted during BMP audits and BMP's would be revised for future applications been eliminated from the rules? Will these problems no longer need to be remedied by the department or will they be remedied some other way? Is the department relying on future BMP's to address the problem? If so, does this change create a time lag for remedying these problems? What would that time difference be?

RESPONSE 204: The SFLMP commitment to remedy problems noted during BMP audits has not been eliminated from the rules. This requirement is contained in ARM 36.11.424(2).

COMMENT 205: ARM 36.11.424(1)(a) Define substantial and what detrimental soil disturbance is.

RESPONSE 205: The rule is consistent with language contained in SFLMP. The amount of potential soil disturbance necessary for an activity to be considered for a BMP audit is determined on a site-specific basis with considerations for existing conditions, soil types, terrain and type of harvest operations utilized. A detrimental soil impact is a biological or physical effect from any activity that reduces soil productivity or results in compaction, displacement, or erosion.

COMMENT 206: ARM 36.11.424(1)(c) The rule should read "...and sensitive or fish species of special concern as identified by the Department of Fish, Wildlife and Parks and the department native fish conservation plans adapted by the State of Montana."

RESPONSE 206: The department's Forest Management Bureau maintains a list of sensitive species that include the sensitive fish species most likely to be affected by DNRC forest management activities as specified in ARM 36.11.434.

COMMENT 207: ARM 36.11.424(1)(e) should be moved from ARM 36.11.426(8). It is a more appropriate place in the rules.

RESPONSE 207: The department concurs and has made the change.

COMMENT 208: The department added ARM 36.11.424(3) because it had been inadvertently omitted from the proposal notice. It is consistent with the SFLMP.

RESPONSE 208: The department has made the change.

COMMENT 209: ARM 36.11.424 The language in this rule has changed considerably from the SFLMP. The proposed rule only requires the department to correct or mitigate problems that are due to forest management practices. Problems from grazing, mining, cabin sites and recreation impacts will no longer be corrected. Please explain this omission.

RESPONSE 209: The intent of the proposed rules is to address the department's forest management activities as defined by ARM 36.11.403(29), which includes grazing of classified forest lands.

COMMENT 210: ARM 36.11.424 The proposed rules omit Section (23) of the SFLMP on Monitoring: "the department would continue to participate in cooperative monitoring efforts, such as the Flathead Basin Commission's Monitoring Plan and the Flathead Basin Forest Practices and Fisheries Cooperative Program Final Report recommendations (see Fisheries RMS #2)". What has happened to this section? Is it no longer important to cooperate with these other entities or will this occur through other means? Please explain.

RESPONSE 210: The rule was revised and is consistent with the SFLMP. Cooperative monitoring efforts were inadvertently omitted from the proposed rules.

COMMENT 211: ARM 36.11.424 The proposed rules omit the requirement to compile the results of monitoring into a report for the Land Board by October 2000 and every five years

thereafter. Will the department no longer make these reports available to the public?

RESPONSE 211: The requirement to compile monitoring results into a report for the Land Board every 5 years is contained in ARM 36.11.448. The report is available to the public. This rule is consistent with the SFLMP.

COMMENT 212: ARM 36.11.424 should state "the department with consultation from MDFWP commit to suspend or modify the project so that adverse impacts are either halted or reversed".

RESPONSE 212: This rule requires the department to manage watersheds to maintain water quality that meets or exceeds state water quality standards and protects designated beneficial uses. Compliance with these standards is also subject to other administrative rules addressing water quality that are administered and regulated by the Montana Department of Environmental Quality.

COMMENT 213: ARM 36.11.424 What is "acceptable level?" Department of Fish, Wildlife and Parks recommends that the department quantify qualitative terms so that rules can be understood by the public and to help the department foresters implementing forest plan direction.

RESPONSE 213: Acceptable levels are those that do not violate applicable laws, rules, water quality standards and protect beneficial uses. There is no single set of quantitative terms that can be used to cover all applicable requirements or that can be applied to all situations occurring at the site-specific or project level.

Comments Regarding ARM 36.11.425 WATERSHED MANAGEMENT - STREAMSIDE MANAGEMENT ZONES AND RIPARIAN MANAGEMENT ZONES

COMMENT 214: ARM 36.11.425(1) The rule should be revised to provide more clarity.

RESPONSE 214: The rule has been revised to replace the use of the term "extended SMZ" with "riparian management zone (RMZ)". The use of term "extended SMZ" causes confusion between the intent of this rule with the requirements of the existing streamside management zone law 77-5-303, MCA and ARM 36.11.302. The department has selected the term "riparian management zones" to describe areas of additional streamside buffers established under these rules.

COMMENT 215: ARM 36.11.425(1) The rules do not reflect the need for management of the vegetation to ensure healthy riparian areas. There must be new vegetation established in these areas or you create the demise of the very habitat you want to protect.

RESPONSE 215: Vegetation management, such as timber harvest, is not excluded from the SMZ and RMZ. Instead, the RMZ widths established under these rules specify areas with special management considerations. These considerations include restrictions on equipment operations and constraints on silvicultural prescriptions that are consistent with the SFLMP.

COMMENT 216: 36.11.425(1) For every stream mile with 100 feet of special management you are affecting 24.3 acres of land. Since many of these sites are the most productive their management or lack thereof will seriously and negatively affect the overall return to the trust.

RESPONSE 216: Revenue generating forest management activities are not prohibited from occurring within SMZ and RMZ widths. Forest management activities are restricted in SMZ's and RMZ's to operations or conditions that the department believes are necessary to provide adequate levels of resource protection that are consistent with the SFLMP and applicable laws.

COMMENT 217: ARM 36.11.425(1) We do not agree with the rule to extend the minimum width of the SMZ required under ARM 36.11.302. The widths of the SMZ as required under the existing Streamside Management law are adequate, even on sites with high erosion risk.

RESPONSE 217: The SFLMP includes additional streamside buffers on sites with erosive soils. The RMZ widths contained in the rules are consistent with the SFLMP.

COMMENT 218: ARM 36.11.425(1) The timber stands within SMZ's must be intensively managed to produce healthy and diverse forests and produce the greatest long-term income to the trusts. The health and productivity of the stands within the SMZ's will deteriorate without proper management.

RESPONSE 218: Under the rules, timber harvests are not prohibited from occurring within SMZ's and RMZ's. Instead, forest management activities are restricted to operations or conditions that are necessary to provide adequate resource protection and remain consistent with the SFLMP.

COMMENT 219: ARM 36.11.425(2)(c) should read "...evaluations, including but not limited to stream surveys that evaluate sediment deposition, slumping, nearby slope failures, riparian health or other measures as determined by a professional geomorphologist or other specialist".

RESPONSE 219: The intent of this rule is to address sources of information that will be used to identify high erosion risk, not to identify potential factors contributing

to degraded stream or watershed conditions. The site-specific field evaluations used to determine high erosion risk could include, but not be limited to, the items suggested.

COMMENT 220: ARM 36.11.425(2)(c) Expanded SMZ's should be required for riparian conservation areas along streams or lakes identified as core or nodal habitat for bull trout.

RESPONSE 220: The rules establish riparian management zones for all fish bearing streams, lakes and other bodies of water. Harvest prescriptions within RMZ's will be designed or modified to provide adequate protection of fish habitat. Restrictions on equipment operation and road construction are applicable to RMZ's established for high erosion risk sites located on both fish bearing and non-fish bearing streams. The requirements of the Montana SMZ law and rules are adequate for low to medium erosion risk sites.

COMMENT 221: ARM 36.22.425(3)(c) should be revised to replace the use of the term "extended SMZ" with "riparian management zone (RMZ)".

RESPONSE 221: The department concurs and has made the change.

COMMENT 222: ARM 36.11.425(3)(c) The proposed SMZ widths are excessive given the likelihood that such areas would be harvested by helicopter or line systems both of which are extremely low impact.

RESPONSE 222: The RMZ widths contained in the rules are consistent with the SFLMP. Under the rules an RMZ would be established on sites with high erosion risk that include slopes ranging from 25 to 40%. Harvest operations in this slope range are typically conducted by ground based harvest and yarding systems. RMZ's established for high erosion risk do not effect silvicultural prescriptions.

COMMENT 223: ARM 36.11.425(3)(d) should be revised to replace the use of the term "extended SMZ" with "riparian management zone (RMZ)".

RESPONSE 223: The department concurs and has made the change.

COMMENT 224: ARM 36.11.425(4(b)(ii) should be revised to replace the use of the term "extended SMZ" with "riparian management zone (RMZ)".

RESPONSE 224: The department concurs and has made the change.

COMMENT 225: ARM 36.11.425(4)(b)(ii) The department should prohibit the use of wheeled or tracked vehicles regardless of slope.

RESPONSE 225: The department disagrees. The rule restricts equipment operation in a manner designed to prevent undesirable impacts to soil resources, erosion and subsequent sediment delivery to streams. It includes provisions that allow equipment operations on gentle to moderate slopes (less than 35%) in areas when terrain, circumstances or conditions permit the use of equipment without causing unacceptable impacts.

COMMENT 226: ARM 36.11.425(4)(b)(ii) What is excessive?

RESPONSE 226: Excessive refers to those levels that cause undesirable or detrimental impacts, or exceeds those levels analyzed for in the project level MEPA assessments.

COMMENT 227: ARM 36.11.425(4)(c) should be revised to replace the use of the term "extended SMZ" with "riparian management zone (RMZ)".

RESPONSE 227: The department concurs and has made the change.

COMMENT 228: ARM 36.11.425(4)(c) The rule should be more specific about the type of cable systems, or at least the specific conditions that must be met for allowing cable yarding in extended SMZ's.

RESPONSE 228: Cable yarding systems will be restricted to those that do not cause excessive ground disturbance. Determining the type and capabilities of appropriate cable systems is best done on a site specific or project level basis.

COMMENT 229: ARM 36.11.425(4)(c) Strike the first sentence, the intent should not be to restrict cable yarding but to minimize disturbance.

RESPONSE 229: The rule has been revised to clarify the intent.

COMMENT 230: ARM 36.11.425(4)(c) What is excessive? Please define for readers.

RESPONSE 230: See response to comment 226.

COMMENT 231: ARM 36.11.425(5) should be amended to say "timber harvest in an extended SMZ is prohibited in a riparian conservation area for a stream identified as core or nodal habitat for bull trout or has been otherwise identified as

critical habitat for westslope cutthroat trout or Yellowstone cutthroat trout by MDFWP".

RESPONSE 231: The rules provide adequate levels of habitat protection for bull trout, westslope cutthroat and Yellowstone cutthroat trout (see ARM 36.11.227). Timber harvest conducted in an SMZ or RMZ of a fish-bearing stream would occur only to the extent that adequate levels of shade, large woody debris recruitment and other habitat features were maintained. Adequate levels of these habitat parameters can only be determined on a site-specific project level basis.

COMMENT 232: ARM 36.11.425(5) What is adequate and potential? Please define.

RESPONSE 232: Adequate levels of shade and large woody debris are defined by rule. Potential refers to trees that could fall into the stream.

COMMENT 233: ARM 36.11.425(5)(a) should be revised to replace the use of the term "extended SMZ" with "riparian management zone"(RMZ).

RESPONSE 233: The department concurs and has made the change.

COMMENT 234: ARM 36.11.425(5)(a) A more appropriate approach would be to have the SMZ extended to no less than 1.5 times the site potential tree height at 100 years.

RESPONSE 234: Potential tree height is appropriate for use as the minimum RMZ width as it relates to tree canopy removal because it is the streamside area from which the tree canopy predominately influences stream shading and large woody debris recruitment. RMZ's established to provide additional level of water resource protection from potential sediment delivery are addressed in ARM 36.11.425.

COMMENT 235: ARM 36.11.425(6)(a) Excellent stream temperature data have been collected...Montana minimum SMZ widths and retention provide adequate protection to maintain stream temperatures.

RESPONSE 235: Forest canopy located beyond the 50' minimum required under the SMZ Law can substantially influence stream shading. The use of potential tree height was selected as appropriate strategy to identify the width of an RMZ where forest canopy is most likely to influence stream shade and water temperatures. This approach is consistent with the approach utilized by the department for SFLMP implementation.

COMMENT 236: ARM 36.11.425(7) Does this apply to salvage? If not, it should.

RESPONSE 236: The rule applies to all forest management activities as defined by rule. The definition of forest management activities includes salvage.

COMMENT 237: ARM 36.11.425(7)(a) The tree retention rules are not based on science.

RESPONSE 237: Stand density is critical to provide for adequate large woody debris recruitment and shade. The existing rules for RMZ tree retention are based on a review of the available scientific literature and are consistent with the SFLMP.

COMMENT 238: We don't believe providing shade retention or woody debris recruitment on a project basis as stated in ARM 36.11.425(5) and (6) is adequate.

RESPONSE 238: Use of potential tree height was selected as appropriate strategy to identify the width of RMZ where forest canopy is most likely to influence stream shade and water temperatures. The level of tree retention necessary to determine adequate levels of shade and potential large woody debris recruitment would be evaluated for each specific location on a project basis using credible science.

COMMENT 239: ARM 36.11.425(9) should be revised to include RMZ's.

RESPONSE 239: The department concurs and has made the change.

COMMENT 240: ARM 36.11.425(9) refers to two rules (ARM 36.11.408 and 36.11.409) that do not seem related.

RESPONSE 240: The references contained in the proposed rule were an error. The rule has been revised.

COMMENT 241: ARM 36.11.425(9) The commenter strongly suggests SMZ widths be wider and that harvest be prohibited in them for high-risk sites and core or nodal habitat for bull trout.

RESPONSE 241: The use of potential tree height was selected as an appropriate strategy to identify the width of RMZ where forest canopy is most likely to influence stream shade and water temperatures. RMZ's will also be established for high erosion risk. Timber harvest would only be conducted in a SMZ or RMZ where adequate levels of shade, large woody debris recruitment and other habitat features were maintained, and excessive soils disturbance and erosion did not occur. Both approaches are consistent with the SFLMP.

COMMENT 242: ARM 36.11.425(9) The rule should include Montana Fish, Wildlife and Parks's designated sensitive fish

species as well. There is no apparent reason to exclude other sensitive species and adverse impacts.

RESPONSE 242: The Forest Management Bureau maintains a list of designated sensitive species as specified in rule. This is consistent with the SFLMP.

COMMENT 243: ARM 36.11.425(10) should be revised to include RMZ's.

RESPONSE 243: The department concurs and has made the change.

Comments Regarding ARM 36.11.426 WATERSHED MANAGEMENT - WETLAND MANAGEMENT ZONES

COMMENT 244: ARM 36.11.426(1)(a), (b), and (c) are inadequate. WMZ's should provide ample shade. The department needs to ensure that complexes comprised of numerous small potholes or other wetlands exceeding .1 acre have some sort of shade retention and that the department develop a rule that examines the cumulative impacts of forestry activities that cover landscapes with clusters of these features.

RESPONSE 244: Provisions in ARM 36.11.426(1)(a) are consistent with SFLMP and provide higher levels of resource protection than currently required under the SMZ law and rules. Provisions contained in ARM 36.11.426(1)(b) and (c) provide adequate levels of resource protection for wetlands.

COMMENT 245: ARM 36.11.426(5)(a) Roads should be prohibited in Wetland Management Zones.

RESPONSE 245: In general, under the rules, the construction and use of roads in wetland management zones would be avoided. On occasion the construction or reconstruction of a road within a WMZ might be necessary, unavoidable or desirable when no other reasonable alternative exists. In any case these activities would only be considered if they could be adequately mitigated.

COMMENT 246: ARM 36.11.426(5)(a) Department of Fish, Wildlife and Parks recommends that roads should not be built within 50' of WMZ to maintain their integrity. FWP is unaware of mitigation measures that could "adequately mitigate" potential impacts, and, therefore, suggests dropping ARM 36.11.426(5)(a) and sticking with language in (5) avoiding the use and construction of roads in WMZ.

RESPONSE 246: Wetland banking and other measures are commonly used to offset or mitigate impacts from wetland road construction when no other reasonable alternatives exist. The department recognizes the sensitivity of road construction in WMZ's. The rule provides adequate wetland protection.

COMMENT 247: ARM 36.11.426(6) should say the department shall "minimize".

RESPONSE 247: The rule provides adequate resource protection. The rule is consistent with the SFLMP.

COMMENT 248: ARM 36.11.426(6)(a)(i) What is excessive?

RESPONSE 248: Excessive refers to those levels that cause undesirable or detrimental impacts, or exceeds those levels analyzed for in the project level MEPA assessments.

COMMENT 249: ARM 36.11.426(6)(b)(iii) The operation of ground-based equipment in a WMZ should be limited to frozen soil only.

RESPONSE 249: The rule provides for an acceptable level of resource protection. Achieving these levels of resource protection requires design and implementation of site-specific mitigation measures depending on site-specific conditions, type of activity proposed and other circumstances and factors occurring at the site. This is consistent with the intent of the SFLMP.

COMMENT 250: ARM 36.11.426(8) and (8)(a) should be moved to ARM 36.11.424(1)(e) WATERSHED MANAGEMENT - MONITORING.

RESPONSE 250: The department concurs and has made the change.

COMMENT 251: ARM 36.11.426(8) Successful management requires adequate monitoring and this should be a mandatory commitment. The department needs to schedule and plan regular impact assessments.

RESPONSE 251: A watershed monitoring strategy was developed and adopted under SFLMP that included a peer and Land Board review. The premise for the approach was directed by the SFLMP. The rule is consistent with the SFLMP.

Comments Regarding ARM 36.11.427 - FISHERIES

COMMENT 252: ARM 36.11.427(2) The referenced rules should be changed to reflect the correct rule numbers.

RESPONSE 252: The department concurs and has made the change.

COMMENT 253: The department should review forest management activities and their effects on federally listed species as well as species of concern, sensitive species, and species the USFWS considers candidates for listing.

RESPONSE 253: ARM 36.11.427(2) addresses forest management activities in relation to threatened, endangered and the department listed sensitive species fish species. ARM 36.11.436(6) addresses the development and maintenance of the department sensitive species list.

COMMENT 254: ARM 36.11.427(2)(a)(i) should be revised to be consistent with the SFLMP.

RESPONSE 254: The department concurs and has made the changes.

COMMENT 255: ARM 36.11.427(2)(a)(i) should also ensure the department implements measures identified in conservation plans the state has developed for westslope cutthroat trout, Yellowstone cutthroats, and fluvial arctic grayling.

RESPONSE 255: ARM 36.11.427(3)(c) addresses fish species on the department sensitive species list.

COMMENT 256: ARM 36.11.427(3)(c)(iv) needs a definition of "reasonable efforts". The department is a signatory to the MOU and Conservation Agreement for westslope cutthroat trout in Montana. A goal of that document is to protect westslope cutthroat trout and their habitats. The commitment in the MOU should be reflected in these rules.

RESPONSE 256: Reasonable efforts are those conservation strategies that satisfy the needs of the species within the context of trust obligations. By signing the MOU associated with these conservation agreements, the department agrees to the terms.

COMMENT 257: ARM 36.11.427(3)(c)(iv) The department is required to review and assess impacts of forest management activities on all fisheries populations under MEPA, not just threatened and endangered. This rule should include Montana sensitive species and important recreational species.

RESPONSE 257: Sensitive species are addressed in the new rules. Issues regarding the potential effects of forest management activities on non-sensitive fish populations are addressed at the project level during the MEPA process.

COMMENT 258: ARM 36.11.427(4) The rule should say "structures...the department should comply with the Stream Protection Act and ensure that adequate passage is provided in consultation with MDFWP for flows up to 100-year events so that all appropriate life histories of the species on site are accommodated".

RESPONSE 258: Stipulations and requirements designed to ensure adequate fish passages are specified in the Stream

Protection Act permits obtained through consultation with MDFWP.

COMMENT 259: These new rules don't appear to account for problems with existing roads, which also need to be addressed in the rules.

RESPONSE 259: Stream crossing structures on existing roads are accounted for when they are subject to the 124 permit process under the authority of the Stream Protection Act.

Comments Regarding ARM 36.11.428 THREATENED AND ENDANGERED SPECIES

COMMENT 260: ARM 36.11.428(1) The rule has been fundamentally changed from the goal for endangered species in the SFLMP. The department has gone from "would participate" and "would confer" to "may participate" and "may confer".

RESPONSE 260: The rule has been revised. The rule is consistent with the SFLMP.

COMMENT 261: ARM 36.11.428(1) In general the department should not be managing trust lands to support threatened and endangered species unless the federal government reimburses the trusts for losses to the trusts due to that management....The trusts should come first.

RESPONSE 261: The department is obligated to comply with section 9 of the ESA.

COMMENT 262: ARM 36.11.428(1) Unless there is a demonstrable income benefit to the trusts, management targets for threatened and endangered and sensitive species are inappropriate. The greatest problem in the proposed rule with regard to threatened and endangered species is its failure to clearly define the link between allowable and prohibited activities. Language is needed such as the following: "All management activities under this rule must be reasonably calculated to administer trust property so as to financially secure the largest amount of legitimate and reasonable advantage to the trust, except where those activities are necessary to avoid a 'taking' or other violation of law."

RESPONSE 262: Fine filter biodiversity considerations for these species are a fundamental component of the SFLMP and warrant consideration in the rules. Providing for habitat needs of these species is consistent with the department view that the best way to produce long-term income for the trust is to manage intensively for healthy and biologically diverse forests.

COMMENT 263: ARM 36.11.428(1) The commenter suggests a more collaborative tone and approach by the department to cooperate fully in the recovery of threatened and endangered species, and to prevent the listing of additional species. The commenter believes this approach is needed to retain and gain maximum management options over the long-term.

RESPONSE 263: This rule was revised to address this concern. The rule is consistent with the SFLMP.

COMMENT 264: ARM 36.11.428(2)(b) Again the department has severely weakened the commitments made in the SFLMP for the protection of threatened and endangered species. Why does the agency get sole discretion when deciding on whether to work with other groups? Shouldn't the Board of Land Commissioners have some say in whether the agency will cooperate with other agencies?

RESPONSE 264: This rule was revised and is consistent with the SFLMP. The rules will carry the force of law when adopted. The department considers it appropriate to retain discretion for working group and recovery effort participation, as consistent with department mandates, ownership and other objectives. The department has no intention of reducing participation in working groups applicable to management of habitat on state lands.

Comments Regarding ARM 36.11.429 THREATENED AND ENDANGERED SPECIES - BALD EAGLE

COMMENT 265: ARM 36.11.429(1)(c)(v) The SFLMP guidance says "prohibit".

RESPONSE 265: "Limit" is a reasonable term for the intended purpose, given the exceptions stated in the Montana Bald Eagle Management Plan of July 1994.

COMMENT 266: ARM 36.11.429(1)(d)(ii)(H) should be edited for clarity.

RESPONSE 266: The department concurs and has made the change.

Comments Regarding ARM 36.11.430 THREATENED AND ENDANGERED SPECIES - GRAY WOLF

COMMENT 267: ARM 36.11.430(1)(c) provides for conservation and management of white-tailed deer, mule deer and elk habitat in a coarse filter approach, in recognition of this prey base for gray wolf. FWP assumes that its collaboration in working with the department on winter range and other critical habitats for deer, elk, and moose will fall under this rule. If so, a fine filter approach may also be needed to focus habitat management in key locations for which

FWP can provide site-specific information. FWP recommends that a fine filter step that involves FWP consultation be added under (1)(c)(iii) so as to deal effectively with the habitat issues important to sustaining the prey base for gray wolves.

RESPONSE 267: The department agrees that such fine filter assessments may be needed in key locations, and would cooperate at the project level where issues could appropriately be addressed through MEPA. Big Game ARM 36.11.443(1)(b) was revised to clarify FWP's role in consulting on big game issues, regardless of potential association with wolf packs. The department believes, with revision, ARM 36.11.443(1)(b) is adequate for the intended purpose. The rule is consistent with the SFLMP.

Comments Regarding ARM 36.11.431 THREATENED AND ENDANGERED SPECIES - GRIZZLY BEAR

COMMENT 268: ARM 36.11.431(1)(a) The Swan Valley agreement has been rendered ineffective for protecting grizzly bears. It is not being fully implemented by some parties.

RESPONSE 268: The department disagrees. The Swan Valley Grizzly Bear Conservation Agreement is faithfully being fully implemented. The department is committed to cooperating to minimize risk to grizzly bears in the Swan Valley.

COMMENT 269: ARM 36.11.431(1)(a)(i) There has been no annual reporting to date.

RESPONSE 269: Monitoring reports have been drafted and submitted by the cooperators to the USFWS since 1999.

Comments Regarding ARM 36.11.432 GRIZZLY BEAR MANAGEMENT ON BLOCKED LANDS

COMMENT 270: The wording in ARM 36.11.432(1) should be changed in the rule to correct English.

RESPONSE 270: The department concurs and has made the change.

COMMENT 271: Some elements of this rule are excessive and will impair the state's ability to intensively manage lands to produce long-term income to the trusts. The proposal to expand security core areas with additional buffers and/or road restrictions to reduce temporary losses of effective core area is far too restrictive and is not consistent with the fiduciary duties owed to the beneficiary.

RESPONSE 271: The temporary identification and expansion of security core areas would typically occur when existing, identified secure areas would be entered for management. This

is proposed to reduce potential for "net loss" of security core as a result of management activities. The department considers this rule consistent with SFLMP direction and reasonable for minimizing risk to grizzly bears.

COMMENT 272: ARM 36.11.432(1)(b) This should be the "moving windows" technique.

RESPONSE 272: The currently accepted technique in use by the department is "moving windows". The department acknowledges that acceptable techniques and methodologies change over time. Broad language to describe methodology in this case is preferable to account for possible future changes.

COMMENT 273: ARM 36.11.432(1)(c) Assumes that the baseline road levels from the SFLMP meet the needs of grizzlies. The department should adopt the federal USFS Flathead National Forest Amendment-19 standards.

RESPONSE 273: This rule is adopted from direction contained in the Interim Motorized Access Management Direction Northern Continental Divide Recovery Zone (March 8, 1995). The department believes the rule is appropriate given its intended purpose.

COMMENT 274: ARM 36.11.432(1)(c)(i) This suggests that the department does not know how many ghost roads they have, and (1)(b) the "non-denning period" language is an effort to give snowmobiles a pass. This should not be allowed.

RESPONSE 274: Occasionally roads are found that were in existence prior to 1996. Correction of such errors can slightly alter baseline road density estimates, but these errors must be accounted for. Correction results in a more accurate portrayal of 1996 baseline road density. This is necessary for accurately analyzing project effects and compliance with rules requiring no net increase. The "non-denning period" language is contained throughout existing interagency policy for grizzly bears. The non-denning period term is science based and is used to denote the period when bears are most vulnerable to human disturbance -- particularly as related to motorized access.

COMMENT 275: ARM 36.11.432(1)(c)(ii) is not based in science and allows the department too much discretion.

RESPONSE 275: The department believes a wording change to the proposed rule is necessary to more accurately convey original intent. This rule is necessary to allow for management flexibility in situations where meeting baseline road densities is clearly incompatible with continued forest management activities. In such cases risk to bears would be carefully assessed and approval for alternative action would

be required by the forest management bureau chief. Such allowance would require that alternative methods for minimizing impacts to grizzly bears be applied to the maximum extent practicable.

COMMENT 276: ARM 36.11.432(1)(d) assumes that 1996 cores are adequate, when they may not be. The last four words "to the extent practicable" allow the department too much discretion. The department needs to provide to the public the science behind the mapped security cores.

RESPONSE 276: This rule is adopted from direction contained in the Interim Motorized Access Management Direction Northern Continental Divide Recovery Zone (March 8, 1995). Due to constraints related to land ownership amount, location, distribution, and agency mandates differing from those of federal agencies, the department has never firmly committed to retaining grizzly bear security core for periods greater than or equal to 10 years. The department recognizes the importance of the 10-year generation time for bears, but must balance ownership constraints and agency mandate. Security core maps are available to the public upon request. Security core delineation on department lands follows established procedures and incorporates professional judgment. The rule was revised to clarify intent.

COMMENT 277: ARM 36.11.432(1)(d)(i) contains language that allows the department too much discretion.

RESPONSE 277: A wording change to the rule is necessary to more accurately convey the purpose and intent. This rule is necessary to allow for management flexibility in situations where meeting baseline core retention requirements is clearly incompatible with continued forest management activities. In such cases risk to bears would be carefully assessed and approval for alternative action would be required by the forest management bureau chief. Such allowance would require that alternative methods for minimizing impacts to grizzly bears be applied to the maximum extent practicable.

COMMENT 278: ARM 36.11.432(1)(e) By definition the Interagency Grizzly Bear Committee (IGBC) core areas contain no roads, skid trails, or other "project-related activities." They are essentially closed to all such intrusions for a maximum of 10 years.

RESPONSE 278: The IGBC definition states "...no motorized use of roads and trails during the non-denning period. Within the core area, restricted roads require closure devices that are permanent such as tank traps, large boulders, dense vegetation, etc." Due to constraints related to land ownership amount, location, distribution, and agency mandates differing from those of federal agencies, the

department has not committed to retaining grizzly bear security core for periods greater than or equal to 10 years.

COMMENT 279: ARM 36.11.432(1)(f) No such activities are permitted in core areas. If they happen, for whatever reason, the area is no longer a core. The department is a member of the IGBC, therefore this is not acceptable.

RESPONSE 279: Since adoption of the SFLMP the department has made substantial efforts to minimize disturbance within identified secure areas. However, due to constraints related to land ownership amount, location, distribution, and agency mandates differing from those of federal agencies, the Department has not committed to retaining grizzly bear security core for periods greater than or equal to 10 years. The Department does not have representation on the IGBC.

COMMENT 280: ARM 36.11.432(1)(f)(ii) Using the terms "shall make efforts" and "where practicable" allows the department too much discretion.

RESPONSE 280: Language contained in the rule acknowledges a broad range of site-specific situations that arise in forest management projects. This rule requires the department to consider areas of importance to bears when conducting activities that involve aerial operations. The rule also requires the department to minimize impacts to bears to the extent it can be accomplished for proposed activities. The department believes the rule is appropriate given its intended purpose.

COMMENT 281: ARM 36.11.432(1)(g) There is no such thing as a "temporary loss" of core. An area is either core, or it isn't.

RESPONSE 281: Due to constraints related to land ownership amount, location, distribution, and agency mandates differing from those of federal agencies, the department has not committed to retaining grizzly bear security core for periods greater than or equal to 10 years. The department recognizes that providing secure areas for periods of time less than 10 years continues to have greater potential to reduce risk for bears than non-secure areas.

COMMENT 282: The language in ARM 36.11.432(1)(h) allows the department too much discretion. The department needs to use best available science.

RESPONSE 282: The department recognizes the importance of disclosing and minimizing total road densities. Due to constraints related to land ownership amount, location, distribution, and agency mandates differing from those of federal agencies, the department did not choose to adopt firm targets for total road density.

COMMENT 283: ARM 36.11.432(1)(j) is inadequate. Monitoring and closure repairs need to happen monthly.

RESPONSE 283: Contractor availability, funding availability, resource risk, closure location, etc. are examples of factors that may influence the repair time of a specific closure device found to be ineffective. The rule as proposed is realistic and accomplishes any needed repairs in a reasonable amount of time.

COMMENT 284: ARM 36.11.432(1)(k) means that 60% can be roaded and clearcut at any given moment. This is a fragmentation level incompatible with most carnivore viability. The department needs to explain to the public what exactly are the situations beyond the department's control. Using the terms "shall make efforts" renders this proposed rule weak and vague.

RESPONSE 284: 40% is the level of cover specified as necessary in the Swan Valley Grizzly Bear Conservation Agreement for reducing risk to grizzly bears. This rule is not proposed to address fragmentation, nor the habitat needs of a broad range of carnivore species. Situations that have arisen beyond department control during the last several years include (but are not limited to) extensive wildfires that have removed cover and large wind events that have blown down trees. The department believes the rule is appropriate for the intended purpose.

COMMENT 285: In ARM 36.11.432(1)(l) what scientific bear-based standards is the department using in this proposed rule? Using the term "where practicable" renders this proposed rule weak and vague.

RESPONSE 285: This subsection is adapted from the Swan Valley Grizzly Bear Conservation Agreement. Its intended purpose is to address cover retention for bears along open roads, and provide flexible language that allows for human safety concerns. The Department believes the definition meets the intended purpose to allow for consideration of cover retention along open roads.

Comments Regarding ARM 36.11.433 GRIZZLY BEAR MANAGEMENT ON OTHER WESTERN MONTANA LANDS

COMMENT 286: ARM 36.11.433(1)(a) should be edited to incorporate the appropriate acronyms and shorten text.

RESPONSE 286: The department concurs and has made the change.

COMMENT 287: ARM 36.11.433(1)(a) Simple linear calculations are outdated and discredited, and "no net

increases" assumes the status quo is o.k. Snowmobiles can no longer be given a pass. They are motorized vehicles that cause disturbance to bears. The department needs to explain exactly what science they are using to back up the statement "temporary increases are permissible for up to two consecutive operating seasons." This allows the department too much discretion.

RESPONSE 287: The rule applies to forest management activities that occur during spring, summer, and fall when bears are most vulnerable to human disturbance -- particularly as related to traditional forms of motorized access. This rule is necessary to allow for management flexibility in situations where meeting road density thresholds is clearly incompatible with continued forest management activities. In such cases risk to bears would be carefully assessed. The department believes that this definition and methodology adequately addresses road density evaluation for the intended purpose given available analysis techniques and data.

COMMENT 288: ARM 36.11.433(1)(a) The rule does not specify the analysis area to be used for determining open road densities. We recommend the 1 square mile guidance be applied and expressed in the context of all the department parcels within a BMU rather than the individual parcel.

RESPONSE 288: The rule states that this would be determined at the parcel level for state lands. Calculation of road densities at the BMU scale is also a reasonable approach. Given consideration of needs of grizzly bears, existing ownership patterns, and existing road densities, the approach provided in this rule is currently the most feasible.

COMMENT 289: ARM 36.11.433(1)(a) We recommend that existing cabin site and mineral development sites be granted specific exemption from road density thresholds.

RESPONSE 289: Considering special management needs on some lands is a reasonable consideration. However, as ESA applies to individuals, whether activities originate from the Forest Management Program, Special Uses Program, Minerals, etc., risk may be posed to bears. In this situation it is necessary to consider cumulative influences of department activities in addition to forest management activities. Thus, from the perspective of grizzly bears, it is appropriate and necessary to consider roads and human activities associated with other uses.

COMMENT 290: ARM 36.11.433(1)(a) We recommend that land purchases and exchanges be exempted from the rule. It would prohibit the department from acquiring lands with open road densities within recovery areas. We do not believe the intent of the rule is to stifle exchange of lands.

RESPONSE 290: As stated, this rule should not prohibit the department from exchanging into, or purchasing land with existing high road density. However, the department must recognize the liabilities and attributes of such lands, which may ultimately influence decisions to exchange or purchase. Road density, access and human development will continue to be important issues associated with lands that lie within grizzly bear recovery zones.

COMMENT 291: ARM 36.11.433(1)(a) Much of the department's forestland is wild and remote, and FWP encourages people to take reasonable precautions for protecting themselves in the outdoors. (A copy of FWP's brochure, "How to Hunt Safely in Grizzly Country," is attached to this letter; it outlines safety measures, including use of bear pepper spray that recreationists might use.)

RESPONSE 291: The department agrees with this concern and is cooperating with FWP to reduce risk to grizzly bears through the NCDE Subcommittee and other programs such as the "Living With Black Bears Grizzly Bears and Lions" Project. It is the department's view that such considerations are best addressed in this manner and not administrative rules.

COMMENT 292: Regarding ARM 36.11.433(1)(b) the department needs to specify the exact science behind this proposed rule. Using the term "to the extent practicable" allows the department too much discretion.

RESPONSE 292: This subsection is adapted from the Swan Valley Grizzly Bear Conservation Agreement. Its intended purpose is to address cover retention for bears along open roads, and provide flexible language that allows for human safety concerns. The department believes the definition meets the intended purpose to allow for consideration of cover retention along open roads.

COMMENT 293: Regarding ARM 36.11.433(1)(c), riparian zones are critical grizzly bear habitat and should have 100-yard setbacks on either side of the high waterline. Using the term "to the extent practicable" allows the department too much discretion.

RESPONSE 293: The phrase "to the extent practicable" was included originally to acknowledge that hiding cover is not always present near riparian zones. The rule is re-worded to more accurately address this consideration.

COMMENT 294: ARM 36.11.433(1)(d) needs to be changed to say "Prohibit contractors and purchasers conducting contract operations from carrying firearms on their persons or in their vehicles while operating anywhere on state lands, coming or going."

RESPONSE 294: The department believes the rule is adequate for the intended purpose.

COMMENT 295: ARM 36.11.433(1)(d) This may not be legal (interference with constitutional right to keep and bear arms). Would the department be accepting liability for potential bear maulings that might be prevented by possession of a firearm?

RESPONSE 295: The department's legal staff conducted a thorough review of this rule. This constraint is legal and within the department's discretion.

Comments Regarding ARM 36.11.434 GRIZZLY BEAR MANAGEMENT ON EASTERN MONTANA LANDS

COMMENT 296: Regarding ARM 36.11.434(1), the department should formally consult with the USFWS both on individual projects and cumulatively. USFWS is preparing to implement their new linkage zone plan between recovery areas, and the department needs to tie their lands in cooperatively.

RESPONSE 296: Under Section 9 of the Endangered Species Act, the department is not legally obligated to formally consult with the USFWS. The department is a participant on the Interagency Public Lands Task Force to cooperatively address wildlife linkage. An addition was made to this rule to clarify the relevant factors the department would consider when developing project-level mitigations for grizzly bears.

Comments Regarding ARM 36.11.435 THREATENED AND ENDANGERED SPECIES - CANADA LYNX

COMMENT 297: Regarding ARM 36.11.435(8)(b)(i), a 10% foraging habitat is very little to retain.

RESPONSE 297: Habitat proportions at the landscape scale that are necessary to promote survival of lynx remain poorly understood. This rule is proposed to ensure that quality foraging habitat for lynx in the amount of 10% is retained where it exists on school trust lands.

Comments Regarding ARM 36.11.436 SENSITIVE SPECIES

COMMENT 298: ARM 36.11.436(1) should be revised to be consistent with the SFLMP.

RESPONSE 298: The department concurs and has made the change.

COMMENT 299: Regarding ARM 36.11.436(1)(a) considering cover types alone is not enough. The department should also consider age classes and structure.

RESPONSE 299: The department recognizes that other forest stand characteristics and attributes are important habitat considerations for sensitive species. In this situation, cover type is the appropriate term to convey the intended meaning. This subsection was originally contained in the SFLMP guidance for sensitive species.

COMMENT 300: ARM 36.11.436(2) should be revised to be consistent with the SFLMP.

RESPONSE 300: The department concurs and has made the change.

COMMENT 301: ARM 36.11.436(2)(b) should be revised to be consistent with the SFLMP.

RESPONSE 301: The department concurs and has made the change.

COMMENT 302: ARM 36.11.436(3) should be revised to be consistent with the SFLMP.

RESPONSE 302: The department concurs and has made the change.

COMMENT 303: ARM 36.11.436(4) should be revised to be consistent with the SFLMP.

RESPONSE 303: The department concurs and has made the change.

COMMENT 304: ARM 36.11.436(5) should be revised to be consistent with the SFLMP.

RESPONSE 304: The department concurs and has made the change.

COMMENT 305: ARM 36.11.436(6) Why do the rules differ from the Plan Guidance? Why has the total species list been reduced to 6 from 14?

RESPONSE 305: This rule was revised to ensure consistency with the SFLMP. SFLMP sensitive species guidance (1998) originally identified 16 sensitive species. Of these, specific "SFLMP management guidelines" were provided for 9 species in 1998. Since 1998, the status has changed for several species (e.g., peregrine falcon and Canada lynx). The department re-evaluated the "guidelines" and developed specific rules only for those species that are most likely to be frequently influenced by forest management activities in Montana. The department will continue to conduct fine filter assessments and mitigate at the project level for the larger array of sensitive species, most of which are from the original 1998 list. However, the department considers it

unnecessary to develop detailed mitigation rule-sets for species that are likely to be infrequently affected.

COMMENT 306: ARM 36.11.436(6) would be sufficient without outlining 6 more rules for flammulated owl, black-backed woodpecker, pileated woodpecker, fisher, common loon, and peregrine falcon. The danger in uplifting some but not all possible sensitive species is the specter of stopping a timber sale because of some yet unnamed species that could be sensitive but has not been addressed specifically.

RESPONSE 306: The department considers the rules for these species necessary for meeting fine filter commitments to biodiversity, and for providing consistent management direction. By identifying sensitive species and objectively evaluating those most likely influenced by department activities, the department's commitments can clearly be established.

Comments Regarding ARM 36.11.439 SENSITIVE SPECIES - PILEATED WOODPECKER

COMMENT 307: In ARM 36.11.439(1), there are no firm commitments and no scientific citations.

RESPONSE 307: Language contained in this rule provides guides for broad management considerations important for pileated woodpeckers. The department believes the rule is adequate for the intended purpose.

Comments Regarding ARM 36.11.440 SENSITIVE SPECIES - FISHER

COMMENT 308: ARM 36.11.440(1) should be revised to delete the unnecessary term "project analysis area".

RESPONSE 308: The department concurs and has made the change.

Comments Regarding ARM 36.11.443 BIG GAME

COMMENT 309: ARM 36.11.443(1) should be revised to be consistent with the SFLMP.

RESPONSE 309: The department concurs and has made the change.

COMMENT 310: ARM 36.11.443(1) The commenter is confused by the term "big game". There are several categories of wildlife that are not mentioned here. We believe all Montana wildlife should be considered on equal footing in the rules.

RESPONSE 310: The purpose of this section was to provide direction for big game species consistent with SFLMP Resource

Management Standards. Consideration for the habitat needs for other species of wildlife is provided in rules for Biodiversity, Threatened and Endangered Species and Sensitive Species. The coarse and fine filter approaches are not intended to give some species preferential status, but they are intended to appropriately address habitat needs for the species found in Montana. Federally listed threatened and endangered species, however, do by law possess elevated status for management consideration.

COMMENT 311: ARM 36.11.443(1)(a) should be revised to be consistent with the SFLMP.

RESPONSE 311: The department concurs and has made the change.

COMMENT 312: ARM 36.11.443(1)(b) should be revised to be consistent with the SFLMP.

RESPONSE 312: The department concurs and has made the change.

COMMENT 313: ARM 36.11.443(3) "Biodiversity monitoring procedures described in ARM 36.11.419 shall be used to track health of forest ecosystems. This process shall be used as the primary indicator of the health of wildlife populations using these ecosystems. When necessary, corrective actions would be taken as described in ARM 36.11.419." should be added to be consistent with the SFLMP.

RESPONSE 313: The department concurs and has made the change.

Comments Regarding ARM 36.11.444 GRAZING ON CLASSIFIED FOREST LANDS

COMMENT 314: ARM 36.11.444(4) should be revised to be consistent with the SFLMP.

RESPONSE 314: The department concurs and has made the change.

Comments Regarding ARM 36.11.445 WEED MANAGEMENT

COMMENT 315: Regarding ARM 36.11.445(1)(b), the department should also consider new infestations of new invaders even if they are not yet listed as noxious, to be a priority.

RESPONSE 315: The department does also consider infestations of new invaders listed by county weed districts.

COMMENT 316: ARM 36.11.445(1) MNPS believes that the department should train their workforce to recognize weeds so

that roads and project areas can be monitored frequently for new infestations.

RESPONSE 316: The education referenced in ARM 36.11.445(1) includes training of the department staff. Weed monitoring is addressed under ARM 36.11.445(7).

Comments Regarding ARM 36.11.446 FINANCES AND ECONOMICS

COMMENT 317: Regarding ARM 36.11.446(1), the SFLMP did not contain a section similar to this section. It is difficult to see how this section will be integrated into every day decision-making. Does this section give DNRC complete discretion to make any management decision it can fit into this category? This section needs further clarification.

RESPONSE 317: This rule is formulated from the concepts expressed in SFLMP ROD Silviculture RMS numbers 6-8. The rule reflects the appropriate level of detail necessary to programmatically evaluate financial and economic considerations. It is the responsibility of the department to abide by the trust mandate and to ensure that it is supported in the management proposals brought before the Board of Land Commissioners. The rule is consistent with the SFLMP.

COMMENT 318: Regarding ARM 36.11.446(1)(a), the department needs to explain this section in more detail. What size of acreage is the department considering? What are the site-specific opportunities they are describing here? This statement is meaningless.

RESPONSE 318: The amount of acreage that the department considers minor would be determined on a site-specific basis. At a minimum, these opportunities would not be on a scale such that normal forest management would be precluded as the dominant use. Site-specific opportunities could include any opportunity that has the ability to generate income to the trust other than sales of forest products. The department believes the rule is adequate for the intended purpose.

COMMENT 319: ARM 36.11.446(3) contains no provisions for tracking the costs of individual timber sales to determine whether they are making or losing money for school trusts. The department is using project-by-project analysis for managing forests but will only look at economics on a programmatic scale. There is no mechanism for tracking whether revenue is actually being generated or if timber sales are below cost.

RESPONSE 319: The economic context for timber sales is to maintain healthy and biologically diverse forests, which will produce long-term income for the trust. The department looks at the conditions of state forestlands in general to determine where and how to achieve the annual forest management program

objectives. Collectively, individual sales contribute to programmatic economic goals. Projects are justified economically by this larger assumption rather than by weighing the costs and benefits of a single project. Sales are based on the criteria of maintaining healthy and biologically diverse forests, not on a concept of maximizing short-term revenue.

Comments Regarding ARM 36.11.447 CATEGORICAL EXCLUSIONS

COMMENT 320: ARM 36.11.447(2)(a) should be edited to clarify meaning.

RESPONSE 320: The department concurs and has made the change.

COMMENT 321: ARM 36.11.447(2)(a) The department has eliminated the final portion of this categorical exclusion that changes it significantly. Why has the department dropped this important consideration of threatened and endangered species from the proposed rule? How can an activity that may negatively impact threatened or endangered species be considered so insignificant that the activity does not require and EA or EIS under MEPA? By definition impacts on an endangered species are significant.

RESPONSE 321: This rule specifically states in ARM 36.11.447(2)(b) that categorical exclusions shall not apply in the following extraordinary circumstances: "federally listed threatened and endangered species or critical habitat for threatened and endangered species as designated by the USFWS."

COMMENT 322: The categorical exclusion in ARM 36.11.447 (3)(w) appears nowhere in the SFLMP and should not be considered as a categorical exclusion. The department should drop this categorical exclusion from the proposed rules.

RESPONSE 322: Categorical exclusions can be determined by rulemaking according to the MEPA rules in ARM 36.2.522(5). The rule has been edited to reduce the volumes that are eligible for categorical exclusion.

COMMENT 323: We recommend any harvest exceeding 50,000 board feet involving fish bearing streams or streams that deliver water to fish bearing streams not be categorically excluded.

RESPONSE 323: As stated in ARM 36.11.447(2)(d), this categorical exclusion would not apply in cases involving "activities within the SMZ of fish bearing streams or lakes, except for modification or replacement of bridges, culverts and other crossing structures."

COMMENT 324: The volumes seem high. The public has a right to be involved in activities on public lands.

RESPONSE 324: Categorical exclusions are not intended to exclude the public from participation.

COMMENT 325: The categorical exclusion for 250 mbf and 1,000 mbf salvage are indefensible. This eliminates scientists from outside the agency and Montana citizens from input on significant projects.

RESPONSE 325: The rule has been edited to reduce the volumes that are eligible for categorical exclusion.

COMMENT 326: ARM 36.11.447 lists actions to be categorically excluded from MEPA review. Of those listed, FWP specifically requests to be notified in advance regarding actions described under ARM 36.11.447(3)(b), (d), (f), (g), (i), (s), and (w). The actions in these sections could affect the resources that FWP manages, such as game and non-game wildlife, fisheries, and recreational opportunities (fishing, stream access, hunting, snowmobiling, etc.).

RESPONSE 326: As indicated in the rule, any qualifying activity would have to meet certain criteria and would not be allowed if extraordinary circumstances are likely. Adoption of these rules would not prohibit such notification prior to implementing any categorical exclusion. The department would prefer to address such requests outside of the administrative rule-making process.

Comments Regarding ARM 36.11.448 MANAGEMENT OF THE STATE FOREST MANAGEMENT PLAN

COMMENT 327: Regarding ARM 36.11.448(3)(a), what if the public views these changes as not being compatible? The public should be notified whenever there are changes being made to the plan. And all changes need to be presented to the Board of Land Commissioners so that it can make the decisions regarding forest management. These decisions should not be made at the sole discretion of the department. What is the definition of minor changes or additions? The SFLMP says cumulative minor changes could result in a programmatic review of the entire plan. Why has this sentence not been included in the rule? What will the impact be of this deletion?

RESPONSE 327: The rule is consistent with the SFLMP. Any substantial programmatic changes to the SFLMP would be addressed through MEPA as a Plan amendment. The department agrees that cumulative minor changes can result in a programmatic review of the entire plan. The rule has been revised. Minor changes shall be determined by the forest management bureau chief, as stated in the SFLMP. Maintaining that discretion is the responsibility of the forest management bureau chief, as directed by the SFLMP.

Comments Regarding ARM 36.11.449 SITE-SPECIFIC ALTERNATIVE PRACTICES

COMMENT 328: ARM 36.11.449(1) should be eliminated. Nowhere in the SFLMP does this rule, or anything resembling it, appear. The department cannot put into the hands of the bureau chief the ability to disregard large sections of forest management rules.

RESPONSE 328: In the interest of allowing for appropriate and informed decision making, the department leaves open the potential that other circumstances may dictate some divergence from the rules as written. In doing so, we acknowledge the inability of broadly applicable rules to account for every possible situation that may occur in the real world. With any action-related activity the department will base its decisions on site-specific analysis, informed public involvement, and consideration of resource protection sideboards provided by these rules.

COMMENT 329: It is unclear in ARM 36.11.449(2) what constitutes "adequate levels of resource protection" when assessing fisheries and aquatic resource issues. Those impacts need to be evaluated by fisheries professionals. FWP will continue to work with the department to review and recommend actions on proposed alternative practices.

RESPONSE 329: The department concurs. Timber harvest conducted in an SMZ of a fish-bearing stream would occur only to the extent that adequate levels of shade, large woody debris recruitment and other habitat features were maintained. Adequate levels of these habitat parameters can only be determined on a site-specific project level basis.

Comments Regarding ARM 36.11.450 TIMBER PERMITS

COMMENT 330: ARM 36.11.450(1) should be edited to clarify the intent.

RESPONSE 330: The department concurs and the department has made the change.

COMMENT 331: 77-5-212, MCA states: "Commercial permits for timber removal. Section (1) Permits may be issued to citizens of the state for commercial purposes at commercial rates without advertising under such restrictions and rules as the board may approve for timber in quantities of less than 100,000 feet board measure; and in cases of emergency due to fire, insect, fungus, parasite, or blowdown and no other, in quantities of less than 200,000 feet board measure."

RESPONSE 331: ARM 36.11.450(1) was edited to include the words "at commercial rates and without advertising".

COMMENT 332: Is the department proposing to bypass the approval of the Board of Land Commissioners? The Board of Land Commissioners is in charge of managing the trust. The Board of Land Commissioners needs to be informed at all times about what is happening on state lands.

RESPONSE 332: The department intends to continue to keep the Board of Land Commissioners informed of all activities being proposed on state land. The public will continue to have the opportunity to comment on permit proposals.

COMMENT 333: It is unclear if these timber permits are categorically excluded or what type of MEPA process will be used.

RESPONSE 333: Permits will only qualify for a categorical exclusion if they meet the criteria under ARM 36.11.447. If they do not qualify for a categorical exclusion, an environmental assessment will be conducted.

4. An electronic copy of this Notice of Adoption is available through the department's site on the World Wide Web at <http://www.dnrc.state.mt.us>. The department strives to make the electronic copy of this Notice of Adoption conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

BOARD OF LAND COMMISSIONERS

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

By: /s/ Judy Martz
JUDY MARTZ
Chair

By: /s/ Arthur R. Clinch
ARTHUR R. CLINCH
Director

By: /s/ Donald D. MacIntyre
DONALD D. MACINTYRE
Rule Reviewer

Certified to the Secretary of State March 3, 2003.

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

In the matter of the) NOTICE OF AMENDMENT
amendment of ARM 37.50.320)
pertaining to foster care)
facility contracts)

TO: All Interested Persons

1. On January 16, 2003, the Department of Public Health and Human Services published MAR Notice No. 37-263 regarding the proposed amendment of the above-stated rule relating to foster care facility contracts, at page 4 of the 2003 Montana Administrative Register, issue number 1.

2. The Department has amended ARM 37.50.320 as proposed.

3. No comments or testimony were received.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and
Human Services

Certified to the Secretary of State March 3, 2003.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption) NOTICE OF ADOPTION
of New Rule I (ARM 42.2.115))
relating to the issuance of)
final agency decisions)

TO: All Concerned Persons

1. On January 30, 2003, the department published MAR Notice No. 42-2-708 regarding the public hearing on the proposed adoption of New Rule I (ARM 42.2.115) relating to the issuance of final agency decisions, at page 94 of the 2003 Montana Administrative Register, issue no. 2.

2. A public hearing was held on February 24, 2003, to consider the proposed adoption. No one appeared at the hearing to testify and no written comments were received subsequent to the hearing.

3. The department has determined that the proposed rule should be further amended as follows:

NEW RULE I (42.2.115) FINAL AGENCY DECISIONS (1) In accordance with the authority of the director as provided in 2-15-112, MCA, the director delegates the authority to issue final agency decisions to the office of dispute resolution (ODR) for all matters except liquor license violations, REVOCATIONS, AND LAPSES.

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

AUTH: Sec. 15-1-217 and 16-1-303, MCA

IMP: Sec. 2-4-621, 2-4-623, 2-4-631, 2-15-112, 2-15-1302, 15-2-302, 16-1-302, and 16-4-411, MCA

4. Therefore, the department adopts ARM 42.2.115 with the amendment listed above.

5. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. 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 website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme
KURT G. ALME
Director of Revenue

Certified to Secretary of State March 3, 2003

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment) NOTICE OF AMENDMENT
of ARM 42.25.1813 relating to)
quarterly reporting of oil and)
gas production taxes)

TO: All Concerned Persons

1. On January 30, 2003, the department published MAR Notice No. 42-2-709 regarding the proposed amendment of ARM 42.25.1813 relating to quarterly reporting of oil and gas production taxes at page 97 of the 2003 Montana Administrative Register, issue no. 2.

2. No comments were received regarding this rule.

3. Therefore, the department amends ARM 42.25.1813 as proposed.

4. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. 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 website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme
KURT G. ALME
Director of Revenue

Certified to Secretary of State March 3, 2003

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

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

Economic Affairs Interim Committee:

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

Education and Local Government Interim Committee:

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

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

- ▶ Department of Public Health and Human Services.

Law and Justice Interim Committee:

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

Revenue and Transportation Interim Committee:

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

State Administration, and Veterans' Affairs Interim Committee:

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

Environmental Quality Council:

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

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

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

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

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

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

Use of the Administrative Rules of Montana (ARM):

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

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 2002. This table includes those rules adopted during the period January 1, 2003 through March 31, 2003 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, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through December 31, 2002, 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 2002 Montana Administrative Registers.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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