

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 13

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

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

In the matter of the )  
adoption of new rules I ) NOTICE OF PUBLIC HEARINGS ON  
through XII pertaining to ) PROPOSED ADOPTION  
river recreation )

TO: All Concerned Persons

1. The Fish, Wildlife and Parks Commission (commission) will hold public hearings to consider the adoption of new rules I through XII pertaining to river recreation. The hearing dates and places are as follows:

July 26, 2004, 6:30 p.m.  
Fish, Wildlife and Parks  
Region 4 Headquarters  
4600 Giant Springs Road  
Great Falls, MT

July 27, 2004, 6:30 p.m.  
West Coast Outlaw Hotel  
1701 Highway 93 South  
Kalispell, MT

July 29, 2004, 6:30 p.m.  
Doubletree Hotel Missoula Edgewater  
100 Madison  
Missoula, MT

August 4, 2004, 6:30 p.m.  
Jorgenson's Inn and Suites  
1714 11th Avenue  
Helena, MT

August 5, 2004, 6:30 p.m.  
Red Lion Hotel  
2100 Cornell Avenue  
Butte, MT

August 10, 2004, 6:30 p.m.  
University of Montana Western  
Mathews Hall  
710 S. Atlantic  
Dillon, MT

August 11, 2004, 6:30 p.m.  
Holiday Inn  
5 Baxter Lane  
Bozeman, MT

August 17, 2004, 6:30 p.m.  
Billings Hotel and Convention Center  
1223 Mullowney Lane  
Billings, MT

August 18, 2004, 6:30 p.m.  
Fish, Wildlife and Parks  
Region 7 Headquarters  
Industrial Site W  
Miles City, MT

August 19, 2004, 6:30 p.m.  
Fish, Wildlife and Parks  
Region 6 Headquarters  
Rural Route 1 - 4210  
Glasgow, MT

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in these public hearings or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on July 16, 2004, to advise us of the nature of the accommodation that you need. Please contact Charlie Sperry, Fish, Wildlife and Parks, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701, telephone (406) 444-3888, fax (406) 444-4952, or email [csperry@state.mt.us](mailto:csperry@state.mt.us).

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

NEW RULE I RIVER RECREATION USE: DEFINITIONS

(1) "Allocation" means distributing limited use opportunities when a rationing system is in place.

(2) "Fixed allocation" means members of a rationed user group or groups do not compete equally for limited opportunities to use a river.

(3) "Management plan" means a plan developed using the processes described in this subchapter for management of recreational use on a river or group of rivers.

(4) "Non-fixed allocation" means 100% of the available use opportunity is allocated to individual river users or parties of river users and not to river service providers.

(5) "Ration" means to regulate use intensity by limiting the amount of use on a river. Rationing requires users to obtain a permit to recreate on a river or requires river service providers to obtain authorization to conduct business on a river. Limitation on the use of a river may apply to one or more user groups and may not necessarily apply to all user groups. To qualify as a rationing strategy, the supply of permits or the amount of authorized use by river service providers must be limited.

(6) "Restrict" means to regulate when and where the public or river service providers can recreate on a river, or the types of recreation that are allowed.

(7) "River service provider" means a business or person that, for monetary or other consideration, provides services on publicly accessible rivers in Montana. This includes angling outfitters licensed by the state of Montana and non-angling river service providers that are not licensed by the state of Montana.

(8) "River user" is someone who uses a river and is not acting as a river service provider.

(9) "River use day" is equivalent to one person recreating on a river for all or part of one day.

(10) "Rule" or "rules" mean regulations pertaining to river recreation adopted through the Montana Administrative Procedure Act (MAPA).

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-201, 87-1-301, 87-1-303, MCA

NEW RULE II POLICY STATEMENT CONCERNING RIVER RECREATION

RULES (1) These rules apply to the process of developing, adopting, amending, or repealing management plans or rules that address river recreation. These rules do not apply to fishing seasons, limits, or regulations that the commission will continue to adopt as biennial or annual rules under MAPA's exceptions.

(2) The purpose of these rules is to provide guidance to the commission, the department, and department-appointed citizen advisory committees in the management of recreation on rivers. These rules seek to promote management of river recreation that provides a full variety of quality recreation for a diverse public and protects natural resources in rivers and on adjacent uplands. These rules also provide guidance for addressing social conflict on rivers.

(3) The general premise of these rules is that the public prefers to recreate on rivers without controls on their recreational experience, other than regulations that are necessary for managing aquatic resources, such as fishing regulations. Educating the public about river recreation issues can lead to modified behavior on rivers and the department can use education as a nonregulatory method to address social problems on rivers. The department should develop strategies for providing river information to all sectors of the recreating public.

(4) The demand on the natural resources and the social experience will continue to grow, and the best approach is a balance between quality of experience and unrestricted use of a limited resource. On any river or stream, there may be a time and a need for management intervention in order to maintain the quality of the river resources and the quality of the recreational experience. The quality of the river resource should be protected as the first and foremost priority.

(5) Further, the general premise of these rules is that if it becomes necessary to manage use on a river, the public prefers that less-restrictive management intervention be tried before proceeding to more-restrictive management intervention,

and that rationing of use is the most restrictive form of management intervention.

(6) Individuals appointed to serve on a citizen advisory committee, river users, and those affected by river recreation should be full and integral partners in the development of management plans or rules. Participation of all interested parties is vital when developing management plans.

(7) Planning and management of Montana's river systems should provide for and conserve a full variety of recreation experiences and assure that river recreation historically enjoyed by people in Montana is recognized.

(8) Nonresidents are an important part of the state's tourism economy and rivers are an attraction to visitors. Nonresidents should have reasonable and equitable opportunities compared to other recreational users to enjoy Montana's resources. "Reasonable and equitable" as applied to nonresidents means recreational use that fairly considers the interests of all types of recreational users, and is not intended to mean that each type of recreational user must have the exact same share of use in terms of the timing, amount, and location of use.

(9) River service providers are an important industry in Montana and should be regulated. There are differences in management considerations between river service providers and private (nonguided) users. Management plans need to provide opportunities for river service providers to compete for the business of paying customers. Management processes should encourage viable and diverse types of commercial services.

(10) Partnerships with other agencies that lead to improved management of the river resources and better services to the public are encouraged.

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-201, 87-1-301, 87-1-303, MCA

NEW RULE III RIVER RECREATION MANAGEMENT PLANS AND RULES

GENERALLY (1) The highest priority of a management plan is providing protection for the following resources:

- (a) the quality of the fisheries;
- (b) wildlife;
- (c) water;
- (d) riparian habitat; and
- (e) other natural resources in or along the river.

(2) Management plans or rules must not allow unlimited recreation to compromise long-term conservation.

(3) Management plans and rules must maintain a balance between quality of experience and unlimited quantity of experience.

- (4) Management plans and rules must be:
  - (a) technically and socially feasible;
  - (b) legal;
  - (c) affordable;
  - (d) measurable;
  - (e) enforceable; and

(f) reasonable to administer.

(5) Management plans must identify the potential or existing impact of recreation on natural resources and provide mitigating actions that could be taken to address concerns.

(6) When possible, the development of management plans must be coordinated with the planning processes of both state and federal agencies having jurisdiction over a river or the reach of a river.

(7) Management plans and rules may not differentiate based solely on the residency of the river user unless the commission determines the best available data indicate that the amount of use by residents or nonresidents is a primary contributor to an identified problem.

(8) Nothing in this subchapter shall prevent the department, with the concurrence of the commission, from amending or repealing a management plan and the commission from amending or repealing rules as needed.

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-201, 87-1-301, 87-1-303, MCA

NEW RULE IV RIVER RECREATION MANAGEMENT PLANS AND RULES:  
DEPARTMENT RESPONSIBILITIES (1) The department, using existing information, shall evaluate the social and biological conditions on rivers and identify those rivers where further analysis and planning may be needed in order to prevent or resolve social conflicts.

(2) The department shall implement Title 75, chapter 1, MCA, the Montana Environmental Policy Act (MEPA) when developing a management plan or when proposing rules for a specific river.

(3) When developing a river recreation management plan for a specific river, the department shall conduct an analysis and decision-making process that complies with MEPA and includes collection and analysis of data, appointment of a citizen advisory committee, development of alternatives, and public review and comment.

(4) The department shall develop management plans and recommend rules to the commission based on the following:

- (a) the values and input of the public;
- (b) best available biological information;
- (c) best available social information;
- (d) best available economic information;
- (e) recommendations of the citizen advisory committee;
- (f) input and advice from the commission; and
- (g) MEPA analysis.

(5) Following the adoption of a management plan or rules, the department to the best of its ability shall assess the effectiveness of management actions considering the criteria outlined in (4)(a) through (4)(d) of this rule. Based on the assessment, the department, with the concurrence of the commission, may amend or repeal a management plan and the commission may amend or repeal rules as needed.

(6) The department shall include other state and federal agencies having jurisdiction over the river or reach of river when developing management plans and rules.

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-201, 87-1-301, 87-1-303, MCA

NEW RULE V RIVER RECREATION MANAGEMENT PLANS AND RULES:  
COMMISSION RESPONSIBILITIES (1) When concurring in a management plan or when adopting, amending, or repealing rules for a river, the commission shall consider the following:

(a) recommendations of the citizen advisory committee;  
(b) public input;  
(c) the best available biological information before the department;

(d) the best available social information before the department;

(e) the best available economic information before the department;

(f) the department's MEPA analysis; and

(g) any existing river management plan for the river.

(2) There is not a requisite amount of information that the commission shall consider before it is able to make a river recreation management decision.

(3) The commission shall adopt river recreation rules according to MAPA.

(4) Nothing in this subchapter shall prevent the commission from making timely river recreation decisions necessary to address emergency biological conditions, such as drought, or issues of public safety.

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-201, 87-1-301, 87-1-303, MCA

NEW RULE VI CREATION OF CITIZEN ADVISORY COMMITTEES

(1) The department shall establish a citizen advisory committee when developing a river recreation management plan or when recommending river recreation rules to the commission.

(2) Members of the citizen advisory committee serve by appointment of the director. In considering appointments the director shall:

(a) identify interests and stakeholders that will be affected by the proposed management plan or regulation; and

(b) appoint members to the committee that represent the identified interests, stakeholders, and perspectives, both locally and statewide.

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-201, 87-1-301, 87-1-303, MCA

NEW RULE VII RIVER RECREATION MANAGEMENT PLANS AND RULES:  
CITIZEN ADVISORY COMMITTEE RESPONSIBILITIES (1) The purpose of the citizen advisory committee is to advise the department and the commission on the management of recreation on a river,



including the development of river recreation management plans and river recreation rules to address social conflicts;

(2) The citizen advisory committee responsibilities are the following:

(a) represent the interests of those affected by river recreation management;

(b) articulate a vision for the river and set goals and objectives in quantitative and qualitative terms that are intended to achieve the vision;

(c) assess river recreation information and existing social and biological conditions on the river;

(d) identify desired or acceptable social and biological conditions for the river;

(e) identify undesired or unacceptable social and biological conditions for the river that would trigger management actions in order to achieve desired or acceptable social and biological conditions;

(f) recommend a range of management actions from less restrictive to more restrictive that should be taken based on the severity of the undesired or unacceptable social and biological conditions;

(g) recommend mechanisms and a timetable for monitoring and evaluating river recreation management plans and river recreation rules; and

(h) submit final recommendations to the department and the commission.

(3) The department shall provide comments to the citizen advisory committee as to whether its recommendations are technically feasible, legal, affordable, measurable, enforceable, and reasonable to administer.

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-201, 87-1-301, 87-1-303, MCA

NEW RULE VIII RESTRICTING OR RATIONING RIVER USE (1) The commission shall make the final decision on whether or not to restrict or ration river use and the adoption of rules for doing so.

(2) When determining how a river should be managed, the commission shall consider management methods in the following order:

(a) nonrestrictive management methods;

(b) restrictive management methods; and

(c) rationing methods.

(3) Under conditions or circumstances identified by the commission, the commission may implement rationing management methods before or simultaneously with restriction management methods or implement restrictive management methods before or simultaneously with nonrestrictive management methods.

(4) When developing a management plan or recommending rules to the commission:

(a) the department shall work with a citizen advisory committee to identify the problems and the social conditions that would trigger restrictions or rationing of use; and

(b) the management plan or rule recommendations must describe how restricting or rationing use would address a particular problem.

(5) If rationing is proposed and it becomes necessary to allocate opportunities to use or conduct business on a river, the department, working with the citizen advisory committee, shall recommend an allocation system to the commission. The department may consider all types of allocation systems including fixed systems, nonfixed systems, and variations of these two types.

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-201, 87-1-301, 87-1-303, MCA

NEW RULE IX FIXED ALLOCATION (1) If a fixed allocation system is proposed for a river, the department and the commission shall seek input from a citizen advisory committee and the general public regarding the following:

(a) the amount of use that would be allocated to each user group; and

(b) the methods used to distribute the use.

(2) If use is allocated to river service providers, the department and the commission shall seek input from a citizen advisory committee, river service providers, and the general public regarding the following:

(a) the method used to determine which individual river service providers would be allocated use; and

(b) the amount of use they would receive.

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-201, 87-1-301, 87-1-303, MCA

NEW RULE X NONFIXED ALLOCATION (1) If nonfixed allocation is proposed for a river, the department and the commission shall seek input from a citizen advisory committee and the general public regarding the following:

(a) overall amount of use that would be allocated to individual river users or parties of river users; and

(b) the methods used to distribute the opportunities to use the river.

(2) When river allocation is nonfixed:

(a) service providers and their employees may not apply for opportunities to use the river for any reason other than to use the river as a private user; and

(b) the commission may consider exceptions for a nonfixed allocation that allows a river service provider to submit an application form on behalf of a known client as long as that client is present at the time of use.

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-201, 87-1-301, 87-1-303, MCA

NEW RULE XI TRANSFERRABILITY OF RIVER USE DAYS (1) The sale or transfer of a licensed or nonlicensed river service

provider business and the transfer of river use days shall comply with 37-47-310(4), MCA, as long as all legal requirements are fulfilled.

(2) Use of any transferred river use days is subject to change pursuant to rules adopted by the commission.

(3) No property right attaches to the transferred river use days.

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-201, 87-1-301, 87-1-303, MCA

NEW RULE XII RIVER RECREATION MANAGEMENT PLANNING MANUAL

(1) Upon adoption of these rules, the department must develop a river recreation planning manual that provides details on implementation of the analysis and decision-making framework in conjunction with MEPA and MAPA. The manual will incorporate the recommendations of the river recreation advisory council as expressed in their final report of July 10, 2003, including the guiding principles.

(2) The river recreation planning manual must provide direction to the department on the following elements of the analysis and decision-making framework:

(a) prioritizing river recreation planning and management needs;

(b) collecting and analyzing data;

(c) appointing and working with a citizen advisory committee;

(d) incorporating the recommendations of a citizen advisory committee into a management plan; and

(e) implementing, monitoring, and evaluating a management plan or rules.

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-201, 87-1-301, 87-1-303, MCA

4. The purpose of these rules is to develop a statewide river recreation planning process and policy. The department and commission are examining recreational uses on the state's rivers in order to ensure that present and future generations can continue to enjoy a quality recreation experience. The commission intends that these rules provide guidance for addressing social conflict on rivers.

Additionally, the commission intends that these rules provide guidance to the commission, the department, and department-appointed citizen advisory committees in the management of recreation on rivers so that management provides a full variety of quality recreation for a diverse public and protects natural resources in rivers and on adjacent uplands.

The need to manage river recreation in order to address social conflicts is not new. As early as 1959 the department adopted a rule governing float angling on the Madison River in order to address conflict between wade and float anglers. For some years

the department has been managing recreation to enhance the recreation experience and reduce social conflicts in Alberton Gorge and on the Smith River. However, the need to manage river recreation came to the forefront of commission concerns after the 1999 legislative session. During this session, Senators Chuck Swysgood and Bill Tash introduced legislation to manage recreation on the Beaverhead and Big Hole rivers.

Fishing pressure on the Beaverhead and Big Hole rivers had increased dramatically from 1995 to 1997, as shown in department Statewide Angling Pressure Surveys. From 1995 to 1997, angler days increased from 17,449 to 39,726 on the Beaverhead and from 69,337 to 83,408 on the Big Hole. These increases were part of an overall trend that led to a marked rise in angler dissatisfaction with the fishing experience on these rivers, according to the department's Angler Satisfaction Surveys and comments and complaints received by the department. The public further expressed its dissatisfaction by urging its elected representatives to introduce SB 445, limiting outfitter use on these rivers.

While then Governor Racicot believed the objectives of SB 445 were laudable, he vetoed it because parts of the bill posed constitutional and implementation problems. However, in his veto letter, Governor Racicot charged the commission to use its rulemaking authority, under the auspices of HB 626, to promptly adopt short-term rules to protect the Beaverhead and Big Hole rivers while management plans were developed.

The commission carried out the Governor's charge by adopting temporary rules managing recreation on the two rivers (1999). Next, the commission appointed citizen advisory committees to create a long term management strategy for the Beaverhead and Big Hole. After several months of work, the commission and the advisory committees did not agree about the best way to resolve the conflicts on the Beaverhead and Big Hole rivers. During the public comment portion of the process, a grassroots public coalition had yet another idea regarding how the conflicts should be resolved. The commission eventually adopted biennial use rules based on input from the advisory committees, the department, and the general public (2001). The commission revisited the rules in 2003 and decided to adopt the temporary rules as administrative rules under the Montana Administrative Procedure Act, with a sunset date of May 1, 2005, which would allow time for the commission to develop a statewide policy that could be used to guide decisions in the future regarding river recreation management, including the Beaverhead and Big Hole rivers. From the beginning, the rules have been approved by some interest groups using the rivers, but opposed by others, particularly the outfitting industry.

When assisting with the formulation of the first river management plans on the Beaverhead and Big Hole rivers, the citizen advisory groups, the commission, and the department

realized that managing river recreation is especially challenging because it involves an individual's personal values, interests, history, and in some cases, livelihoods. Often, these interests cannot be quantified or supported by data. The perception of what constitutes a "quality" recreation experience may differ widely from one recreator to another. Management plans or rules cannot be formulated strictly on the basis of data. The department has the technical expertise to manage fish, wildlife, and recreation; yet the public's views and values should balance the department's technical expertise. The commission believes that river recreation management plans and rules should reflect the interests of the public while protecting natural resources.

The commission, the department, and the public realize that river recreation use is increasing and that management of recreation in the future will probably not be limited to the Beaverhead and Big Hole rivers. As river recreation use continues to increase, management of other rivers may be necessary. When a need arises, the commission, the department, and citizen advisory committees need a standardized framework to assist in making river management decisions. The proposed rules address that need.

To assist with development of a statewide river recreation management policy and decision-making framework, the commission authorized the department to establish the River Recreation Advisory Council in 2002. The commission tasked the council with developing recommendations for managing recreation on rivers where the amount and types of use may be degrading the natural resources or detracting from the quality of the experience.

After many months of work, the council reached consensus on an analysis and decision-making process the commission and department could use to address social conflicts on rivers. The council also reached consensus on a set of guiding principles that represent the collective values of the council. The council intended that these principles provide guidance to the commission, department, and department appointed advisory committees when making value-laden decisions on river recreation management. The council presented its final recommendations to the commission in July of 2003. The Council reconvened twice more in order to continue discussing rationing and allocation systems for rivers. Although the council did not reach group consensus on rationing of use on rivers, the council members did develop discussion points that proved useful to the department in the development of policy statements and these proposed rules.

Without question the advisory council's work was invaluable in formulating the river recreational use rules. The many insightful and thoughtful recommendations made by the council show that the commission's commitment to using the citizen

advisory council process was well founded. The commission appointed a commission representative to serve on the council with other represented interests, closely reviewed the council's work, and implemented most of its recommendations in these proposed rules.

When the River Recreation Advisory Council completed its work, the department solicited public comment on its recommendations. The commission then directed the department to draft a commission and department policy on the development and implementation of management plans and rules to address recreational conflicts on rivers. The policy was to be based on the recommendations of the council and input from the general public. The policy was further reviewed internally and adjustments were made to allow for commission authority and procedures. On March 11, 2004, a draft policy was presented to the commission.

At its March meeting, the commission requested that the department draft the policy as administrative rules, to be adopted under the Montana Administrative Procedure Act. Furthermore, the commission requested that the proposed rules incorporate changes to the policy that would clearly articulate the commission's authority to adopt river recreation policy and rules using the best information available at the time.

The proposed administrative rules reflect the commission's authority to act as the decision maker, the practicality of circumstances under which decisions must sometimes be made, the values of the public, a desire to protect the resource, a commitment to ensure quality recreation experience, and a commitment to fully involve and consider public input when making river recreation management decisions.

5. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearings. Written data, views or arguments may also be submitted to Charlie Sperry, Fish, Wildlife and Parks, P.O. Box 200701, Helena, MT 59620-0701, telephone (406) 444-3888, fax (406) 444-4952, email csperry@state.mt.us, and must be received no later than August 31, 2004.

6. Charlie Sperry or another hearings officer has been designated to preside over and conduct the hearing.

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

the office at (406) 444-7456, or may be made by completing the request form at any rules hearing held by the department.

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

By: /s/ M. Jeff Hagener  
M. Jeff Hagener,  
Secretary Fish, Wildlife and  
Parks Commission

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

Certified to the Secretary of State June 21, 2004

BEFORE THE BOARD OF LANDSCAPE ARCHITECTS  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the proposed ) NOTICE OF PUBLIC HEARING  
amendment of ARM 24.153.403, ) ON PROPOSED AMENDMENT  
fee schedule )

TO: All Concerned Persons

1. On July 26, 2004, at 9:00 a.m., a public hearing will be held in room 471, Park Avenue Building, 301 South Park, 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 who need an alternative accessible format of this notice. If you require an accommodation, contact Mr. Todd Boucher no later than 5:00 p.m., July 20, 2004, to advise us of the nature of the accommodation you need. Please contact Todd Boucher, Board of Landscape Architects, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2368; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdlar@state.mt.us.

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

24.153.403 FEE SCHEDULE (1) Fees for examinations administered on paper must ~~shall~~ be transmitted by money order or check payable to Montana state board of landscape architects. Fees for examination sections administered by electronic means must be paid directly to the council of landscape architect registration boards. The board assumes no responsibility for loss in transit of such remittances. All fees are non-refundable.

(2) remains the same.

(3) Examination fees are set by the testing agency and vary. Contact the board office for a current schedule of test section fees. ~~Examination fees are paid directly to the board.~~

AUTH: 37-1-131, 37-1-134, 37-66-202, MCA

IMP: 37-1-134, 37-66-202, 37-66-301, 37-66-304, 37-66-307, MCA

REASON: The Board of Landscape Architects has determined that changes are needed to address new electronic examination sections, which are offered solely by the examination vendor-the Council of Landscape Architect Registration Boards (CLARB.) The Board previously collected all examination fees, but now for three of the five examinations sections, the



examination is scheduled and paid for directly to CLARB by the examination candidate. This change will affect approximately 20 examination candidates per year.

4. Concerned persons may present their data, views or arguments either orally or in writing. Written data, views or arguments may also be submitted to the Board of Landscape Architects, 301 South Park, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to [dlibsdlar@state.mt.us](mailto:dlibsdlar@state.mt.us) and must be received no later than 5:00 p.m., July 30, 2004.

5. An electronic copy of this Notice of Public Hearing is available through the Department and board's site on the World Wide Web at <http://discoveringmontana.com/dli/lar>, in the Rules Notices 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, and that a person's technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

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

7. Lon Mitchell, attorney, has been designated to preside over and conduct this hearing.

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

BOARD OF LANDSCAPE ARCHITECTS  
SHELLY ENGLER, CHAIRPERSON

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

/s/ MARK CADWALLADER  
Mark Cadwallader,  
Alternative Rule Reviewer

Certified to the Secretary of State June 21, 2004

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

In the matter of the )  
amendment of ARM 36.25.128, )  
repeal of ARM 36.25.129 and )  
36.25.130, and adoption of )  
new rules I through XVI )  
regarding land banking )  
)

NOTICE OF PUBLIC HEARING  
ON PROPOSED AMENDMENT,  
REPEAL AND ADOPTION

TO: All Concerned Persons

1. The Department of Natural Resources and Conservation will hold two public hearings on the proposed amendment, repeal, and adoption of the above-stated rules relating to the conduct of land banking by the Department on behalf of the State Board of Land Commissioners. Section 77-2-362(3), MCA, enacted by the 2003 Montana Legislature, requires that "[t]he board shall adopt rules providing for the implementation and administration of the state land bank fund, purchases, and sales." The hearing dates and locations are as follows:

July 21, 2004, 7:30 p.m.  
Bureau of Land Management  
111 Garryowen Road  
Miles City, Montana

August 2, 2004, 7:00 p.m.  
Department of Fish, Wildlife and Parks  
3201 Spurgin Road  
Missoula, Montana

2. The Department of Natural Resources and Conservation and the State Board of Land Commissioners will make reasonable accommodations for persons with disabilities who wish to participate in these public hearings or need an alternative accessible format of this notice. If you require an accommodation, contact the agency no later than 5:00 p.m. on July 12, 2004 (Miles City hearing), or July 24, 2004 (Missoula hearing), to advise us of the nature of the accommodation you need. Please contact Candace Durran, Real Estate Management Bureau, Department of Natural Resources and Conservation, P.O. Box 201601, Helena, MT 59620-1601; telephone (406) 444-2883; FAX (406) 444-2684; e-mail cdurran@state.mt.us.

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

36.25.128 SALES (1) The board may sell any land under lease or license, ~~except those lands classified as forest lands,~~ under the same terms and conditions as land not under lease or license. The board shall notify the lessee prior to

such sale ~~and~~ at least ~~6~~ six months prior to possession being given to the purchaser or as consistent with the applicable lease agreement ~~and such notice shall be made only during the period of May 1 through October 31 of any calendar year.~~ The lessee or licensee shall be entitled to compensation for improvements as provided in ARM 36.25.125. The purchaser will be given possession of land sold on March 1 next succeeding the date of the sale unless the lease or license expires prior to that date or the lessee or licensee and purchaser agree in writing on another date.

AUTH: 77-1-209, 77-2-328, MCA  
IMP: 77-2-326, MCA

REASONABLE NECESSITY: If a parcel is sold outside of land banking, the closing should be consistent with the lease agreement. If land banking expires in 2008, the Land Board would prefer to have this rule in place to regulate other possible sales.

4. The following rules are proposed to be repealed:

36.25.129 SALE OF CABINSITES AND CITY OR TOWN LOTS: APPLICATION AND NOTICE PROCEDURES found on page 36-5647 of the Administrative Rules of Montana.

AUTH: 77-2-328, MCA  
IMP: 77-2-318, MCA

36.25.130 SALE OF CABINSITES AND CITY OR TOWN LOTS: BIDDING AND FINAL BOARD DETERMINATION found on page 36-5650 of the Administrative Rules of Montana.

AUTH: 77-2-328, MCA  
IMP: 77-2-318, MCA

REASONABLE NECESSITY: It is reasonably necessary to repeal ARM 36.25.129 and 36.25.130 because the implementing statutory authority for these rules, Section 77-2-318(4), MCA, expired on October 1, 1999.

5. The proposed new rules provide as follows:

RULE I DEFINITIONS As used in this subchapter, the following definitions apply, except where the context clearly indicates otherwise:

(1) "Annual rate of return" means the annual return divided by the asset value multiplied by 100%.

(2) "Annual return" means the net annual income.

(3) "Asset value" means the value of an asset as determined by appraisal or purchase price.

(4) "Bid" means a written or oral monetary commitment to purchase land or interest in land offered at the specified time and place by a person eligible to participate in an

auction, as specified by the department in accordance with 77-2-363, MCA.

(5) "Bid bond" means bid deposit, as defined in (6).

(6) "Bid deposit" means a certified check or cashier's check drawn on any Montana bank equal to 50% of the minimum sales price submitted in connection with a bid as an assurance of the performance of a contractual or promissory requirement.

(7) "Board" means the state board of land commissioners.

(8) "Current annual rate of return" means the average annual return for three years divided by the purchase price and multiplied by 100%.

(9) "Department" means the department of natural resources and conservation.

(10) "Earnest money" means a sum of money paid by a prospective purchaser as proof of that person's intention to complete the purchase transaction.

(11) "Net annual income" means total revenues from all sources less total average expenses from all sources based on all available cost information, including information in the "Report on the Return on Asset Value by Trust and Land Office for State Trust Land."

(12) "Parcel" means one section (640 acres) or less, irrespective of ownership, that can be identified by legal description, independent of any other parcel of land, using documents on file in the records of the county clerk and recorder's office.

(13) "Pool" means combining the assets within a trust fund or among trust funds to create greater cumulative proceeds to be used to purchase new assets for that trust or the combined trusts.

(14) "Report on the Return on Asset Value by Trust and Land Office for State Trust Land" means the annual report produced to analyze the rates of return originating on trust land on land classified as forest, agricultural and grazing, and other.

(15) "Tract of record" means a distinct portion of land, irrespective of ownership, that can be identified by legal description, independent of any other portion of land, using documents on file in the records of the county clerk and recorder's office.

(16) "20-year average annual rate of return" means the sum of the annual rates for return for the most recent 20 consecutive years divided by 20.

AUTH: 77-1-204, 77-2-308, 77-2-328, 77-2-362, MCA

IMP: 77-2-328, 77-2-362, MCA

RULE II LAND BANKING TRANSACTION COSTS (1) Except as provided in 77-2-362(2)(c), MCA, the department may use up to 10% of the proceeds deposited in the land bank fund to pay costs of transactions, as provided in 77-2-362(2)(b), MCA.

(2) The department may not be compensated for transaction costs of services performed by department staff.

(3) The department shall:

- (a) maintain a record of each transaction;
- (b) summarize transaction costs at the completion of each sale or acquisition; and
- (c) include an accounting of transaction costs in the report required by 77-2-366(2), MCA.

AUTH: 77-2-362, MCA  
IMP: 77-2-362, MCA

RULE III CONSIDERATIONS IN THE SALE OF STATE TRUST LAND

PURSUANT TO LAND BANKING (1) The board may only sell a parcel that is wholly surrounded by other public land if the board provides compelling reasons for the sale.

(2) The board may only sell a parcel that is wholly surrounded by land under conservation easement if the board provides compelling reasons for the sale.

(3) The board may only sell a parcel that the department, in compliance with the Montana Environmental Policy Act, 75-1-201, et seq., MCA, (MEPA), determines significant for threatened or endangered species if the board provides compelling reasons for sale.

(4) If the sale of a parcel would extinguish existing, reasonable public access to other public or state trust land or to public water, as defined in 77-2-303(2)(a), MCA, the board shall reserve an easement or right of way for access to the other public or state trust land or to public water.

(5) If the sale of a parcel would extinguish historic access to private land, the department shall provide an opportunity for the landowner to purchase an easement under 77-1-107, 77-1-130, or 77-2-101, MCA.

(6) If a person directly or indirectly creates an isolated parcel of school trust land in order to benefit from land banking, the department shall recommend that the parcel be considered non-isolated.

AUTH: 77-2-362, MCA  
IMP: 77-2-308, 77-2-363, MCA

RULE IV PROCEDURES FOR NOMINATING AND EVALUATING STATE TRUST LANDS FOR SALE PURSUANT TO LAND BANKING

(1) The board shall sell state trust land on a parcel-by-parcel basis.

(2) The board reserves the right to approve or deny nominations for sale of state trust land. The department reserves the right to prioritize activities related to the sale of state trust land.

(3) The board, the department, or the current lessee may nominate a parcel or parcels of state trust land for sale.

(a) Nominations must be on a form issued by the department and must be sent to the appropriate department office, as noted on the form.

(b) A lessee may nominate one or more parcels currently held by that lessee under a state of Montana surface lease agreement. The nominating lessee shall pay a nonrefundable \$100 processing fee for each parcel of land nominated.

(c) The department may not accept incomplete nominations.

(d) The department shall review the classification of the parcel, as provided in 77-1-401, MCA, and classify the parcel if not classified.

(e) When a parcel is nominated, the department shall notify the lessee of the parcel, all persons holding a license on the parcel, and the representative of the trust beneficiary. Notice to the trust beneficiary must go to the representative identified for each trust affected by the proposed sale.

(4) The department shall conduct a preliminary review of each nominated parcel to determine whether further review is warranted. The department may consider the following factors in the preliminary review:

(a) the parcel produces low income, as calculated by:

(i) high market value and low return on asset;

(ii) high administrative costs relative to other similar parcels; or

(iii) the potential to increase productive capacity of the land is low;

(b) whether the parcel is isolated. On a non-isolated parcel, the department shall describe the existing level of access;

(c) the parcel's impact on the diversity of the overall asset portfolio and within its land classification;

(d) the extent of infrastructure, such as roads, utilities, power, telephone, water, or sewer availability;

(e) the estimated net annual income from the parcel, based on information in the "Report on the Return on Asset Value by Trust and Land Office for State Trust Land";

(f) the potential for appreciation or depreciation in the value of the parcel, based on the best available information from the local real estate market;

(g) the parcel's potential for development or value-added activities that complement local and statewide economic development;

(h) whether and to what degree the sale of the parcel would affect access to other public lands; and

(i) whether the parcel is adjacent to other public land or private land under conservation easement, as documented by current information in the Montana natural heritage program database or similar source.

(5) If the department determines that a parcel meets the preliminary suitability requirements for sale, the department shall conduct an environmental review of the parcel under MEPA. If the MEPA analysis determines that the sale would result in a significant adverse impact on natural resources, the parcel is generally not suitable for sale unless the board determines otherwise. If the department conducts a checklist environmental assessment under MEPA, the department shall briefly explain in writing each conclusion of "no impact."

(6) The department shall determine whether a parcel is suitable for sale and report to the board on the parcel's suitability for sale.

(a) If the department determines the parcel is not suitable for sale, the department may remove the parcel from nomination and eliminate the parcel from further review.

(b) The department shall post the report required by [Rule IV(5)], including the MEPA analysis, in a dated notice on the department web site or other equivalent electronic medium. The notice must be posted at least 15 days before the next meeting of the board.

(c) The department shall notify the lessee of the department's recommendation by certified mail, as provided in 77-2-363(3), MCA. As a courtesy, the department shall try to contact the lessee by telephone about the determination. The notification must be mailed on or before the day the department posts the notice on its web site or other equivalent electronic medium.

(d) The department shall notify all persons holding a license on the parcel and the trust beneficiary about the determination.

(e) Any person may appeal to the board the department's removal of a parcel from nomination within 15 days of the department posting the report on the web site or other equivalent electronic medium. The board shall place the appeal on the next available agenda of a regularly scheduled meeting no later than 15 days before the meeting.

(f) On a board- or department-nominated parcel, the lessee may, within 60 days of the determination, notify the department that the lessee intends to propose a land exchange.

(7) For each parcel, the department shall conduct a title review, if necessary.

(8) Upon the department's report to the board under [Rule IV(5)], the board shall approve or reject the proposed sale.

(a) If the board rejects the proposed sale of the parcel, the department shall remove the parcel from nomination.

(b) If the board approves the proposed sale of the parcel, the department shall post the parcel on the department web site or other equivalent electronic medium within 30 days of the board's approval.

(9) If the board has approved a proposed sale, the department shall commission an appraisal from a list of licensed, department-approved appraisers.

(a) The department shall conduct or contract for the appraisal, to be reimbursed by the appropriate party under [Rule VI(2)(b)] or [Rule VII(8)(a)].

(b) The appraisal must:

(i) include state-owned improvements in the valuation;

(ii) exclude lessee-owned or licensee-owned improvements from the valuation;

(iii) use comparable sales for like properties; and

(iv) include details of a discount in appraised value due to lack of access.

(c) The department shall post the appraised value of the



parcel in a dated notice on the department web site or other equivalent electronic medium.

(10) Any person may commission, at that person's own expense, another appraisal.

(a) A person commissioning another appraisal shall notify the department within 15 days of the posting of the appraised value.

(b) Any subsequent appraisal must be completed within 60 days of notification to the department of the intent to commission the appraisal.

(c) Any subsequent appraisal must include all elements required of the first appraisal.

(11) The department shall present to the board the first appraisal and any subsequent appraisals that are provided to the department.

(12) Upon receiving the appraisal or appraisals and survey, the board shall set a minimum bid on the parcel. The department shall add the minimum bid to the parcel's listing on the department web site or other equivalent electronic medium.

(13) If the board has approved a proposed sale, the department shall make the contents and findings of any title review and any environmental due-diligence review available to the public, all bidders, and the lessee.

(14) The department shall provide notice of the proposed sale to the following persons:

(a) the department of fish, wildlife and parks;

(b) the department of transportation;

(c) the department of environmental quality;

(d) all adjacent landowners;

(e) the appropriate trust beneficiaries;

(f) the county in which the parcel is located;

(g) any person holding a license on the parcel; and

(h) any surface lessees by certified mail. The notice to lessees must include an estimate of costs necessary to complete the sale.

(15) If necessary, the department shall conduct a survey of the parcel or parcels proposed for sale. The department shall pay for the survey, to be reimbursed by the appropriate party under [Rule VI(2)(c)] or [Rule VII(8)(d)].

AUTH: 77-1-204, 77-2-308, 77-2-362, MCA

IMP: 77-2-328, 77-2-362, 77-2-363, 77-2-366, MCA

RULE V REQUIREMENTS FOR LAND BANKING EARNEST MONEY

DEPOSIT (1) The lessee who nominated the parcel shall submit earnest money in the sum of \$1,000 within 30 days of receiving notice from the department that the parcel is available for sale.

(a) The department shall refund earnest money if the lessee is an unsuccessful bidder.

(b) If the lessee buys the parcel, the department shall apply earnest money to the purchase price and closing costs.

(2) If the lessee does not submit earnest money within 30 days of notice of availability for sale, the department shall remove the parcel from nomination.

(3) Board- and department-nominated parcels do not require \$1,000 earnest money.

AUTH: 77-1-204, 77-2-308, 77-2-362, MCA  
IMP: 77-2-328, 77-2-363, MCA

RULE VI TERMINATION OF LESSEE-INITIATED LAND BANKING SALE AFTER EARNEST MONEY DEPOSIT PAID BY LESSEE

(1) If the current lessee of the land to be sold has initiated the sale, as authorized by 77-2-361 through 77-2-367, MCA, and deposited earnest money with the department, the lessee may cancel the sale. The lessee shall send written notice by certified mail to the department, postmarked no later than 30 days before the date of the auction.

(2) If the lessee cancels the sale after the department has given notice of the auction, the lessee shall pay all costs incurred by the department in preparing the sale, including but not limited to:

(a) any costs incurred for preparation of documents required by 75-1-201, et seq., MCA;

(b) appraisal;

(c) survey;

(d) cultural resource inventory;

(e) natural resource inventories;

(f) public hearings;

(g) other costs that may be incurred by the department.

(3) The earnest money and bid deposit, as required in [Rule VII(4)], paid by the lessee must be applied toward costs incurred by the department for the canceled sale.

(4) Any amount of earnest money and bid deposit remaining after payment of department costs must be returned to the lessee.

AUTH: 77-1-204, 77-2-308, MCA  
IMP: 77-2-328, MCA

RULE VII PROCEDURE FOR CONDUCTING STATE TRUST LAND SALES

(1) All land sales are subject to the provisions of 77-2-318 through 77-2-326, MCA.

(2) The department shall set the date of the auction. Bidders may appear personally or be represented by a legally authorized representative.

(3) As required by 77-2-322, MCA, the department shall, at a minimum, publish notice of the auction in a newspaper of general circulation in the county where the auction is to take place, once each week for four consecutive weeks preceding the due date for bid deposits. The department shall post the notice on the department web site or other equivalent electronic medium and provide links to associated realty web sites when feasible.

(4) A person wishing to bid upon state trust land

offered for sale at auction shall submit a bid deposit and execute a purchase agreement with the department. The bid deposit and purchase agreement must be postmarked no later than 45 days before the date of the auction.

(5) Subject to (6), land must be sold to the highest bidder who consummates the sale.

(6) In accordance with 77-2-324, MCA, the lessee has the preference right to match the high bid.

(7) The purchaser shall pay closing costs, including but not limited to:

- (a) the cost of the appraisal;
- (b) title insurance;
- (c) filing fees;
- (d) survey, if necessary.

(8) The department shall retain the bid deposit of the successful bidder. The department shall return the bid deposits of all unsuccessful bidders within five business days following the auction.

(9) If the highest bidder fails to consummate the sale for any reason, the department may offer the parcel to the next highest bidder at the final sale price. If the next highest bidder, or a subsequent bidder, in sequence of bid amount, agrees to the terms of the sale, that bidder shall complete a purchase agreement and submit a bid deposit to the department.

(10) If the final bidder who agrees to consummate the sale fails to comply with the terms of the sale for any reason, that bidder's bid deposit is forfeit and must be credited to the land banking fund, after deduction of sale costs incurred by the department.

AUTH: 77-1-204, 77-2-308, 77-2-362, MCA

IMP: 77-2-328, 77-2-363, MCA

#### RULE VIII SETTLEMENT FOR AND REMOVAL OF IMPROVEMENTS

(1) If the parcel is under an agricultural or grazing lease or license with the state at the time of sale, settlement and removal of improvements are governed by the conditions of the lease or license or by ARM 36.25.125.

(2) If the parcel is under a residential lease at the time of sale, the conditions of settlement for and removal of improvements are governed by the lease or by ARM 36.25.131.

(3) If the parcel is under a commercial lease or license with the state at the time of sale, the conditions of settlement for and removal of improvements are governed by the lease or license.

(4) In all other situations, the purchaser of the state trust land shall reimburse the former lessee for the reasonable value of those improvements the purchaser has accepted.

(5) Where there is a dispute over the value of the improvements, arbitration, as detailed in 77-6-306, MCA, must be used to set the value of improvements.

AUTH: 77-1-204, 77-2-308, 77-6-303, 77-6-304, 77-6-305,  
77-6-306, MCA  
IMP: 77-2-328, MCA

RULE IX FINAL BOARD APPROVAL AND ISSUANCE OF DOCUMENTS  
OF CONVEYANCE

(1) Before issuing documents of conveyance, the department shall present the proposed sale to the board.

(a) The board shall approve or disapprove the sale.

(b) If the land board disapproves the sale, the successful bidder is not responsible for costs.

(2) For the sale of land acquired from the federal government pursuant to the state's Enabling Act, the board may convey title through a state patent, pursuant to 77-2-341, 77-2-342, and 77-2-343, MCA.

(3) The board may convey title to other land by a grant or quit claim deed.

(4) The board may not warrant title to any land conveyed.

(5) The board may not give warranty or representation, express or implied, to a bidder for, or a purchaser of, state trust land concerning the accuracy or completeness of the title review for the property or the environmental due-diligence review investigating the presence or absence of toxic or hazardous substances.

(6) State trust land must be sold "as is."

AUTH: 77-1-204, 77-2-308, MCA  
IMP: 77-2-328, MCA

RULE X THE LAND BANKING FUND (1) The proceeds from a sale of state trust land must be deposited in the land banking fund to which the land belonged.

(2) When the board conducts a sale of state trust land pursuant to the land banking program, the board shall distribute the proceeds according to the provisions of 77-1-109, 77-2-337, 77-2-361, 77-2-362, 77-2-363, 77-2-364, 77-2-365, 77-2-366, and 77-2-367, MCA.

(3) Proceeds from the sale of land from within individual trusts may be pooled to acquire tracts of land to add to state trust land, if approved by the board after consultation with the affected beneficiaries.

(4) If land banking expires in 2008, any proceeds remaining in the state trust land bank fund must be expended by the 10th year after the effective date of each sale.

(5) Any remaining proceeds must be deposited in the appropriate permanent trust fund.

(6) The department shall account separately for individual trust receipts.

(7) If land banking is authorized beyond 2008, the proceeds in the land banking funds must remain intact and available for land banking purposes.

AUTH: 77-1-204, 77-2-308, 77-2-362, MCA  
IMP: 77-2-328, 77-2-362, MCA

RULE XI NOMINATION OF TRACTS FOR ACQUISITION (1) Any person may nominate a tract or tracts for acquisition.

(2) Nominations must be on a form issued by the department and must be sent to Land Banking, Department of Natural Resources, P.O. Box 201601, Helena, MT 59620-1601.

(a) Every person nominating land, except the department or the board, shall pay a nonrefundable \$100 fee for each tract of land nominated.

(b) The department may not accept incomplete nominations.

(3) The department may contract with a third party, such as a licensed real estate agent, to act on behalf of the state in acquiring a tract or tracts.

(4) The department shall notify each trust beneficiary whose land sale proceeds would potentially support the proposed acquisition. Notice to the trust beneficiary must go to the contact person identified for each trust affected by the proposed acquisition.

(5) The department shall post all tracts nominated for acquisition on the department's web site or other equivalent electronic medium. The department shall update the status of the tract throughout the process, including all applicable reports.

AUTH: 77-2-362, MCA

IMP: 77-2-364, MCA

RULE XII PRELIMINARY REVIEW OF TRACTS NOMINATED FOR ACQUISITION (1) The department reserves the right to prioritize activities related to the acquisition of land.

(2) The department shall obtain from the seller and evaluate a disclosure statement that describes any known material defects in the property.

(a) The seller shall provide disclosure on a form provided by the department.

(b) If the seller fails to provide disclosure within 60 days of the department's request, the tract must be considered unsuitable for acquisition.

(3) The department shall conduct a preliminary review to determine the tract's suitability for acquisition. The review must address, but is not limited to, the following factors:

(a) the financial feasibility of acquiring and managing the tract;

(b) the existing level of access; and

(c) the potential for multiple use.

(4) Concurrent with the nomination of a tract and after the preliminary review, the department may secure the ability to purchase the tract, contingent upon approval by the board, as provided in [Rule XIII].

(5) If the department determines a tract is not suitable for acquisition, the department shall remove the tract from nomination and eliminate it from further review.

(6) Any person may appeal to the board the department's

removal of a tract from nomination within 15 days of the department posting the report on the web site or other equivalent electronic medium. The board shall place the appeal on the next available agenda of a regularly scheduled meeting no later than 15 days before the meeting.

AUTH: 77-1-204, 77-2-308, 77-2-362, MCA  
IMP: 77-2-328, 77-2-364, MCA

RULE XIII PRELIMINARY BOARD APPROVAL TO PURCHASE LAND, EASEMENTS, OR IMPROVEMENTS (1) The department shall present the preliminary review of the nominated tract to the board.

(a) If the board disapproves acquiring a tract, the department shall remove the tract from nomination and eliminate it from further review.

(b) If the board approves the preliminary review, the department shall begin a due-diligence evaluation.

AUTH: 77-2-362, MCA  
IMP: 77-2-364, MCA

RULE XIV ANALYSIS, REVIEW, AND DUE DILIGENCE IN PREPARING TO ACQUIRE STATE TRUST LAND (1) The department may not purchase a tract, easement, or improvement pursuant to 77-2-361, 77-2-362, 77-2-363, 77-2-364, 77-2-365, 77-2-366, and 77-2-367, MCA, without preparing a financial analysis. The analysis must include:

(a) the annual return calculated over a 20-year accounting period;

(b) a 20-year average annual rate of return;

(c) a comparison with the current annual rate of return of the parcel or parcels sold, the proceeds of which are used to fund this transaction;

(d) a prudent determination that the acquisition is likely to produce more net revenue for the affected trust or trusts than the revenue that was produced from the land sold, and a greater or equal average annual rate of return as may be reasonably expected over a 20-year accounting period, with an acceptable level of risk for the affected trust or trusts; and

(e) the expected classification of the tract under 77-1-401, MCA.

(2) Before acquiring a tract, easement, or improvement, the board shall determine that the financial risks and benefits of the purchase are prudent, financially productive investments that are consistent with the board's fiduciary duty as a reasonably prudent trustee of a perpetual trust. That duty requires the board to comply with the requirements of 72-34-114 and 77-2-364(3), (4), (5), MCA.

(3) The department shall prepare a description of each proposed acquisition. The description must include the following elements:

(a) an inventory of soils, vegetation, wildlife use, mineral characteristics, public use, recreational use, aesthetic values, cultural values, surrounding land use,

zoning, planning information, weeds, floodplain information, water resources, fisheries, wetlands, and riparian characteristics;

(b) whether the tract is isolated. On a non-isolated tract, the department shall describe the existing level of access;

(c) the extent of infrastructure, such as roads, utilities, power, telephone, water, or sewer availability;

(d) whether and to what degree the purchase of the tract would affect access to other public lands;

(e) whether the tract is adjacent to other public land or private land under conservation easement, as documented in current information in the Montana natural heritage program database or similar source; and

(f) the status of subsurface mineral rights.

(4) Before acquiring any interest in land, the department shall conduct a due-diligence review as follows:

(a) conduct or review a current appraisal compliant with the Uniform Appraisal Standards for Federal Land Acquisition of the tract to determine fair market value by using comparable sales for like properties;

(b) review the title to the property proposed for acquisition and confirm that the seller is presenting a marketable title. Should the department identify any defects or encumbrances, the seller shall take steps to cure any title defects or remove the encumbrances to satisfy the department;

(c) if necessary, require a survey of the tract; and

(d) determine any limiting factors for future uses or development of the real property or the presence of toxic or hazardous materials. This may include, but is not limited to:

(i) phase I assessments, such as searches of government agency records and chain-of-title searches for evidence of property history and regulatory compliance, a review of permit applications, environmental health records, environmental compliance data, and other relevant information available from federal and state administrative agencies, discussions with former property owners and employees, and preliminary site visits;

(ii) phase II assessments, such as sampling of soils, water, and structural materials, well drilling, chemical analysis of samples, geotechnical survey, and a toxicological risk assessment.

(5) The department shall notify the appropriate board of county commissioners and adjacent landowners of the proposed acquisition.

AUTH: 77-2-362, MCA

IMP: 77-2-364, MCA

RULE XV FINAL APPROVAL OF LAND ACQUISITION BY STATE LAND BOARD

(1) The department shall report to the board the complete findings compiled under the requirements of [Rule XIV].

(2) The department shall recommend whether acquiring the

tract is in the best interest of the affected trust beneficiary.

(3) When prudently necessary to protect the interests of the affected trust beneficiary, the board may reject, modify, or approve the proposed purchase of any trust asset.

(4) Acquisition of a tract may not occur without final land board approval.

AUTH: 77-2-362, MCA

IMP: 77-2-363, MCA

RULE XVI DOCUMENTS OF CONVEYANCE ON LAND ACQUISITION

(1) Title to land acquired by the state must be by warranty deed.

AUTH: 77-1-204, 77-2-308, 77-2-362, MCA

IMP: 77-2-328, MCA

REASONABLE NECESSITY: These rules are reasonably necessary to effectuate the purposes of Chapter 355 of the Laws of 2003, currently codified as Sections 77-2-361 through 77-2-367, MCA, inclusive. This 2003 legislative enactment expressly authorized the state board of land commissioners to engage in land banking, in which proceeds from the sale of state trust land may be pooled and used, subject to specified restrictions, for the purchase of replacement trust land. The principal reason for promulgating these rules is to provide a procedural framework that best serves and protects each institutional trust while implementing Chapter 355 of the Laws of 2003.

Adoption of Rule I, Definitions, is reasonably necessary to reduce any ambiguity in the interpretation of these rules.

Adoption of Rule II, Land Banking Transaction Costs, is reasonably necessary to delineate how the land banking costs will be allocated and accounted.

Adoption of Rule III, Considerations in the Sale of State Trust Land Pursuant to Land Banking, is reasonably necessary to clarify what lands will be considered for sale, under what circumstances.

Adoption of Rule IV, Procedures for Nominating and Evaluating State Trust Lands for Sale Pursuant to Land Banking, is reasonably necessary to define the procedures and limitations on land banking sales.

Adoption of Rule V, Requirements for Land Banking Earnest Money Deposit, is reasonably necessary to explain the requirements for submitting earnest money to qualify as a bidder for a land banking sale.



Adoption of Rule VI, Termination of Lessee-initiated Land Banking Sale after Earnest Money Deposit Paid by Lessee, is reasonably necessary to specify the disposition of earnest money deposits and assess costs in the event a lessee cancels a land banking sale.

Adoption of Rule VII, Procedure for Conducting State Trust Land Sales, is reasonably necessary to set out exact procedures for conducting land banking sales.

Adoption of Rule VIII, Settlement for and Removal of Improvements, is reasonably necessary to provide for an orderly and clearly-defined transition of possession and control of the land from a prior lessee to the buyer of the land.

Adoption of Rule IX, Final Board Approval and Issuance of Documents of Conveyance, is reasonably necessary to define the documents by which land titles will be conveyed, as well as the conditions by which the state board of land commissioners will review and approve any land banking sale.

Adoption of Rule X, The Land Banking Fund, is reasonably necessary to describe the disposition of the proceeds obtained from land banking sales.

Adoption of Rule XI, Nomination of Tracts for Acquisition, is reasonably necessary to describe the procedures for nominating tracts of land to acquire pursuant to land banking.

Adoption of Rule XII, Preliminary Review of Tracts Nominated for Acquisition, is reasonably necessary to explain the process for reviewing tracts for potential acquisition pursuant to land banking.

Adoption of Rule XIII, Preliminary Board Approval to Purchase Land, Easements, or Improvements, is reasonably necessary to describe the conditions under which the department may proceed to a due-diligence evaluation for potentially acquiring a tract of land pursuant to land banking.

Adoption of Rule XIV, Analysis, Review, and Due Diligence in Preparing to Acquire State Trust Land, is reasonably necessary to formulate the elements to consider and analyze, so as to comply with the State's trust duties and to comply with the procedural analysis required by 72-34-114 and 77-2-364(3), (4), (5), MCA.

Adoption of Rule XV, Final Approval of Land Acquisition by State Land Board, is reasonably necessary to describe the procedures and conditions for final approval to acquire land in the land banking program.

Adoption of Rule XVI, Documents of Conveyance on Land Acquisition, is reasonably necessary to specify the type of conveyance by which the State will accept title to lands acquired in the land banking program.

6. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearings. Written data, views, or arguments may also be submitted to Candace Durran, Real Estate Management Bureau, Department of Natural Resources and Conservation, P.O. Box 201601, Helena, MT 59620-1601; telephone (406) 444-2883; FAX (406) 444-2684; or e-mailed to cdurran@state.mt.us. All written data, views, or arguments must be received no later than 5:00 p.m. on August 16, 2004.

7. Jeanne Holmgren, Real Estate Management Bureau Chief, Department of Natural Resources and Conservation, or her designee, will preside over and conduct the hearings.

8. An electronic copy of this Notice of Proposed Amendment is available through the department's website at <http://www.dnrc.state.mt.us>. The department strives to make the electronic copy of this Notice of Proposed Amendment conform to the official version, as printed in the Montana Administrative Register. However, the department advises that it will decide any conflict between the official printed version and the electronic version in favor of the official printed version. In addition, the department advises that the website might be inaccessible at times, due to system maintenance or technical problems.

9. The department 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 may make a written request, which includes their name and mailing address. Interested persons should specify that they wish to receive notices regarding conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources, or a combination of topics. The written request may be mailed or delivered to Legal Unit, Department of Natural Resources and Conservation, P.O. Box 201601, 1625 11th Avenue, Helena, MT 59620-1601, or faxed to the office at (406) 444-2684. As an alternative, interested persons may complete a request form at any department rulemaking hearing.

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

BOARD OF LAND COMMISSIONERS

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

By: /s/ Karl Ohs  
KARL OHS  
Chair

By: /s/ Arthur R. Clinch  
ARTHUR R. CLINCH  
Director

By: /s/ Tommy H. Butler  
Tommy H. Butler  
Rule Reviewer

Certified to the Secretary of State June 21, 2004.

BEFORE THE DEPARTMENT OF AGRICULTURE  
OF THE STATE OF MONTANA

In the matter of the amendment) NOTICE OF AMENDMENT  
of ARM 4.3.101, 4.3.102, )  
4.3.201, 4.3.202, 4.3.203, )  
4.3.204, 4.3.501, 4.3.602, )  
4.3.603, and 4.3.604 relating )  
to rural development loans )

TO: All Concerned Persons

1. On May 6, 2004, the Department of Agriculture published MAR Notice No. 4-14-146 regarding the proposed amendment of the above-stated rules relating to rural development loans at page 1088 of the 2004 Montana Administrative Register, Issue Number 9.

2. The agency has amended ARM 4.3.101, 4.3.102, 4.3.201, 4.3.202, 4.3.203, 4.3.204, 4.3.501, 4.3.602, 4.3.603 and 4.3.604 exactly as proposed.

3. No comments or testimony were received.

DEPARTMENT OF AGRICULTURE

/s/ W. Ralph Peck  
Ralph Peck  
Director

/s/ Tim Meloy  
Tim Meloy, Attorney  
Rule Reviewer

Certified to the Secretary of State, June 21, 2004.

BEFORE THE DEPARTMENT OF AGRICULTURE  
OF THE STATE OF MONTANA

In the matter of the ) NOTICE OF AMENDMENT  
amendment of ARM 4.13.1001A )  
relating to state grain )  
laboratory fees )

TO: All Concerned Persons

1. On May 20, 2004, the Department of Agriculture published MAR Notice No. 4-14-151 regarding the proposed amendment of the above-stated rule relating to state grain laboratory fees at page 1181 of the 2004 Montana Administrative Register, Issue Number 10.

2. The agency has amended ARM 4.13.1001A exactly as proposed.

3. No comments or testimony were received.

DEPARTMENT OF AGRICULTURE

/s/ W. Ralph Peck  
Ralph Peck  
Director

/s/ Tim Meloy  
Tim Meloy, Attorney  
Rule Reviewer

Certified to the Secretary of State, June 21, 2004.

BEFORE THE DEPARTMENT OF CORRECTIONS  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 20.9.103 and 20.9.134 pertaining )  
to the Youth Placement Committee )

TO: All Concerned Persons

1. On March 11, 2004, the Department of Corrections published MAR Notice No. 20-7-28 regarding the public hearing on the proposed amendment of ARM 20.9.103 and 20.9.134 pertaining to the Youth Placement Committee at page 547 of the 2004 Montana Administrative Register, Issue Number 5.

2. The department has amended ARM 20.9.103 and 20.9.134 exactly as proposed.

3. No comments or testimony were received.

DEPARTMENT OF CORRECTIONS

/s/ Bill Slaughter  
Bill Slaughter, Director

/s/ Colleen A. White  
Colleen A. White, Rule Reviewer

Certified to the Secretary of State June 21, 2004

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

In the matter of the transfer ) NOTICE OF TRANSFER  
of ARM 8.44.101 through )  
8.44.504, pertaining to the )  
board of plumbers )

TO: All Concerned Persons

1. Pursuant to Chapter 483, Laws of Montana 2001, effective July 1, 2001, the Board of Plumbers was transferred from the Department of Commerce to the Department of Labor and Industry, ARM Title 24, Chapter 180.

2. The Department of Labor and Industry has determined that the transferred rules will be numbered as follows:

<u>OLD</u>	<u>NEW</u>	
8.44.101	24.180.101	Board Organization
8.44.201	24.180.201	Procedural Rules
8.44.202	24.180.202	Citizen Participation <del>Rules</del>
8.44.401	24.180.203	Board Meetings
8.44.402	24.180.301	Definitions
8.44.412	24.180.401	Fee Schedule
8.44.403	24.180.404	Applications
8.44.404	24.180.407	Examinations
8.44.406	24.180.410	Duplicate And Lost Licenses
8.44.411	24.180.413	General Responsibilities
8.44.409	24.180.501	Journeyman Plumbers Responsibilities
8.44.413	24.180.504	Qualifications - Journeyman
8.44.407	24.180.505	Journeyman Must Work In The Employ Of Master
8.44.414	24.180.506	Qualifications - Master
8.44.408	24.180.507	Master Plumbers - Registration Of Business Name
8.44.410	24.180.601	Investigation
8.44.415	24.180.604	Out-Of-State Applicants - Reciprocity
8.44.416	24.180.607	Temporary Practice Permits
8.44.501	24.180.701	Medical Gas Endorsement Required - Definitions
8.44.502	24.180.704	Application For Endorsement
8.44.503	24.180.707	Annual Renewal Of Endorsement
8.44.504	24.180.710	Endorsement Verification
8.44.405	24.180.2101	Renewals
8.44.418	24.180.2401	Complaint Procedure
8.44.417	24.180.2404	Screening Panel

3. The transfer of rules is necessary because this board was transferred from the Department of Commerce to the Department of Labor and Industry by the 2001 legislature by Chapter 483, Laws of Montana 2001.

BOARD OF PLUMBERS

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

/s/ MARK CADWALLADER  
Mark Cadwallader  
Alternate Rule Reviewer

Certified to the Secretary of State June 21, 2004.



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

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 8.52.624, 8.52.801, 8.52.802, ) AND ADOPTION  
8.52.803, 8.52.804 and 8.52.805, )  
to clarify record retention and )  
defined professional relationships )  
of psychologists, and the adoption )  
of NEW RULE I (8.52.625), relating )  
to foreign-educated psychologists )

TO: All Concerned Persons

1. On March 25, 2004, the Board of Psychologists published MAR Notice No. 8-52-26 regarding the public hearing on the proposed amendment and adoption of the above-stated rules at page 611 of the 2004 Montana Administrative Register, issue no. 6.

2. A public hearing on the proposed amendment and adoption was held on April 15, 2004. No one attended the hearing. Several public comments were received concerning the proposed rule changes. The Board has thoroughly considered the comments and a summary of the comments and the Board's responses are as follows:

Comment 1: The Montana Psychological Association (MPA) and Guy Dean Bateman, PhD, expressed concerns that the amendments to ARM 8.52.624 would preclude crisis intervention by licensed psychologists via the telephone.

Response 1: The Board states that it is not the intent behind the proposed rule amendments to preclude licensed psychologists from providing telephonic crisis services. The Board has amended ARM 8.52.803(4) to provide clarity in this matter.

Comment 2: Debra Sanchez, PhD, MPA, and the MPA stated that telephonic "on-call" coverage for mental health agencies would also be precluded under the amendments to ARM 8.52.624.

Response 2: The Board recognizes the commenters' concerns and has amended ARM 8.52.803(4) to clarify that is it not the Board's intent to preclude licensed psychologists from rendering telephonic "on-call" coverage services.

Comment 3: Guy Dean Bateman, PhD, stated that the Board should provide a definition for "client," as used in these rules.

Response 3: The Board has concluded that a specific definition of "client" is not necessary for proper interpretation and application of the rules.

Comment 4: Guy Dean Bateman, PhD, commented that the amendments to ARM 8.52.803(1)(d) would remove current protections in rule for people working with psychologists but who are not clients.

Response 4: The Board has concluded that individuals who are not clients but who work with licensees are protected elsewhere in existing rules. ARM 8.52.803(2)(a) states that a licensee shall not "exploit persons over whom they have supervisory, evaluative or other authority such as students, supervisees, employees, research participants or clients."

Comment 5: Bill Cook, PhD, expressed concerns that the amendments to ARM 8.52.624 appear to preclude a psychologist's use of email as a communication technique in practice.

Response 5: The amendment to ARM 8.52.624 does not preclude the use of email as a part of a psychologist's practice. The amendment requires that a defined professional relationship be initially established through contexts that are specifically defined in rule. The Board has amended the rule to provide more clarity.

Comment 6: Bill Cook, PhD, stated that the requirement in ARM 8.52.802(2)(a) of a psychologist-client discussion to include "modalities of treatment" is vague and requests clarification of the meaning.

Response 6: The Board agrees with the comment and has amended the rule to provide more clarity in its meaning.

Comment 7: Cheryl Blank, PhD, expressed concern that the proposed requirement in New Rule I for foreign-trained psychologists to have a minimum level of English competency is racist in nature.

Response 7: The Board is statutorily obligated to license psychologists and regulate the practice of psychology in Montana for the protection of the health, safety and welfare of the Montana public. The Board determined that a minimum level of English competency is necessary to ensure the safety of members of the public who obtain the professional services of foreign-trained psychologists.

3. After consideration of the comments, the Board has amended ARM 8.52.801, 8.52.804, 8.52.805, and has adopted New Rule I (8.52.625) exactly as proposed.

4. The Board has amended ARM 8.52.624, 8.52.802, and 8.52.803 as proposed with the following changes (deleted matter stricken, new matter underlined):

8.52.624 DEFINITIONS As used in this chapter, the following definitions apply:

(1) "Defined professional relationship" means a

relationship in which a licensee or license applicant provides diagnostic, assessment and/or therapeutic services to a client. A defined professional relationship shall be initially established in a context where services are provided:

(a) through (2) remain as proposed.

AUTH: 37-1-131, 37-17-202, MCA  
IMP: 37-1-131, 37-17-101, MCA

8.52.802 PRACTICE OF PSYCHOLOGY (1) and (2) remain as proposed.

(a) shall disclose fees and confidentiality prior to initiating the defined professional relationship with clients, except in the case of a clinical emergency. Upon initiating the defined professional relationship there must be a discussion of the nature and anticipated course of contracted services, limitations of confidentiality and modalities of communication by which treatment is provided, and mandated reporting situations. When services rendered involve more than one interested party, the psychologist shall clarify the dimensions of confidentiality and professional responsibility to all participating parties;

(b) through (3) remain as proposed.

AUTH: 37-1-131, 37-1-319, 37-17-202, MCA  
IMP: 37-1-131, 37-1-316, 37-17-101, MCA

8.52.803 PROFESSIONAL RESPONSIBILITY (1) through (3) remain as proposed.

(4) remains as proposed.

(a) shall provide psychological services for the purpose of diagnosis, assessment or treatment only in the context of a defined professional relationship. However, nothing in these rules precludes the provision of psychological services for crisis management or intervention even in the absence of a defined professional relationship;

(b) through (7) remain as proposed.

AUTH: 37-1-131, 37-1-319, 37-17-202, MCA  
IMP: 37-1-131, 37-1-316, 37-17-101, MCA

BOARD OF PSYCHOLOGISTS  
PAUL SILVERMAN, PhD, Chair

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

/s/ MARK CADWALLADER  
Mark Cadwallader  
Alternate Rule Reviewer

Certified to the Secretary of State June 21, 2004

13-7/1/04

Montana Administrative Register

BEFORE THE BOARD OF SOCIAL WORK EXAMINERS  
AND PROFESSIONAL COUNSELORS  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the transfer ) NOTICE OF TRANSFER  
of ARM 8.61.101 through )  
8.61.1605, pertaining to the )  
board of social work examiners )  
and professional counselors )

TO: All Concerned Persons

1. Pursuant to Chapter 483, Laws of Montana 2001, effective July 1, 2001, the Board of Social Work Examiners and Professional Counselors was transferred from the Department of Commerce to the Department of Labor and Industry, ARM Title 24, Chapter 219.

2. The Department of Labor and Industry has determined that the transferred rules will be numbered as follows:

<u>OLD</u>	<u>NEW</u>	
8.61.101	24.219.101	Board Organization
8.61.201	24.219.201	Procedural Rules
8.61.401	24.219.301	Definitions
8.61.404	24.219.401	Fee Schedule <u>For Social Workers</u>
8.61.1203	24.219.405	Fee Schedule <u>For Professional Counselors</u>
8.61.403	24.219.501	<u>Application Procedures For Social Work</u>
8.61.402	24.219.504	<u>Licensure Requirements For Social Work</u>
8.61.406	24.219.509	Application To Convert An Inactive Status License To An Active Status License
8.61.407	24.219.512	<u>Licensure Of Out-Of-State Social Worker Applicants</u>
8.61.1202	24.219.601	Application Procedure
8.61.1201	24.219.604	Licensure Requirements
8.61.1205	24.219.609	Application To Convert An Inactive Status License To An Active Status License
8.61.1206	24.219.612	<u>Licensure Of Out-Of-State Licensed Professional Counselor Applicants</u>
8.61.1605	24.219.615	Annual License Renewal
8.61.408	24.219.801	Code of Ethics - Licensed <u>Professional Counselors and Clinical Social Workers</u>
8.61.1207	24.219.804	Code of Ethics - Licensed <u>Professional Counselors And Licensed Clinical Social Workers</u>
8.61.601	24.219.2101	Hours, Credits, And Carry Over

8.61.602	24.219.2104	Accreditation And Standards
8.61.603	24.219.2107	Reporting Requirements
8.61.604	24.219.2110	Continuing Education Noncompliance
8.61.1601	24.219.2201	Hours, Credits And Carry Over
8.61.1602	24.219.2204	Accreditation And Standards
8.61.1603	24.219.2207	Reporting Requirements
8.61.1604	24.219.2210	Continuing Education Noncompliance
8.61.405	24.219.2301	Unprofessional Conduct <u>For Social Workers</u>
8.61.1204	24.219.2305	Unprofessional Conduct <u>For Professional Counselors</u>
8.61.302	24.219.2401	Complaint Procedure
8.61.301	24.219.2404	Screening Panel

3. The transfer of rules is necessary because this board was transferred from the Department of Commerce to the Department of Labor and Industry by the 2001 legislature by Chapter 483, Laws of Montana 2001.

BOARD OF SOCIAL WORK EXAMINERS AND  
PROFESSIONAL COUNSELORS

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

/s/ MARK CADWALLADER  
Mark Cadwallader  
Alternate Rule Reviewer

Certified to the Secretary of State June 21, 2004.

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

In the matter of the adoption	)	NOTICE OF ADOPTION AND
of Rules I through VI and the	)	AMENDMENT
amendment of ARM 37.40.302,	)	
37.40.311, 37.40.320,	)	
37.40.321, 37.40.330,	)	
37.40.346, 37.40.401,	)	
37.40.402 and 37.40.405	)	
pertaining to nursing	)	
facilities and swing-bed	)	
hospitals	)	

TO: All Interested Persons

1. On April 22, 2004, the Department of Public Health and Human Services published MAR Notice No. 37-327 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules relating to nursing facilities and swing-bed hospitals at page 994 of the 2004 Montana Administrative Register, issue number 8.

2. The Department has adopted rules I [37.40.416], II [37.40.420], III [37.40.421], IV [37.40.408], V [37.404.409] and VI [37.40.412] as proposed.

3. The Department has amended ARM 37.40.302, 37.40.320, 37.40.321, 37.40.330, 37.40.346 and 37.40.405 as proposed.

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

37.40.311 RATE ADJUSTMENT FOR COUNTY FUNDED RURAL NURSING FACILITIES (1) For state fiscal year 2005 ~~and each year thereafter~~, the department will provide a mechanism for a one time, lump sum payment to non-state governmental owned or operated facilities for medicaid services. These payments will be for the purpose of maintaining access and viability for a class of "at risk" county affiliated facilities who are predominately rural and are the only nursing facility in their community or county or who provide a significant share of nursing facility services in their community or county.

(a) remains as proposed.

(b) The department will calculate the amount of lump sum distribution that will be allowed for each county affiliated provider so that the total per day amount does not exceed the computed medicare upper payment limit for these providers. Distribution of these lump sum payments will be based on the medicaid utilization at each participating facility for the period July 1, 2004 through June 30, 2005 ~~and each year~~

thereafter.

(c) In order to qualify for this lump sum adjustment effective July 1, 2004 ~~and each year thereafter~~, each non-state governmental owned or operated facility must enter into a written agreement to transfer local county funds to be used as matching funds by the department. This transfer option is voluntary, but those facilities that agree to participate must abide by the terms of the written agreement.

(2) Effective for the period commencing on or after July 1, 2004 ~~and each year thereafter~~, the department will provide for a one time, lump sum distribution of funding to nursing facilities not participating in the funding for "at risk" facilities for the provision of medicaid services.

(a) The department will calculate the maximum amount of the lump sum payments that will be allowed for each participating non-state governmental owned or operated facility, as well as the additional payments for other nursing facilities not participating in the funding for "at risk" facilities for the provision of medicaid services in accordance with state and federal laws, as well as applicable medicare upper payment limit thresholds. This payment will be computed as a per day add-on based upon the funding available. Distribution will be in the form of lump sum payments and will be based on the medicaid utilization at each participating facility for the period July 1, 2004 through June 30, 2005 ~~and each year thereafter~~.

AUTH: Sec. 53-6-113, MCA

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

37.40.401 SWING-BED HOSPITALS, DEFINITIONS (1) A swing-bed hospital is a licensed hospital, critical access hospital (CAH) with swing-bed approval or licensed medical assistance facility which is medicare-certified to provide posthospital SNF care as defined in 42 CFR 409.20.

(2) remains as proposed.

(3) "Swing-bed" means a bed approved pursuant to 42 USC 1395tt to be used to provide either acute care or extended skilled nursing care to a patient.

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

37.40.402 SWING-BED HOSPITALS, PROVIDER PARTICIPATION REQUIREMENTS (1) To participate and be reimbursed as a swing-bed hospital service provider in the Montana medicaid program, a hospital must meet all of the following requirements:

(a) through (b)(i)(D) remain as proposed.

(c) The critical access hospital (CAH) with swing-bed approval has no more than 25 acute care inpatient beds, of which no more than 15 are used for acute care at any one time for providing inpatient care.

(c) through (h)(ii) remain as proposed but are renumbered (d) through (i)(ii).

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

5. The United States Department of Health and Human Services, Centers for Medicare and Medicaid Services declined to approve amendment of Montana's Medicaid state plan to extend the rate adjustment for county funded rural nursing facilities beyond state fiscal year 2005. Therefore, the Department has removed the proposed amendments to ARM 37.40.311 that would do so. The Department intends to continue pursuit of Medicaid state plan approval for the extension of the rate adjustment for county funded rural nursing facilities beyond state fiscal year 2005.

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

COMMENT #1: The purported reason for amending ARM 37.40.401 to add critical access hospitals (CAHs) to the definition of "swing-bed hospitals" is to parallel 42 CFR 409.20. However, that federal rule only addresses critical access hospitals that are swing-bed approved. In addition, 50-5-233, MCA, concerning the designation of critical access hospitals recognizes the distinction between critical access hospitals with swing-beds and those without swing-beds in the number of acute care inpatient beds.

RESPONSE: The Department agrees that the definition of "swing-bed hospitals" should be clarified so that only critical access hospitals with swing-bed approval are included. The definition at ARM 37.40.401(1) has been revised accordingly and a cross reference to the approval process at 42 USC 1396tt has been added. For purposes of consistency, a new (1)(c) was added to the provider participation requirements in ARM 37.40.402 referring to a critical access hospital "with swing-bed approval". The other provision of ARM 37.40.402(1)(c) is intended to paraphrase the requirements of 42 CFR 485.645, special requirements for CAH providers of long term care services ("swing-beds").

Dawn Sliva  
Rule Reviewer

Russ Cater for  
Director, Public Health and  
Human Services

Certified to the Secretary of State June 21, 2004.



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

In the matter of the amendment ) NOTICE OF AMENDMENT AND  
of ARM 37.78.102, 37.78.103, ) REPEAL  
37.78.106, 37.78.206, )  
37.78.216, 37.78.506, )  
37.78.806, 37.78.807, )  
37.78.810 and 37.78.826, and )  
repeal of 37.78.817, 37.78.825 )  
and 37.78.830 pertaining to )  
temporary assistance for needy )  
families program (TANF) )

TO: All Interested Persons

1. On April 22, 2004, the Department of Public Health and Human Services published MAR Notice No. 37-326 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules relating to Temporary Assistance for Needy Families Program (TANF), at page 977 of the 2004 Montana Administrative Register, issue number 8.

2. The Department has amended ARM 37.78.102, 37.78.106, 37.78.206, 37.78.807, 37.78.810 and 37.78.826 and repealed ARM 37.78.817, 37.78.825 and 37.78.830 as proposed.

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

37.78.103 TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF):  
DEFINITIONS The following definitions apply to this chapter:

(1) through (5) remain as proposed.

(6) "Case management" means the process of formulating and developing and maintaining a family investment agreement/WoRC employability plan for a participant.

(7) through (16) remain as proposed.

(17) "Employment and training activities" means the activities in the family investment agreement/WoRC employability plan for all participants.

(18) and (19) remain as proposed.

(20) "Family investment agreement (FIA)/WoRC employability plan" means a written document designating the case management entity who will assist the family in working toward self-sufficiency.

(21) through (38) remain as proposed.

(39) "Participation hours" means the number of hours which a TANF cash assistance participant must perform employment and training activities as specified in the participant's family investment agreement/WoRC employability plan.

(40) through (61) remain as proposed.

(62) "Work readiness component (WoRC)" means the intensive activities case management component of the TANF cash assistance program.

AUTH: Sec. 53-4-212, MCA

IMP: Sec. 53-4-211 and 53-4-601, MCA

37.78.216 TANF: TANF CASH ASSISTANCE FAMILY INVESTMENT AGREEMENT AND FIA/WoRC EMPLOYABILITY PLAN (1) ~~The family investment agreement (FIA)/WoRC employability plan is a negotiated document listing a referral to either the WoRC program for case management or to tribal native employment works (NEW) for case management~~ eligibility requirements, employment and training activities, and mutual obligations of the state and the participant regarding the course of action leading to the individual's employment and the number of hours and the time limits within which such activities and obligations shall be performed.

(a) All participants in the TANF cash assistance programs are required to negotiate and comply with their FIA/WoRC employability plan as a condition of eligibility in the TANF cash assistance program. A participant who is exempt from time limits as specified in ARM 37.78.202 must enter into a FIA/WoRC employability plan. The FIA/WoRC employability plan activities for a participant who is eligible for TANF extended benefits will take into consideration any limitations which are the basis for the extension.

(b) ~~The FIAs~~ FIA/WoRC employability plan will be reviewed at least once every 12 months by the eligibility case manager and at least monthly by the WoRC case manager. They may also be renegotiated as needed or at the request of either the participant, ~~or~~ the eligibility case manager, or the WoRC case manager.

(c) Once the ~~agreement~~ FIA/WoRC employability plan is completed, it is signed by the participant, ~~and~~ the eligibility case manager and the WoRC case manager. The participant receives a signed copy.

(d) Failure to perform the activities required in the FIA/WoRC employability plan on a timely basis will result in sanctions in accordance with ARM 37.78.506.

(2) Because entering into a FIA/WoRC employability plan is a condition of eligibility for TANF cash assistance, failure or refusal without good cause to enter into a FIA/WoRC employability plan initially or to renegotiate and/or sign a new FIA/WoRC employability plan when requested will result in the denial of or termination of assistance for the entire assistance unit.

~~(3) The WoRC employability plan is a negotiated document listing employment and training activities, and mutual obligations of the WoRC program and the participant regarding the course of action leading to the individual's employment and the number of hours and the time limits within which such activities and obligations shall be performed.~~

~~(a) All individuals who are referred to the WoRC program~~

~~are required to negotiate and comply with their WoRC employability plan as a condition of eligibility in the TANF cash assistance program. A participant who is exempt from time limits as specified in ARM 37.78.202 who is referred to WoRC must enter into a WoRC employability plan. The WoRC employability plan activities for a participant who is eligible for TANF extended benefits will take into consideration any limitations which are the basis for the extension.~~

~~(b) The WoRC employability plan is renegotiated as needed or at the request of either the participant or the WoRC case manager.~~

~~(c) Once the employability plan is completed, it is signed by the participant and the WoRC case manager. The participant receives a signed copy.~~

~~(d) Failure to perform the activities required in the WoRC employability plan on a timely basis will result in sanctions in accordance with ARM 37.78.506.~~

~~(4) Because entering into a WoRC employability plan is a condition of eligibility for TANF cash assistance when the individual is referred to WoRC, failure or refusal without good cause to enter into a WoRC employability plan initially will result in the denial of assistance for the entire assistance unit.~~

AUTH: Sec. 53-4-212, MCA

IMP: Sec. 53-4-211, 53-4-601, 53-4-606 and 53-4-608, MCA

37.78.506 TANF: TANF CASH ASSISTANCE; SANCTIONS (1) If any member of the assistance unit fails or refuses without good cause as defined in ARM 37.78.508 to comply with an employment related or training activity as defined in (8), the first sanction will result in the reduction of the monthly TANF cash assistance payment by an amount equal to one person's share of the payment for one month. The second and subsequent sanctions will result in case closure and the imposition of a one month ineligibility period. This rule does not apply to households who are receiving TANF extended benefits as defined in ARM 37.78.202. The imposition of a sanction ends the currently negotiated FIA/WoRC and ~~WoRC~~ employability plan the last day of the penalty month. A sanction is considered imposed even if a fair hearing is requested and continued benefits are issued.

(2) through (7)(b) remain as proposed.

(8) "Employment-related or training activities", as specified in (7)(a), means activities specified on the FIA/WoRC employability plan or in the tribal NEW plan which are directly intended to promote economic self-sufficiency.

(9) remains as proposed.

AUTH: Sec. 53-4-212, MCA

IMP: Sec. 53-4-211, 53-4-601, 53-4-608 and 53-4-717, MCA

37.78.806 TANF CASH ASSISTANCE EMPLOYMENT AND TRAINING: PARTICIPATION (1) A person who is eligible for the TANF cash assistance program is required to participate in employment and

training as provided in these rules. All adults, minor parents, teen parents, and minor children 16 or 17 who are not attending school or an equivalency program full time must participate in employment and training activities as indicated in the FIA/WoRC employability plan if they are referred to the WoRC program for case management, or as indicated in their tribal NEW plan if they are referred to the tribal NEW program for case management.

(2) and (3) remain as proposed.

AUTH: Sec. 53-4-212, MCA

IMP: Sec. 53-2-201, 53-4-211, 53-4-601 and 53-4-613, MCA

4. In the process of responding to comments from the public about other rules, the Department reviewed the definition of the Work Readiness Component (WoRC) in ARM 37.78.103(62). The definition as currently written indicates that this component of the TANF cash assistance program provides only intensive case management services, which is incorrect. WoRC provides case management services for all activities, not only intensive case management services. Therefore, the word "intensive" has been changed to "activities" to encompass this broader definition of WoRC.

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

COMMENT #1: ARM 37.78.102 incorporates the TANF cash assistance manual by reference. The explanation of the changes to the manual provides that assistance is available if the child spends the "substantially" greater part of each month, rather than merely the greater part of each month, with the parent seeking assistance. If "substantially" is not defined, it would appear to lead to case-by-case decision-making leading to arbitrary and capricious administration.

RESPONSE: The Department agrees. As proposed, the material in the TANF manual addressing eligibility of parents who share custody of their minor children stated that the child must live with the parent the "substantially greater" part of each month, but the term "substantially" was not defined. The manual has been revised to be more specific about the amount of time the child must spend with a parent each month in order for the parent to qualify for assistance. The manual now states that the child is considered to be living with the TANF applicant the substantially greater part of the month if the child lives with the applicant three or more days per month more than the child lives with the other parent.

COMMENT #2: In ARM 37.78.103 as proposed to be amended, the "family investment agreement (FIA)" is now defined as "a written document designating the case management entity who will assist the family in working toward self-sufficiency". The revised definition conflicts with 53-4-606, MCA. That statute provides

that the FIA must set forth the mutual obligations of the participant and DPHHS to help the family achieve the goal of self-sufficiency. The statute goes on to enumerate various items that may be included in the agreement.

ARM 37.78.216 concerning negotiation of and compliance with the FIA clearly implement the provisions of section 53-4-606, MCA. A definition that negates the statutorily prescribed content of the FIA and limits the document to designating the case management entity renders negotiation and compliance meaningless. The only thing to negotiate would be whether the case management entity was the WoRC program or NEW.

ARM 37.78.506 concerning sanctions purports to implement 53-4-717, MCA. However, that statute provides for sanctions for failure to participate in the employment and training program as a condition of the individual's "family investment agreement". If the family investment agreement only designates the case management entity as proposed in ARM 37.78.102, then the FIA no longer conditions participation in the employment and training program as contemplated by statute. This rule also appears inconsistent with the statute based upon the change to the definition of "family investment agreement".

RESPONSE: The Department agrees. The definition of "family investment agreement (FIA)" in ARM 37.78.103 and ARM 37.78.216 regarding negotiation of and compliance with FIAs has been revised to make them consistent with the requirements of 53-4-606, MCA, governing FIAs. There will be a single document entitled "Family Investment Agreement/WoRC Employability Plan" which would contain all items specified in the definitions of "FIA" and "WoRC Employability Plan" as defined in ARM 37.78.103 on the first notice. This document would set forth the mutual obligations of the participant and DPHHS as well as the other items required by 53-4-606, MCA.

When the FIA is defined in a manner consistent with 53-4-606, MCA, ARM 37.78.506 will properly implement 53-4-717, MCA, which requires the imposition of sanctions on an individual who fails to participate in an employment and training program as a condition of the individual's FIA.

COMMENT #3: ARM 37.78.806 concerning employment and training participation is limited to an individual referred to the WoRC program for case management. There seems to be no provision requiring similar participation for an individual referred to NEW. Are program requirements and participation different based upon the designated case manager?

RESPONSE: A person who is referred to either the WoRC program or the Tribal NEW program for case management must participate in employment and training activities as indicated in the person's WoRC plan or Tribal NEW plan. Language has been added to ARM 37.78.806 to specify that persons referred to Tribal NEW

must comply with the requirements of their tribal NEW plan.

Dawn Sliva  
Rule Reviewer

Russ Cater for  
Director, Public Health and  
Human Services

Certified to the Secretary of State June 21, 2004.

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

In the matter of the amendment ) NOTICE OF AMENDMENT  
of ARM 37.85.212 pertaining to )  
resource based relative value )  
scale (RBRVS) reimbursement )

TO: All Interested Persons

1. On April 22, 2004, the Department of Public Health and Human Services published MAR Notice No. 37-324 pertaining to the public hearing on the proposed amendment of the above-stated rule relating to resource based relative value scale (RBRVS) reimbursement, at page 964 of the 2004 Montana Administrative Register, issue number 8.

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

37.85.212 RESOURCE BASED RELATIVE VALUE SCALE (RBRVS) REIMBURSEMENT FOR SPECIFIED PROVIDER TYPES (1) through (7)(b)(iii) remain as proposed.

(8) Except for physician administered drugs as provided in ARM 37.86.105(3), clinical, laboratory services and anesthesia services, if neither medicare nor medicaid sets RVUs, then reimbursement is by-report.

(a) remains as proposed.

(b) For state fiscal year 2005, the "by-report" rate is ~~47%~~ 45% of the provider's usual and customary charges.

(9) through (14) remain as proposed.

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

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

3. At the time the notice proposing the amendment of ARM 37.85.212 was filed, the Department could not accurately calculate the by-report rate for state fiscal year 2005 because the data were not available. ARM 37.85.212(8)(b) is now being amended to adjust the rate based on current data.

Russ Cater  
Rule Reviewer

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

Certified to the Secretary of State June 17, 2004.

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

In the matter of the amendment ) NOTICE OF AMENDMENT  
of ARM 37.86.1102 pertaining )  
to outpatient drugs, )  
requirements )

TO: All Interested Persons

1. On March 25, 2004, the Department of Public Health and Human Services published MAR Notice No. 37-322 pertaining to the public hearing on the proposed amendment of the above-stated rule relating to outpatient drugs, requirements, at page 628 of the 2004 Montana Administrative Register, issue number 6.

2. The Department has amended ARM 37.86.1102 as proposed with the following changes from the original proposal. Matter to be added is underlined.

37.86.1102 OUTPATIENT DRUGS, REQUIREMENTS (1) through (8) remain as proposed.

(9) The department will use the following procedures to develop the preferred drug list (PDL):

(a) The department will perform a pharmacoeconomic analysis of the medicaid pharmacy program and identify therapeutic classes of drugs for possible PDL inclusion.

(b) The department and the drug use review (DUR) board/formulary committee members will consider recommendations and determine which therapeutic drug classes will be reviewed at a meeting of the committee. Notice of the meeting and the therapeutic drug class to be considered will be posted on the department's web site in advance of the meeting date.

(c) The department will perform drug class reviews using peer-reviewed literature, established evidence-based practice methods, and local clinicians to interpret and apply practical experience to the structured evidence reviews. The department will also conduct supplemental rebate negotiations.

(d) The committee will combine its members' evaluations and the evaluations from the department to consider equivalent products within the drug class. Information used by the department and its contractors will be available to the public prior to the meeting. During the meeting, the committee will also hear comments from interested parties.

(e) The committee will recommend to the department which preferred agents should be selected for the specific therapeutic class.

(f) The department will make a final decision and post its decision on the department's web site.

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



COMMENT #1: The Department of Public Health and Human Services (the Department) received several comments regarding the importance of public education and notice. Education for providers and consumers would bring the State closer to the ideal of only purchasing effective medications that support recovery and bring more consistency to treatments.

RESPONSE: The Department agrees. The Montana Drug Use Review (hereinafter "DUR") Board and the Prior Authorization (hereinafter "PA") Program have focused on provider education since their inception. Quality of care to Montana's indigent population has been improved by relating more information about a particular drug or therapy to providers. It is the intent of the Department and the Board to continue this practice as the Preferred Drug List (hereinafter "PDL") is implemented.

COMMENT #2: The Department should clarify for the public how the PDL in each therapeutic class will be determined.

RESPONSE: The following procedures will be followed in the development of the PDL:

1) The Department will perform a pharmacoeconomic analysis of the Medicaid Pharmacy program and identify therapeutic classes of drugs for possible PDL inclusion.

2) The Department and the DUR Board/Formulary Committee will consider recommendations and post, on the Department's web site, which therapeutic drug classes will be reviewed at a meeting, at least 14 days in advance of the meeting date.

3) The Department will perform drug class reviews using peer-reviewed literature, established evidence-based practice methods, and local clinicians to interpret and apply practical experience to the structured evidence reviews. In addition, the Department will conduct supplemental rebate negotiations.

4) The Medicaid DUR Board/Formulary Committee will combine their evaluations and the evaluations from the Department to consider equivalent products within the drug class. Information used by the Department and its contractors will be available to the public prior to the DUR Board meeting. During the Board meeting, the DUR Board/Formulary Committee will also hear comments from interested parties, which may include practitioners, pharmaceutical industry representatives, clients, and the general public.

5) Considering all available evidence and comments, the DUR Board/Formulary Committee will then recommend to the Department which preferred agents should be selected for the specific therapeutic class.

6) The Department will then post its decision on the

Department's web site.

The Department has added this procedure to the rule as ARM 37.86.1102(9).

COMMENT #3: The State should pursue other methods to deal with excessive profits of the pharmaceutical industry, including regulation and public education campaigns.

RESPONSE: This is not within the jurisdiction of the Department.

COMMENT #4: The Department should provide reports to the legislature, governor and the public regarding the PDL program.

RESPONSE: The Department will prepare reports regarding the PDL program.

COMMENT #5: There should be public notice and participation in Medicaid drug formulary committee meetings and Medicaid decisions.

RESPONSE: The public will be notified and will be afforded the opportunity to participate in the PDL process as outlined in the response to Comment #2.

COMMENT #6: A PDL or a PA program limits the availability of appropriate and effective psychotropic medications and treatments for people with mental illnesses.

RESPONSE: The Department agrees with the position that Medicaid clients need access to appropriate and effective psychotropic medications. The PDL program is intended to make clinically appropriate drugs available through therapeutic class reviews, supplemental rebate negotiations, and a formulary committee process. The program is intended to allow Montana Medicaid to maintain coverage of essential drugs while reducing pharmacy expenditures. The PA program is not a new proposal. Historically, a drug was not prior authorized or placed in the PA program unless it positively impacted the program. It is the Department's intent to continue this philosophy -- if a drug, or the inclusion of a drug class, on the PDL cannot be predicted to positively impact the Medicaid program in terms of patient care and cost control, then that drug, or corresponding drug class, is not recommended for inclusion on the PDL.

The Department does not agree that the proposed rules will further limit the availability of drugs for Medicaid clients. Medically necessary drugs will continue to be available for Medicaid clients. Prior authorization requirements may be placed on some medications consistent with current Department protocol and PDL decisions made by the formulary committee in their deliberations. The purpose of the proposed rule is to use the money appropriated for the Medicaid drug program as

effectively as possible. The rule change is intended to allow Montana Medicaid to maintain coverage of essential drugs as the cost and demand for pharmaceutical drugs increases.

COMMENT #7: The most critical mental health service needed is access to effective psychiatric medication.

RESPONSE: Access to medication is of utmost importance to the Department. The Department views the PDL as a tool to help maintain access to medication and all Medicaid services across the continuum of care.

COMMENT #8: Use of a PDL denies patients timely access to FDA approved drugs.

RESPONSE: The Department disagrees. It is required to have PA requests completed within 24 hours and offers a 72-hour emergency supply of medication as set forth in 42 USC 1396r-8(5).

COMMENT #9: A PDL would interfere with emergency room treatment.

RESPONSE: A PDL will not interfere with emergency room treatment or admissions on an emergent basis because it is designed for the outpatient prescription drug program.

COMMENT #10: A PDL places an arbitrary limitation on therapeutic options available to health care providers.

RESPONSE: The Department disagrees that the limitation is arbitrary. Medicaid will pay for a non-preferred drug if a provider establishes medical necessity.

COMMENT #11: Patients are denied access to certain medications because policy dictates use of a drug on the PDL first.

RESPONSE: Client access to a drug not on the PDL is not denied if the prescribing provider can document the medical necessity for the drug.

COMMENT #12: Removing access to treatment is life threatening and provides no cost savings to the state over the long term.

RESPONSE: The PDL does not remove access to treatment. The Department believes the PDL program will result in effective cost management that will allow the Medicaid prescription drug program to provide clinically appropriate access to pharmaceutical drugs while allowing the Department to better manage its finite resources.

COMMENT #13: Nothing should be done to limit availability of the most effective drugs for people with mental illnesses.

RESPONSE: The PDL does not limit the availability of effective drugs. The Department believes the PDL ensures appropriate utilization of clinically appropriate drugs. If a drug or drug class cannot be predicted to positively impact the program that drug or corresponding drug class is not recommended for inclusion on the PDL.

COMMENT #14: Access to medications should be based on sound clinical judgement and the most advanced science, not on agreements that are of the most financial benefit to drug companies.

RESPONSE: The Department agrees and will use a value-based model for its PDL that includes a pharmacoeconomic analysis and identification of therapeutic classes for possible PDL inclusion. The Department will perform drug class reviews using evidence from bio-medical literature and perform supplemental rebate negotiations. The Medicaid formulary committee will combine its evaluations and the evaluations from the Department to recommend equivalent products within the drug class and select preferred agents. This method allows the Department to create a best value PDL to include clinically appropriate and cost effective drugs in each selected therapeutic class. Additionally, Montana Medicaid will participate in the multi-state national Medicaid pooling initiative.

COMMENT #15: Medicaid patients are particularly vulnerable as they have a limited ability to pursue other treatments.

RESPONSE: The Department agrees that inadequate access to health care is a problem for many Montana citizens. The Department must make decisions that will allow the maximum benefit possible across all the programs that Montana Medicaid offers. The PDL and PA programs are intended to make the limited resources go further.

COMMENT #16: Pharmaceuticals, especially psychotropic medications used to treat mental illness, affect individuals differently based on individual history and other medications. These drugs may have varying and sometimes serious individual side effects. The proposed program will provide no cost savings to the state over the long term and comes at the expense of consumers and their quality of care. Restricting certain medications used to treat mental illness will result in increased costs in other areas, such as increased frequency of doctor visits, more emergency room visits, longer and more frequent hospitalizations, incarceration, job loss, homelessness and overall patient suffering.

RESPONSE: The Department disagrees that the above would be the result of the rule changes. The Department and the DUR Board/Formulary Committee understand the unique challenges faced by the mental health provider community in the treatment of their patients. Based on this, when a drug or inclusion of a

drug class in the PDL cannot be predicted to positively impact the Medicaid program both in terms of program costs and patient care, then that drug or corresponding drug class is not recommended for inclusion on the PDL.

COMMENT #17: It is a lengthy process to change medications, and conditions often deteriorate during this time. Patients not uncommonly try many drug regimens for many years before arriving at an effective drug therapy.

- \* Patient responses to drugs vary radically, and even an individual's response to a drug may change decisively over time.
- \* Many newer drugs are more expensive and have become widely utilized because they work better and have fewer side effects.
- \* Patients will decompensate or stop trying to obtain appropriate treatment if unable to refill prescriptions promptly.
- \* Implementation of the PDL may result in thousands of patients being forced to switch from medications they've become stabilized on to "preferred" products, resulting in new side effects, adverse interactions and confusion.
- \* The Department should weigh efforts to reduce Medicaid spending against barriers to care that harm beneficiaries and ultimately increase costs to the state.
- \* The state will save money on pharmaceuticals and end up spending significantly more on emergency rooms, jails and hospitals. The cost of neglect will not only be counted in human suffering; it will reappear in other areas of the state's budgets and in other levels of government. Short-term savings achieved in formulary budgets may be more than offset by spending on inpatient care. Medication that works is far less expensive than hospitalization, job loss, homelessness and incarceration.
- \* Psychotropic medications should be exempt from PDL because of the side effects of older, less effective medications, the difficulty of getting patients to continue taking psychotropic medications that don't work well, and the difficulty of predicting the effect of different drugs for each patient based on their individual medical history.
- \* Carve-outs for psychotherapeutic medications are recognized as essential because of the way these drugs

work and also because of the special challenges of serving people with serious mental illness enrolled in the Medicaid program. The Kaiser Commission on Medicaid and the Uninsured has concluded that all psychotherapeutic medications should be exempt from prior authorization requirements.

- \* The Department should except from the PDL any drug prescribed for the treatment of anxiety and related disorders, depression, bipolar disorder, schizophrenia and agitation and psychosis associated with dementia. The new rule could disproportionately affect persons with psychiatric illnesses.
  
- \* The proposal is contrary to Medicaid rule 42 CFR 440.230(c) not to reduce or deny benefits on the basis of medical diagnosis, illness or condition. Federal Medicaid rules require that a service must be sufficient in amount, duration and scope to reasonably achieve its purpose for most people requiring the service (42 CFR 440.230(b)). Nothing should be done to limit availability of the most effective drugs for people with mental illnesses.

RESPONSE: The Department does not agree that a "carve out" of mental health drugs as proposed in the comments is necessary to adequately serve mentally ill clients. In lieu of the carve out and to address the other issues raised in Comment #17, the Department is forming a mental health work group comprised of Department staff, mental health providers and advocates to ensure the PDL meets the needs of the Department and its clients, to help establish policy and to address the unique issues of mental health clients.

COMMENT #18: Prior authorization creates an administrative barrier to patient care that a physician, or other health care provider, must overcome to implement a desired treatment plan. PA can be a cumbersome process that adversely affects the quality of care.

RESPONSE: Drug PA is allowed under 42 USC 1396r-8 and Montana Medicaid has had a drug PA system since 1994. The PA criteria are developed by the Board through a comprehensive review of medical references and compendia, peer-reviewed literature and clinical practice guidelines ensuring quality of care. The drug PA program is not intended to restrict utilization, but is intended to promote use of the most cost effective medication. Viewed as cumbersome by some, the PA process in reality serves as an educational tool by providing drug information and a quality check of current prescribing practices. Medications are always available through the PA process for beneficiaries meeting medical necessity criteria.

COMMENT #19: The PA requirement for the drugs used to treat

serious mental illness would overwhelmingly burden the already enormous challenge of accurately diagnosing and effectively treating serious mental illness.

RESPONSE: Drugs deemed effective will be included on the PDL. Drugs will be included on the PDL based on clinical benefit as well as cost. However, a provider who prescribes a drug considered non-preferred and not on the PDL would have to establish medical necessity in order for Medicaid to pay for the drug. As explained in the response to Comment #17, because the difficulty of determining an effective drug treatment program for mental health has been raised by many commentators, the Department is forming a work group comprised of the Department staff, mental health providers and advocates to ensure the PDL meets the needs of the Department and its clients.

COMMENT #20: Although the PDL will not ban any particular drug, it will limit prescriptions for drugs not on the PDL, and will result in denials.

RESPONSE: Although it is true that, if a drug is not on the PDL and PA is sought, PA will be denied if the provider cannot establish medical necessity, the Department feels the requirement is necessary both to protect patients and the Medicaid program, as explained above.

COMMENT #21: Federal statute requires that any PA request must be responded to within 24 hours, and in emergency situations the state must provide for pharmacy dispensing of at least a 72 hour supply of the requested drug.

RESPONSE: The Department agrees with this comment. Montana Medicaid conforms to the statutory requirement (42 USC 1396r-8(5)) and has the edits in place in the point of sale system.

COMMENT #22: A drug PA process creates a "fail-first" requirement. This will deter the use of medications that may be the best fit for many individuals, who will have to make due with inadequate medications or go without.

RESPONSE: Providers will be encouraged to prescribe from the PDL and a provider must establish medical necessity before a non-preferred drug will be approved. The Department does not agree that this creates a "fail-first" program. Not all non-preferred drugs will have a fail-first requirement as evidenced in the current drug PA criteria for Montana Medicaid.

COMMENT #23: PA requires additional time and paper work. This may cause the few psychiatrists we have in Montana to avoid prescribing atypical drugs that they believe will be more effective.

RESPONSE: The Department intends to have effective drugs included on the PDL and will strive not to increase provider

time or paperwork. It is correct, however, that if a client's medical condition dictates a "non-preferred" drug treatment regimen the provider will have to establish medical necessity so the client can obtain that medication.

COMMENT #24: Because drugs get on the PDL based on a rebate, one can conclude that the efficacy of the drug is not the controlling factor.

RESPONSE: Drugs will be included on the PDL based on clinical benefit as well as cost. The DUR Board/Formulary Committee makes the final recommendation to the Department regarding which drugs should be placed on the PDL.

COMMENT #25: Psychiatrists report that primary care physicians are not accepting new mental health patients due to the cumbersome Medicaid PA process needed for mental health drugs.

RESPONSE: The Department has not observed this in Montana. It agrees, however, that access to primary care providers is a very important consideration and it will monitor for this problem.

COMMENT #26: Drug PA may lead to less than optimal treatment or discourage or delay treatment.

RESPONSE: The Department disagrees. As noted above, the Department is required to have PA requests completed within 24 hours and offer a 72-hour emergency supply of medication.

COMMENT #27: If requests for prior authorizations based on particular circumstances will be routinely approved, why have a PA requirement at all? If they will not, it will result in costly hospitalizations and additional medical care. Where are the savings?

RESPONSE: Savings will come from a market shift to preferred drugs and also supplemental rebates. If prior authorization resulted in a high percentage of approvals for a given treatment or drug, then it would be questionable whether the program is necessary. However, the Medicaid PA program has not been a routine approval process and the denials have not resulted in costly hospitalizations or additional medical care because the Department and the DUR Board/Formulary Committee have made efficacious drug therapies available for practitioners to use in treating their Medicaid clients.

COMMENT #28: While large populations of people might do equally well on either two similar drugs, individual differences can be remarkable. Doctors generally attempt to prescribe the least costly effective drug, so a doctor will almost always have good reason for choosing the more expensive course. The appeals process therefore seems superfluous and may discourage or delay effective treatment. Quality of care to indigent people is deteriorating due to the constant meddlesomeness of the State.



RESPONSE: The Department disagrees that the prior authorization process is superfluous or discourages or delays treatment. Prior authorization criteria are established based on sound clinical data reviewed by the Formulary Committee comprised of physicians and pharmacists. The PA program is designed to ensure the medical necessity of the prescribed medication based on clinically appropriate criteria. The Department has a required turn-around time to prevent delays in filling a prescription where the drug requires a prior authorization.

COMMENT #29: The quality of patient care will be compromised as a result of implementing a PDL and PA.

RESPONSE: The Department will strive to ensure that quality is built into the development of the PDL and subsequent PA process. Identification of preferred drugs is based on review and clinical analysis of medical references, pharmacy compendia, and peer-reviewed literature, and final approval authority rests with the Department based on recommendations from the DUR Board/Formulary Committee. Equal care is taken in the development of PA criteria. If a drug or inclusion of a drug class in the PDL cannot be predicted to positively impact the Medicaid program in terms of both patient care and cost control, that drug or corresponding drug class will not be recommended for inclusion on the PDL. This should help ensure quality of care.

COMMENT #30: Some health care systems will not routinely allow new patients to be started on atypical medications until they have failed on generic medications.

RESPONSE: Not all non-preferred drugs will have a fail-first requirement, as evidenced in the current drug PA criteria for Montana Medicaid.

COMMENT #31: Cost control paradigms may reduce pressure on specific line items and they may be designed to minimize access concerns, but they are not designed to ensure quality care.

RESPONSE: The Department has a responsibility to both its clients and the taxpayers of Montana and believes the PDL will provide a quality program for its clients while efficiently managing its finite resources in a responsible manner.

COMMENT #32: PDLs and PA may drive costs higher by encouraging other health care services and negatively impacting the quality of care.

RESPONSE: The Department will continue to monitor expenses across all Medicaid programs and will address quality of care issues and cost shift issues as they arise.

COMMENT #33: Continuity of care protections for patients should be a part of the rule change.

RESPONSE: The Department disagrees that continuity of care issues belong in the rule, given its scope. However, the Department will work with various groups such as the mental health work group to establish policy for continuity of care issues.

COMMENT #34: The Department appears to place more importance on the financial arrangement with the drug companies than on the clinical needs of people.

RESPONSE: The clinical needs of clients are the reason for the Medicaid program. The Department must meet its fiscal responsibility while ensuring that Montana's poor have the appropriate healthcare safety net in place. The Department has determined that negotiating with pharmaceutical manufacturers for supplemental rebates is a superior alternative to reducing provider reimbursement rates or cutting services to Medicaid clients.

COMMENT #35: Qualified prescribers and/or providers should determine what prescription drugs present the best therapeutic option for patients.

RESPONSE: In many instances, quality of care provided to Montana's indigent population has been improved by supplying more information about a particular drug or therapy to providers. It is not the intent of Medicaid to interfere in a provider's treatment of patients, but the Department and the DUR Board/Formulary Committee believe that discussion about the most effective drug therapy is always in a patient's best interest as new evidence and literature are presented.

COMMENT #36: It is critical to select drugs for the PDL based on unbiased efficacy studies using objective, clinical data.

RESPONSE: The Department agrees. Identification of preferred drugs are based on review and clinical analysis of medical references, pharmacy compendia, and peer-reviewed literature. Final approval authority rests with the Department based on recommendations from the DUR Board/Formulary Committee.

COMMENT #37: Preservation of physician authority to determine drug selection in accordance with current standards of medical practice is imperative.

RESPONSE: The Department agrees. It is not the intent of Medicaid to interfere in a provider's treatment of patients, but the Department believes that discussion about the most effective drug therapy is always in a patient's best interest as new evidence and literature are presented.

COMMENT #38: The Department received several comments that a psychiatrist and/or psychologist and an experienced pharmacist should be included on the DUR Board.

RESPONSE: The Department concurs with the comments and is actively recruiting a psychiatrist to be a member of the DUR Board/Formulary Committee. By law, membership of the DUR Board/Formulary Committee shall include health care professionals who have recognized knowledge and expertise in one or more of the following: the clinically appropriate prescribing of covered outpatient drugs; the clinically appropriate dispensing and monitoring of covered outpatient drugs; drug use review, evaluation and intervention; and, medical quality assurance. At least 1/3 but no more than 51% of the membership of the DUR Board/Formulary Committee shall be made up of licensed and actively practicing physicians and at least 1/3 will be licensed and actively practicing pharmacists.

COMMENT #39: A psychiatrist should be appointed to the DUR board before a formulary is established. The Department should seek input from multiple disciplines within medicine and pharmacology so adequate options within drug classes are offered to optimize care.

RESPONSE: The Department agrees.

COMMENT #40: Pharmaceutical manufacturers should participate in the PDL development process.

RESPONSE: It is the intent of the Department for the DUR board to hear comments from members of the pharmaceutical industry, consumers, and other interested parties during drug class reviews.

COMMENT #41: Patient representation should be a part of the Medicaid drug formulary committee.

RESPONSE: See the response to Comment #40.

COMMENT #42: A "dispense as written procedure" should be added to the rule.

RESPONSE: Dispense as written guidelines are included in Medicaid policy manuals. In addition to prior authorization requirements, brand name drugs with a generic equivalent may be billed only when the prescriber has handwritten "Brand Necessary" or "Brand Required" on the prescription. The pharmacy must retain brand certifications documentation.

COMMENT #43: The Department needs to set high standards for its evidence-based PDL system.

RESPONSE: The Department agrees. Identification of preferred drugs is based on review and clinical analysis of medical

references, pharmacy compendia, and peer-reviewed literature, and final approval authority rests with the Department based on recommendations from the DUR Board/Formulary Committee. Equal care is taken in the development of PA criteria.

COMMENT #44: The Department received several comments concerning protocols for decision making by the DUR Board/Formulary Committee. Commentors suggested the Department should:

- \* follow protocols already established, such as the Ohio Medication Algorithm Project, Texas Medication Algorithm Project (TMAP), or Medication Management Approaches in Psychiatry (MedMAAP);
- \* utilize an evidence-based, best practice approach emphasizing clinical efficacy, not cost/rebates;
- \* develop step by step decision-making processes based on the latest research and on each patient's specific needs that guide the doctor and patient through the appropriate treatment options;
- \* use the services of Oregon State University College of Pharmacy for its research, as other states do;
- \* develop a comprehensive program of training for the medical community in the use of treatment algorithms for serious mental illness.

RESPONSE: The Department will form a workgroup comprised of the Department staff, mental health providers and advocates to explore these options and ensure the PDL meets the needs of the Department and clients.

COMMENT #45: A PDL program seems to be based on rebates from drug manufacturers, not on sound medical advice and effectiveness of individual drugs.

RESPONSE: A significant component of the PDL is supplemental rebates, but medical advice and drug effectiveness are equally important. The Department has determined that negotiating with pharmaceutical manufacturers for supplemental rebates is a superior alternative to reducing provider reimbursement rates or cutting services to Medicaid clients. The PDL will be developed to ensure that quality is built into the development of the PDL and subsequent PA process. Identification of preferred drugs is based on review and clinical analysis of medical references, pharmacy compendia, and peer-reviewed literature, and final approval authority rests with the Department, based on recommendations from the DUR Board/Formulary Committee. Supplemental rebates are used to add drugs to the preferred drug list. Equal care is used in the development of PA criteria.

COMMENT #46: A PDL would consist only of drugs that have a rebate agreement with the drug manufacturer.

RESPONSE: The Department disagrees with this comment. The PDL will be value-based. Development is focused on making clinically appropriate drugs available through therapeutic class reviews, supplemental rebate negotiations and the formulary committee process.

COMMENT #47: A PDL would do nothing to promote better prescribing practices so that Medicaid pharmacy dollars were going for the best possible treatment.

RESPONSE: The Department does not agree. The PA component of the PDL serves as an educational tool by providing drug information and a quality check of current prescribing practices. The Department and the DUR Board/Formulary Committee feel that discussion about the most effective drug therapy is always in a patient's best interest as new evidence and literature are presented.

COMMENT #48: A PDL will not differentiate the drugs that actually increase overall disease burden from drugs that do not.

RESPONSE: The Department does not agree. The DUR Board/Formulary Committee will review evidence based on review and clinical analysis of medical references, pharmacy compendia, and peer-reviewed literature, and final approval authority rests with the Department based on recommendations from the DUR Board/Formulary Committee.

COMMENT #49: If a company does not participate in the state rebate program, its drugs will not make the list.

RESPONSE: The Department does not agree. The referenced drug, or any other drug the DUR Board/Formulary Committee deems necessary, will be on the PDL.

COMMENT #50: Effectiveness of a drug will not be the reason it is listed.

RESPONSE: The Department does not agree. See the response to Comment #48.

COMMENT #51: If a doctor decided what medicine to prescribe or what procedures to perform based on what favors they could garner from a supplier, it would be grounds for malpractice. This would ". . . essentially determine what medicines are available to seriously ill individuals based on how much of a kick-back pharmaceutical companies will give us".

RESPONSE: The Medicaid program provides access to health care to Montana's poor in the most cost effective way possible. See response to Comment #34.

COMMENT #52: Cost and supplemental rebates should be considered only for therapeutically equivalent drugs.

RESPONSE: The Department agrees. Once the reference drug(s) is chosen, other therapeutically equivalent drugs within the drug's therapeutic class will be included on the PDL based on cost and supplemental rebates.

COMMENT #53: Drug selection should only be clinically based, not cost motivated.

RESPONSE: The Department does not agree. Cost and clinical effectiveness must both be considered. See the response to Comment #48.

COMMENT #54: Access to medications should be based on sound clinical judgment and the most advanced science, not on agreements that are of the most financial benefit to drug companies.

RESPONSE: Supplemental rebates with the pharmaceutical manufacturers are designed to maximize savings within the program, therefore preserving Medicaid benefits across the continuum of care. This benefits Medicaid clients and Montana.

COMMENT #55: The Department did not have a discussion with the Central Service Area Authority, Mental Health Oversight Advisory Council or with the Public Health Advisory Council about this proposal. It is unfortunate that Department's preliminary efforts toward controlling Medicaid pharmacy cost did not include outreach to the many groups that advise the Department.

RESPONSE: The Department has included and will continue to include constituency groups in the ongoing discussion regarding the implementation of the PDL. During the therapeutic class review, the formulary meetings will be open to the public and there will be an additional opportunity for public comments during these meetings. The PDL is a topic that was discussed at the Public Health Care Redesign Project and was one of several recommendations made by the group to try to control costs in the Medicaid prescription drug program.

COMMENT #56: The Montana Medicaid Program's Policy Goal 5 promised that "The Medicaid program will include opportunities for broad public input into decisions that significantly change program design or populations served". The accountability measures are "(1) Availability of timely and accurate information distributed in a variety of formats; (2) Open and inclusive process; transparent public policy decisions."

RESPONSE: The Department welcomes and encourages public participation and the assistance of advisory boards. The comment period for these rules was extended to facilitate

comments.

COMMENT #57: Pharmaceuticals are drawing attention because drug spending has increased recently due to an aging population, added utilization and availability of new products.

RESPONSE: The Department concurs. All of these factors contribute to the increase in drug spending. Additional factors include direct-to-consumer advertising and heavy marketing to providers by pharmaceutical manufacturers. These marketing costs are passed along to consumers and third party payers in the form of increased drug costs.

COMMENT #58: The consumer should not be punished for the greed of the pharmaceutical industry.

RESPONSE: The PDL is not designed to punish consumers. It is a means for Montana Medicaid to control its increasing drug spending.

COMMENT #59: By denying or restricting payment for certain drugs, the State would be practicing medicine without the proper clinical information about individual patients, which is immoral and unethical.

RESPONSE: The Department is not practicing medicine, it is managing a finite set of resources in the most cost effective manner without cutting back on services or provider reimbursements.

COMMENT #60: A PDL would have a significant impact on Montana State Hospital patients.

RESPONSE: The Department understands the impact a PDL could have on patients of the Montana State Hospital, especially during discharge planning. The Department has met with the hospital professional staff and understands their concerns.

COMMENT #61: Michigan, Vermont, Florida, Kentucky and Tennessee have exemptions to PDL programs for medication for mental illnesses. The National Alliance for the Mentally Ill, the National Mental Health Association, and the American Psychiatric Association oppose PDL, PA and rebates.

RESPONSE: See response to Comment #17.

COMMENT #62: Montana should plan for the future and address the need for cost savings by investing in more community based resources such as PACT, rather than denying the mentally ill access to modern medicine.

RESPONSE: The Department continues to look forward while managing its finite resources. The Department will continue to attempt to ensure that client's medication needs are met through

appropriate utilization and does not, therefore, agree that the mentally ill will be denied access to modern medicine.

COMMENT #63: The proposed rule changes should go to the Legislature, with full public input, rather than being decided solely by the Department.

RESPONSE: The Department is implementing statute and legislative intent with this proposed rule change, which it is mandated to do by law. The Department always keeps the Legislature fully informed regarding its rulemaking.

COMMENT #64: Current trends indicate that a more effective way to reduce medical costs is to standardize and optimize treatment of chronic illness.

RESPONSE: The Department understands the important role disease case management plays in improving the health outcomes in chronically ill clients. The Department has recently implemented disease case management for asthma, diabetes, chronic heart failure, cancer and chronic pain. Though a valuable tool, it is not the only method the Department will employ to manage its finite resources.

COMMENT #65: Another financial issue to consider is the potential cost of a lawsuit that may result when patients now are started on standard anti-psychotic medication and later develop persistent tardive dyskinesia. It would presumably take only one or two lawsuits to eliminate the cost savings.

RESPONSE: The DUR Board/Formulary Committee recognizes the danger of tardive dyskinesia. Conditions such as this are addressed by criteria developed through a comprehensive review of medical references and compendia, peer-reviewed literature and clinical practice guidelines.

COMMENT #66: What, if any, safeguards are provided to insure that this cost containment strategy does not harm patients or delay their access to the care and treatment prescribed by their doctor?

RESPONSE: All criteria are developed through a comprehensive review of medical references and compendia, peer-reviewed literature and clinical practice guidelines. Additionally, PA response is within 24 hours of a request and the system allows for a 72-hour supply of a covered outpatient prescription drug in an emergency situation.

COMMENT #67: Is it in the patients' best interest for the state of Montana to replace the expertise of Medicaid patients' own physicians in making decisions on what medicines are right for their patients?

RESPONSE: It is not the intent of Medicaid to interfere in a  
Montana Administrative Register



provider's treatment of a patient, but the Department and the DUR Board/Formulary Committee believe that discussion about the most effective drug therapy is always in a patient's best interest as new evidence and literature are presented.

COMMENT #68: Will Montana's implementation of a restrictive PDL and a PA program jeopardize the health of Montana's vulnerable Medicaid patients?

RESPONSE: The Department will make every attempt to ensure that quality is built into the development of the PDL and subsequent PA process. Identification of preferred drugs is based on review and clinical analysis of medical references, pharmacy compendia, and peer-reviewed literature. Final approval authority rests with the Department based on recommendations from the DUR Board/Formulary Committee. Equal care is taken in the development of PA criteria.

COMMENT #69: How will Montana be able to prevent delays in beneficiary access and adverse consequences to a Medicaid patient's health?

RESPONSE: PA response is within 24 hours of a request and the point-of-sale (POS) system allows for a 72-hour supply of a covered outpatient prescription drug in an emergency situation.

COMMENT #70: How will the Department track costs and service utilization throughout the Medicaid program to assure that costs are not simply shifted from the prescription drug benefit to more expensive services?

RESPONSE: The Department regularly monitors and tracks the costs of all Medicaid programs. The Department will continue to monitor the Medicaid budget to ensure the PDL decisions have not shifted costs to other Medicaid programs.

COMMENT #71: Has the Department given sufficient consideration to the high administrative costs of the program, especially when balanced against its potential negative impact on beneficiary access to medicines, consequences for patient health and overall cost to the Medicaid program?

RESPONSE: The Department has considered all of the above. The Department estimates administrative costs of approximately \$1 million with savings estimated at five percent of annual drug spending, or approximately \$5 million in state fiscal year 2005.

COMMENT #72: Would the Department consider a primary care, case management program before it moves to implement its restrictive PDL and supplemental rebate program?

RESPONSE: Montana Medicaid has had a primary care, case management (PCCM) program in place since 1993. Approximately 70% of Medicaid clients are enrolled in the program with an

annual savings of approximately \$20 million. PCCM is one of many methods the Department will employ to manage the Medicaid program's finite resources.

COMMENT #73: The draft rule does not discuss disputes and appeals. Medicaid beneficiaries should have the right to a timely appeal of disputed coverage decisions to an independent, objective third party. To protect individual health, this process should be prompt. Decisions on disputed coverage decisions should be made immediately, or as rapidly as the patient's condition requires.

RESPONSE: The Department is reviewing its current appeals procedures, with the intent to establish an appeals process directly related to the PDL program.

COMMENT #74: The Department should join other states participating in the evidence-based research consortium operated by the Oregon State Health University.

RESPONSE: The Department is investigating this opportunity.

COMMENT #75: The Department should consider instituting a state drug discount program for low-income individuals who do not qualify for Medicaid and have no drug coverage. Some states are able to obtain more favorable prices for their Medicaid clients by making drugs available at Medicaid prices for low-income individuals with incomes up to 350% of the federal poverty level. By making drugs affordable for low-income individuals, they are less likely to need Medicaid in the future.

RESPONSE: The Department will continue to explore the feasibility of a state drug discount program. The Department also agreed to review this idea in the Public Health Care Redesign Project.

Russ Cater  
Rule Reviewer

Russ Cater for  
Director, Public Health  
and Human Services

Certified to the Secretary of State, June 21, 2004.

**NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE**

**Interim Committees and the Environmental Quality Council**

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

**Economic Affairs Interim Committee:**

- ▶ Department of Agriculture;
- ▶ Department of Commerce;
- ▶ Department of Labor and Industry;
- ▶ Department of Livestock;
- ▶ Office of the State Auditor and Insurance Commissioner;

and

- ▶ Office of Economic Development.

**Education and Local Government Interim Committee:**

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

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

- ▶ Department of Public Health and Human Services.

**Law and Justice Interim Committee:**

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

**Energy and Telecommunications Interim Committee:**

- ▶ Department of Public Service Regulation.

**Revenue and Transportation Interim Committee:**

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

**State Administration, and Veterans' Affairs Interim Committee:**

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

**Environmental Quality Council:**

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

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

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is 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<br>Subject                    | 1. Consult ARM topical index.<br>Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued. |
| Statute<br>Number and<br>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 March 31, 2004. This table includes those rules adopted during the period April 1, 2004 through June 30, 2004 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 March 31, 2004, 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 2003 and 2004 Montana Administrative Registers.

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