

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 14

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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

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BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

| | |
|---------------------------------|--------------------|
| In the matter of the proposed) | NOTICE OF PROPOSED |
| adoption of new rules I) | ADOPTION |
| through X relating to) | |
| alternative dispute) | NO PUBLIC HEARING |
| resolutions of seed contract) | CONTEMPLATED |
| disputes) | |

TO: All Concerned Persons

1. On August 21, 2004, the Montana Department of Agriculture proposes to adopt new rules I through X relating to alternative dispute resolutions of seed contract disputes.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Agriculture no later than 5:00 p.m. on August 5, 2004 to advise us of the nature of the accommodation that you need. Please contact Gregory H. Ames at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2944; TTY: (406) 444-4687; Fax: (406) 444-5409; or E-mail: agr@state.mt.us.

3. The proposed new rules provide as follows:

NEW RULE I DEFINITIONS The definitions in this subchapter apply to 80-5-501 through 80-5-510, MCA:

- (1) "Alternative dispute resolution" (ADR) means a process by which the parties agree to submit their differences to the judgment of an impartial council.
- (2) "Buyer" means a person who buys agricultural seed.
- (3) "Council" means the alternative dispute resolution council established in 80-5-504, MCA.
- (4) "Seller" means a person selling agricultural seed.

AUTH: 80-5-509, MCA
IMP: 80-5-509, MCA

REASON: The statute does not define these terms used in the alternative dispute resolution process.

NEW RULE II BUYER FORMS FOR ALTERNATIVE DISPUTE RESOLUTION

(1) The buyer's sworn complaint must be on forms provided by the department or in a format containing the following information:

- (a) name and address of person or company filing for alternative dispute resolution;

- (i) permission to enter owned or leased property for purposes of conducting an investigation of the sworn complaint;
- (b) seller name and address where seed was purchased;
- (c) crop kind, crop variety and, if applicable, brand name;
- (d) lot number and amount of seed purchased, purity and germination information;
- (e) amount of carryover seed available for sampling purposes;
- (f) description of complaint, including alleged damages and dollar loss estimates;
- (g) crop production information may include, but is not limited to:
 - (i) legal description of field;
 - (ii) acres affected;
 - (iii) planting date, seeding rate, and seeding depth;
 - (iv) previous three years field crop history; and
 - (v) directions to or location of field;
 - (h) filing date;
 - (i) signature; and
 - (j) notary's acknowledgment.
- (2) The filing fee of \$250 must accompany the copy sent to the department, and is non-refundable upon receipt of an answer from the seller as required in 80-5-506(2), MCA.
- (3) The department may request additional information.

AUTH: 80-5-509, MCA
IMP: 80-5-506, MCA

REASON: This rule provides a list of items important and necessary for the council to investigate a claim by a damaged party. This format of information will allow for each request to be similar in appearance and content, allowing for easier and timely interpretation of claim information.

Both parties involved in the Alternative Dispute Resolution (ADR) process will initially pay a \$250 filing fee. The filing fee will be deposited in the seed account established by 80-5-132, MCA for the purpose of funding costs of the investigation and ADR. If the costs exceed the original filing fees, the council can assess the additional costs to the non-prevailing party or equally distribute them between the parties to the extent that the parties have agreed in writing to the equal distribution. An ADR and investigation may involve, but is not limited to, the following cost estimates: Seed Lab Analysis for purity and germination \$44, Electrophoresis testing to determine variety of a questioned seed \$100, Trait Testing \$15 per trait using Enzyme-Linked ImmunoSorbent Assay (ELISA) methods, review of submitted documentation, examination of buyer and seller, field inspection of growing crop and sampling of remaining seed \$300 (15 hours @ \$20 per hour), Laboratory grow-out test of seed \$400, two meetings of council members including lodging, per

diem and mileage costs \$1,160. Department of Agriculture administrative costs of mailing the statutorily required notices to the buyer and seller, establishing documentation files and copies, costs of informal hearing rooms, and other procedural costs are established to account for 20% of the fixed or known costs being approximately \$403. The total expected cost of an ADR and investigation and conclusion would be \$2,422. The additional cost of investigation, above the filing fees, in this scenario is \$1,922. This money would be reimbursed to the department's seed account for a zero cost impact to the department.

The total economic impact to the non-prevailing party would be \$2,172. The economic impact to the prevailing party would be the original filing fee of \$250. Should the parties agree to an equal distribution of the incurred costs of investigation, each party would see an economic impact of \$1,211.

This rule will impact a seed producer and a seed dealer who become involved in a dispute. The department does not expect more than three disputes a year.

NEW RULE III SELLER'S RESPONSE TO BUYER AND DEPARTMENT

(1) The seller's response filed with the department shall contain, but is not limited to the following:

- (a) seller name and address;
- (b) grower name filing for alternative dispute resolution;
- (c) date seller was first notified of request for alternative dispute resolution;
- (d) responses made to the complaint, whether they agree or disagree and why;
- (e) seed lot identification including:
 - (i) name of seed labeler;
 - (ii) lot number;
 - (iii) certification number;
 - (iv) seed kind;
 - (v) seed variety;
 - (vi) seed treatment, (if treated);
 - (vii) any tests conducted on the lot in question (purity, germination, barley streak mosaic virus, other); and
 - (viii) production year of seed lot;
- (f) list of any additional sales of this lot;
- (g) list of any other complaints that may have been received; and
- (h) seller name, date and signature.

(2) The filing fee of \$250 must accompany the copy sent to the department and is non-refundable upon receipt by the department.

(3) The department may request additional information.

(4) If the seller fails to respond within the time given, the council may place the seller in default and advise the buyer of their right to proceed with a civil complaint in state district court.

AUTH: 80-5-509, MCA
IMP: 80-5-506, MCA

REASON: This rule provides the seller of seed the format and information to reply to a submitted complaint. The information submitted by the seller allows the council to assess whether this is a valid complaint and determine other problems or additional complaints that may occur with the seed lot in question.

The rule is further necessary because it advises the seller of the buyer's right to proceed in the event of the seller's default, and impresses upon the seller the importance of advocacy by both parties in a dispute. The economic impact for this rule is the same as stated in New Rule II.

NEW RULE IV EXPENSES FOR WITNESSES AND TESTING

(1) Upon request to, and approval of the council, the buyer or seller may have witnesses on their behalf. The expenses for witnesses for either side shall be borne entirely by the party producing such witnesses. The costs of grow out tests or other tests that may be required that exceed the amount of the filing fee may be allocated by the council in making the award.

AUTH: 80-5-509, MCA
IMP: 80-5-508 and 80-5-510, MCA

REASON: Section 80-5-508, MCA allows for the distribution of costs for ADR. Each party involved in ADR may bring witnesses to a hearing for testimony on their behalf. Alternative dispute resolution is a cost effective way to resolve seed performance issues. The party bringing witnesses on their behalf should pay for their costs without the expectation the costs would become subject to the final award to be paid by the non-prevailing party.

NEW RULE V INVESTIGATION PROCEDURES (1) Investigation procedures may include, but are not limited to the following:

- (a) interviewing the buyer of the seed;
- (b) interviewing the seller of the seed;
- (c) obtaining sample(s) of any remaining seed for grow out tests;
- (d) obtaining copies of records of fertilizer or pesticide that were applied to the field;
- (e) observing the field conditions in question and obtaining:
 - (i) pictures of plants growing;
 - (ii) stand counts of plants;
 - (iii) soil samples for analysis of fertilizer and pesticide residue; and
 - (iv) maps of the field showing patterns or findings observed;

(f) contacting weather service to obtain weather information during the growing season;

(g) contacting university, extension, or industry personnel with expertise on crop type in question; and

(h) observing other documentation as deemed necessary by council members.

(2) Investigations made by the council should be organized and under the direction of a lead investigator with the greatest knowledge of the cropping system and crop type involved in the complaint. This lead investigator may be chosen from the council membership.

(3) If the council determines none of its members possess the knowledge or expertise to conduct a thorough investigation, nothing in these rules shall preclude the council from appointing an investigator from outside its membership to conduct the investigation.

AUTH: 80-5-509, MCA

IMP: 80-5-504 and 80-5-506, MCA

REASON: Knowledge of farming practices, cropping systems and investigational procedures are essential to determining whether a seed failed to perform as stated on the label. A complete investigation will also allow for an equitable settlement between the parties involved. Experts such as Certified Crop Advisors (CCAs) may be appointed to conduct the investigation for the council. CCAs are trained in making recommendations for various farming practices. They are knowledgeable in fertilizer requirements, soil conditions, herbicide application, and water usage for crops.

NEW RULE VI SCHEDULING OF INFORMAL HEARING (1) The presiding officer shall fix the time and place for each informal hearing and shall notify each party in writing of the scheduled informal hearing at least seven days in advance of that date.

(2) The informal hearing will follow the procedures of the Montana Administrative Procedure Act established in 2-4-603 and 2-4-604, MCA.

(3) Such notice shall include:

(a) the names and addresses of the parties to whom notice has been given;

(b) the address and telephone number of the presiding officer of the council;

(c) the names and addresses of the members of the council;

(d) the date, time, place, and subject of the informal hearing; and

(e) a statement of the legal authority under which the informal hearing is being held including the sections of statute and rules involved.

(4) The presiding officer of the council shall attempt to schedule the hearing at a time and place mutually agreeable to the buyer and the seller. Provided that if a mutually

agreeable time and place cannot be found, the presiding officer may set the time and place.

(5) The presiding officer of the council may allow all or a part of the informal hearing to be conducted by telephone, or other electronic means, when the rights of the parties will not be prejudiced and each party has an opportunity to participate.

(6) The parties involved in the informal hearing must declare and receive approval from the council for all persons appearing upon their behalf to provide testimony. A party may not be represented by an attorney unless all parties are represented by an attorney in the informal hearing.

AUTH: 80-5-509, MCA

IMP: 80-5-505, MCA

REASON: This rule allows both parties to provide additional supporting testimony at an informal hearing. Complex issues dealing with seed performance, agronomic practices and environmental issues can become very cumbersome. These issues and questions are not easily portrayed in a written notice and require further explanation in person by the parties involved. The membership of the council may have questions of both parties and this will be most economically handled by a hearing where both parties are present to answer all questions.

NEW RULE VII WAIVER OF INFORMAL HEARING (1) The parties may provide, by written agreement submitted to the presiding officer, that the informal hearing shall be conducted on the pleadings submitted without oral argument or testimony.

(2) The council may make their determination through submitted information and are not compelled to hold an informal hearing.

AUTH: 80-5-509, MCA

IMP: 80-5-509, MCA

REASON: Section 80-5-509, MCA allows for the department to adopt rules for the efficient administration of ADR. Both parties may have enough evidence to present in written documentation for the council to review. If the amount of damages is small enough and the expense to travel to a central location is prohibitive, this rule gives both parties the right to opt out of the informal hearing and have the council determine their case on the submitted documentation.

NEW RULE VIII ALTERNATIVE DISPUTE RESOLUTION COUNCIL REPORT (1) The council shall prepare a written report of its findings within the established time frames. The report shall include:

- (a) findings of fact and conclusions;
- (b) the award; and

(c) allocations as to costs, if any.

(2) A simple majority of the council shall be sufficient to make a decision.

(3) The report shall constitute the final decision of the council.

(4) Any member disagreeing with an award may prepare a dissenting opinion and that opinion shall be included in the council report.

(5) Nothing in these rules will prohibit the department from taking enforcement actions based on the findings of the alternative dispute resolution council as prescribed in 80-5-136, MCA, of the Montana Agricultural Seed Act.

(6) Council findings of "inconclusive due to lack of evidence or cooperation" between parties would be noted in the final report. These findings may result in no award of damages being issued. Costs of the investigation would still be allocated equally.

AUTH: 80-5-509, MCA

IMP: 80-5-507, MCA

REASON: Section 80-5-507, MCA requires the council to finalize its investigation via a written report to the director. This report must be complete and accurate as it becomes admissible in court should the parties decide to pursue further legal action. Council members with a dissenting opinion may also write a report that will become a part of the findings and court record.

NEW RULE IX AWARD UPON SETTLEMENT (1) If the parties to a dispute settle that dispute during the course of an alternative dispute resolution, the council, at the request of the parties, may set forth the terms of the agreed settlement in the report. A copy of the agreement reached by the parties and a statement requesting withdrawal from alternative dispute resolution must be sent to the council.

AUTH: 80-5-509, MCA

IMP: 80-5-503, MCA

REASON: This rule provides for the parties to terminate the dispute resolution process, if both parties agree, before the council completes their findings. After initial application for ADR the parties may decide the best way to settle their dispute is better handled between them without the ADR investigation. The business relationship between buyer and seller will often be left intact if they work together to solve the dispute. Settling the case before the council concludes its investigation will also benefit them if it appears the cost of ADR will exceed the initial costs of filing for ADR. The agreement to settle is subject to submission in court the same as the council's complete findings and final report.

NEW RULE X CONFIDENTIALITY (1) Article XII, Section 9, of the 1972 Constitution of the State of Montana provides for the right of all citizens to participate in the deliberations of public agencies, except where "the demand of individual privacy clearly exceeds the merits of public disclosure." If any party to an alternative dispute resolution proceeding requests that confidentiality be observed as to any part, or all of the proceeding, they must make a request to the council in the sworn complaint referenced in [NEW RULE II], or in the response referenced in [NEW RULE III]. The council and the department will balance the privacy interests with the right to participate and advise the parties before proceeding whether the dispute resolution will be kept confidential. In the event the proceeding is determined open, then the complaining, or responding party reserves the right to withdraw the complaint or response, or any part thereof, before any disclosure is made.

AUTH: 80-5-509, MCA
IMP: 80-5-509, MCA

REASON: This rule is necessary because it tells the affected public of their right to know, their right to privacy and how the department will balance those competing interests when responding to a request to observe proceedings and examine documents.

4. Concerned persons may submit their data, views or arguments concerning this proposed adoption in writing to Gregory H. Ames at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2944; Fax: (406) 444-5409; or E-mail: agr@state.mt.us. Any comments must be received no later than August 19, 2004.

5. If persons who are directly affected by the proposed adoption wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Gregory H. Ames at the Montana Department of Agriculture, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2944; TTY: (406) 444-4687; Fax: (406) 444-5409; or E-mail: agr@state.mt.us. A written request for hearing must be received no later than August 19, 2004.

6. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those

persons directly affected has been determined to be 31 persons based on 311 licensed seed dealers.

7. The Department of Agriculture maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding noxious weed seed free forage, noxious weeds, alfalfa seed, agriculture in Montana schools program, agriculture development, pesticides, warehouseman, produce, mint, seed, alternative crops, wheat research and marketing, rural development and/or hail. Such written request may be mailed or delivered to Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2944; Fax: (406) 444-5409; or E-mail: agr@state.mt.us or may be made by completing a request form at any rules hearing held by the Department of Agriculture.

8. An electronic copy of this Notice of Proposed Adoption is available through the Department's website at www.agr.state.mt.us, under the Administrative Rules section. The Department strives to make the electronic copy of the Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the 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.

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

DEPARTMENT OF AGRICULTURE

/s/ Ralph Peck
Ralph Peck
Director

/s/ Tim Meloy
Tim Meloy, Attorney
Rules Reviewer

Certified to the Secretary of State, July 12, 2004.

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

In the matter of the repeal) NOTICE OF EXTENSION OF PUBLIC
or amendment of ARM) COMMENT PERIOD ON PROPOSED
12.9.204 pertaining to Lone) REPEAL OR AMENDMENT
Pine Game Preserve)

TO: All Concerned Persons

1. On May 6, 2004, the Fish, Wildlife and Parks Commission (commission) and the Department of Fish, Wildlife and Parks (department) published MAR Notice No. 12-306 at page 1101 of the 2004 Montana Administrative Register, Issue Number 9 regarding a public hearing on the proposed repeal or amendment of the above-stated rule. The notice of proposed agency action is amended to extend the public comment period. The commission and department will continue to receive public comment until August 13, 2004.

2. Concerned persons may submit their data, views or arguments, either orally or in writing, to Dan Vincent, 490 North Meridian Road, Kalispell, MT 59901; telephone (406) 752-5501; fax (406) 256-0341; email dvincent@state.mt.us. Any comments must be received no later than August 13, 2004.

3. The commission and department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking 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 29, 2004, to advise us of the nature of the accommodation that you need. Please contact John Fraley, Fish, Wildlife and Parks, 490 North Meridian Road, Kalispell, MT 59901; telephone (406) 751-4564; fax (406) 257-0349; email jffraley@state.mt.us.

By: /s/ M. Jeff Hagener
M. Jeff Hagener,
Secretary Fish, Wildlife and
Parks Commission and
Director of the Department of
Fish, Wildlife and Parks

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

Certified to the Secretary of State July 12, 2004

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

| | | |
|--------------------------------|---|--------------------------|
| In the matter of the adoption |) | NOTICE OF PUBLIC HEARING |
| of new rules I and II, and |) | ON PROPOSED ADOPTION AND |
| amendment of ARM 18.9.302, |) | AMENDMENT |
| 18.10.106, and 18.10.404 |) | |
| concerning posting a bond by |) | |
| certain fuel tax licensees and |) | |
| other fuel tax reporting |) | |
| requirements |) | |

TO: All Concerned Persons

1. On August 17, 2004, at 9:00 a.m., a public hearing will be held in the auditorium of the Montana Department of Transportation building at 2701 Prospect Avenue, Helena, Montana, to consider the adoption and amendment of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on August 10, 2004, to advise us of the nature of the accommodation you need. Please contact Robert Turner, Fuel Tax Management and Analysis Bureau, Department of Transportation, P.O. Box 201001, Helena, MT 59620-1001; telephone (406) 444-7672; TDD (406) 444-7696; fax (406) 444-6032; or e-mail boturner@state.mt.us.

3. The proposed new rules provide as follows:

RULE I IFTA LICENSE BOND REQUIREMENT (1) International Fuel Tax Agreement (IFTA) licensees, or others as determined by the department, will be required to post a bond equivalent to twice the licensees' estimated quarterly tax liability but not less than \$500, in the event of non-compliance with the filing of a fuel tax return(s) and payment of fuel tax liability. The bond can be a surety, a certificate of deposit or cash.

(2) Non-compliance that triggers the requirement for a licensee to post a bond is as follows:

- (a) three late quarterly filings in a three-year period;
- (b) non-payment of the tax liability of an IFTA quarterly tax return two or more times in a four-quarter period; or
- (c) the license was previously revoked, but has been reinstated.

(3) The dollar amount of the bond will be increased by \$500 for each additional non-compliance infraction.

(4) The requirement for a bond will be removed and the bond released after three years if there has been timely compliance for those three years.

AUTH: 15-70-104, MCA
IMP: 15-70-121 and 15-70-304, MCA

REASON: This new rule is reasonably necessary because 15-70-121, MCA, which ties Montana to the International Fuel Tax Agreement (IFTA), does not state under what conditions IFTA licensees are subject to a bond. As a result, it is necessary to clarify under what circumstances a bond will be required. The proposed rule only requires a bond in the event of non-compliance with the filing of fuel tax return(s) and payment of fuel tax liability. Ten percent or 150 licensees of the total population of the IFTA licensees in Montana are estimated to be affected. The revenue generated from bond forfeiture cannot be estimated.

RULE II IFTA REINSTATEMENT FEE (1) IFTA licensees will be required to pay a reinstatement fee of \$100 to obtain a new license if the licensee had their license or permit revoked by the department.

AUTH: 15-70-104, MCA

IMP: 15-70-121 and 15-70-305, MCA

REASON: This new rule is reasonably necessary because 15-70-121, MCA, which ties Montana to the International Fuel Tax Agreement (IFTA), does not state the dollar amount of the reissuance fee to be charged when a previous licensee is requesting a new license. Ten percent or 150 licensees of the total population of the IFTA licensees in Montana are estimated to be affected. The revenue generated from reissuance fees is estimated at \$15,000.00.

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

18.9.302 SELLERS' INVOICE (1) Any person, other than a licensed distributor, who sells and delivers gasoline or special fuel to a purchaser on which a refund may be claimed, must issue an original invoice at the time of delivery, showing the number of gallons delivered. Each invoice issued must be an original invoice. Only one original invoice may be issued for each delivery. In addition to these requirements ~~outlined~~, each invoice must contain or show the following:

- ~~(a) a preprinted serial number;~~
- (b)(a) name and address of seller;
- ~~(c)(b) name and address of purchaser;~~
- (d)(c) complete date of delivery or purchase;
- ~~(e)(d) type of fuel;~~
- (f)(e) number of gallons or liters invoiced purchased;
- (g)(f) price per gallon; and or liter, or total amount of sale;
- ~~(h) to establish that the tax has been charged, at least one of the following:~~
- ~~(i) the U.S. dollar amount of tax;~~
- ~~(ii) the rate of tax; or~~
- ~~(iii) a statement that the Montana tax is included in the price.~~

(g) unit number of the vehicle; and/or
~~(i)(h)~~ identification of the equipment or bulk storage that the gasoline or special fuel is placed into if it is fueled ~~from~~ by other than a cardlock. Examples include, but are not limited to, fuel cans, slip tanks, tractors or bobcats.

(2) Any person who requests a refund or credit of motor fuel tax must have evidence that the motor fuel tax was paid.

AUTH: 15-70-104, MCA
IMP: 15-70-206, 15-70-207, 15-70-222, 15-70-345,
15-70-348 and 15-70-361, MCA

REASON: This amendment is reasonably necessary to reflect that the Montana Department of Transportation has changed its record keeping requirements to mirror those of the International Fuel Tax Agreement (IFTA). The department will no longer require that the "amount of the tax, rate of tax, or notation that the tax is included in the price" be included as part of the receipt or that the receipts have to have a preprinted serial number.

18.10.106 IFTA AGREEMENT (1) The department ~~hereby~~ adopts and implements the International Fuel Tax Agreement (IFTA) as set forth in 15-70-121, MCA.

~~(2) In addition to being subject to the rules and regulations of the IFTA agreement, an IFTA license holder who is a resident of Montana is subject to the same statutes and rules of a special fuel user under Title 15, chapter 70, part 3, MCA.~~

AUTH: 15-70-104 and 15-70-121, MCA
IMP: 15-70-121, MCA

REASON: This amendment is reasonably necessary because 15-70-121, MCA, only requires that the International Fuel Tax Agreement (IFTA) is effective when it is adopted by rule. It is not necessary to state that a resident IFTA license holder is subject to statute and rules of Montana.

18.10.404 SELLER INVOICES (1) Any invoice, receipt or statement used to support any special fuel user's records must contain the following:

~~(a) A preprinted serial number, except when invoices are automatically assigned a number by a computer or similar machine when issued;~~

~~(b)(a) Nname and address of seller;~~

~~(c)(b) Nname and address of purchaser;~~

~~(d)(c) Tthe date of sale and type of fuel;~~

~~(e)(d) Sspecial fuel must be identified as either clear, undyed or dyed or undyed;~~

~~(f)(e) Ggallons or liters invoiced;~~

~~(g)(f) Tthe price per gallon or liter, or total amount of sale;~~

~~(h) To establish that the tax has been charged, at least one of the following:~~

~~(i) the U.S. dollar amount of tax;~~

~~(ii) the rate of tax; or~~

~~(iii) a statement that the Montana tax is included in the~~

price.

~~(i)~~(g) Identification of the vehicle or equipment into which the special fuel is placed; and

~~(j)~~(h) Identification of the equipment or bulk storage that the gasoline or special fuel is placed into if it is fueled ~~from~~ by other than a cardlock. Examples include, but are not limited to, fuel cans, slip tanks, tractors or bobcats.

(2) Any person who requests a refund or credit of motor fuel tax must have evidence that the motor fuel tax was paid.

AUTH: 15-70-104, MCA

IMP: 15-70-121, 15-70-306, and 15-70-323, MCA

REASON: This amendment is reasonably necessary to reflect that the Montana Department of Transportation has changed its record keeping requirements to mirror those of the International Fuel Tax Agreement (IFTA). The department will no longer require that the "amount of the tax, rate of tax, or notation that the tax is included in the price" be included as a part of the receipt or that the receipts have to have a preprinted serial number.

5. Concerned persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Robert Turner, Fuel Tax Management and Analysis Bureau, Department of Transportation, P.O. Box 201001, Helena, MT 59620-1001; or emailed to boturner@state.mt.us and must be received no later than August 20, 2004.

6. Timothy W. Reardon, attorney, has been designated to preside over and conduct the hearing.

7. The Department of Transportation maintains a list of interested persons who wish to receive notices of the rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding rules proposed by the Administration Division, Aeronautics Division, Highways and Engineering Division, Maintenance Division, Motor Carrier Services Division, and/or Rail, Transit and Planning Division. Such written request may be mailed or delivered to the Montana Department of Transportation, Legal Services, 2701 Prospect Ave., P.O. Box 201001, Helena, MT 59620-1001; faxed to the office at (406) 444-7206; e-mailed to lmanley@state.mt.us; or may be made by completing a request form at any rules hearing held by the department.

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

MONTANA DEPARTMENT OF TRANSPORTATION

By: /s/ James Currie
James Currie, Deputy Director

/s/ Lyle Manley
Lyle Manley, Rule Reviewer

Certified to the Secretary of State July 9, 2004

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

| | | |
|-------------------------------------|---|----------------------|
| In the matter of the proposed |) | |
| adoption of New Rule I, amendment |) | NOTICE OF PROPOSED |
| of ARM 18.8.101, 18.8.204, |) | ADOPTION, AMENDMENT, |
| 18.8.205, 18.8.420, 18.8.422, |) | AND REPEAL |
| 18.8.504, 18.8.509, 18.8.510B, |) | |
| 18.8.511A, 18.8.902, and 18.8.1101, |) | NO PUBLIC HEARING |
| and the proposed repeal of 18.8.203 |) | CONTEMPLATED |
| and 18.8.208 concerning the Motor |) | |
| Carrier Services regulations for |) | |
| overdimensional vehicles and loads |) | |

TO: All Concerned Persons

1. On October 8, 2004, the Department of Transportation proposes to adopt, amend, and repeal the above-stated rules.

2. The Department of Transportation will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department no later than 5:00 p.m., August 16, 2004, to advise us of the nature of the accommodation you need. Please contact Motor Carrier Division, Department of Transportation, P.O. Box 4639, Helena, MT 59604-4639; telephone (406) 444-7638; TDD (406) 444-7696; fax (406) 444-9263; or e-mail mdtmcscontact@state.mt.us.

3. The proposed new rule provides as follows:

RULE I COMPLIANCE WITH WEIGHING LOCATION SIGNS

(1) Drivers of vehicles meeting the requirements of 61-10-141(1) and (3), MCA, are required to stop at all weighing locations displaying an open sign.

(2) A violation of this rule is punishable as provided by law.

AUTH: 61-10-155, MCA

IMP: 61-10-141, MCA

REASON: The new rule is reasonably necessary to provide clarification of the requirement for drivers operating vehicles defined in 61-10-141(1) and (3), MCA to enter all open weighing locations and clarifying the penalty for failure to comply.

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

18.8.101 DEFINITIONS (1) through (11) remain the same.

(12) A telephonic permit is a computer-generated special permit that is issued to a vehicle or load that originates in a location where the permit cannot be transmitted

electronically or purchased in person. A vehicle or load that is operating on a telephonic permit is subject to all applicable rules and regulations that apply to special permits.

(13) Financial stationery permits are hand written special permits issued on pre-printed, four-part, consecutively numbered forms.

AUTH: 61-10-155, MCA

IMP: 61-3-711, 61-3-712, 61-3-713, 61-3-714, 61-3-715, 61-3-716, 61-3-717, 61-3-718, 61-3-719, 61-3-720, 61-3-721, 61-3-722, 61-3-723, 61-3-724, 61-3-725, 61-3-726, 61-3-727, 61-3-728, 61-3-729, 61-3-730, 61-3-731, 61-3-732, 61-3-733, 61-10-107, 61-10-121, and 61-10-125, MCA

REASON: The new definition explains a procedure that can be used when an oversize and/or overweight permit is required but a written or printed copy cannot be obtained prior to travel. If a carrier orders and pays for a permit, and the permit is a computer-generated permit, the permit number can be given to the permittee in lieu of a printed copy. The permit number is the permittee's authorization to travel with the oversize/overweight load. The permittee is subject to the same restrictions and conditions that apply to a permitted load that is traveling with a printed permit and enforcement personnel can assure compliance at a weigh station or roadside stop by accessing a computer database.

A new definition of financial stationery has been added for clarification since the term "financial stationery" is used elsewhere in these rules.

18.8.204 FLEET TRANSFERS (1) remains the same.

~~(2) Ad valorem taxes on the transferred vehicles will be prorated to the end of the annual registration period of the fleet into which the vehicles were transferred.~~

(3) and (4) remain the same but are renumbered (2) and (3).

AUTH: 61-3-716, MCA

IMP: 61-3-721, 61-3-725, MCA

REASON: The laws of 1997, Chapter 496, Section 2 repealed 15-6-138(1)(f), MCA which applied to buses and trucks having a rated capacity of more than one ton. The amendment will not increase or decrease any monetary amount for any person, because the statute was repealed in 1997. The amendment simply brings the rule into line with the existing statute.

18.8.205 CHANGE OF REGISTRATION PERIOD (1) and (2) remain the same.

(3) ~~Ad valorem taxes and~~ Gross vehicle weight fees will be prorated to the end of the new registration period.

(4) remains the same.

AUTH: 61-3-716, MCA
IMP: 61-3-716 and 61-3-721, MCA

REASON: The laws of 1997, Chapter 496, Section 2 repealed 15-6-138(1)(f), MCA which applies to buses and trucks having a rated capacity of more than one ton. The amendment will not increase or decrease any monetary amount for any person, because the statute was repealed in 1997. The amendment simply brings the rule into line with the existing statute.

18.8.420 G.V.W. VALIDATING IDENTIFICATION (1) Each truck, truck tractor, trailer, semitrailer or three unit combination with a gross weight in excess of 24,000 pounds (or non-resident paying a G.V.W. fee only) will be issued a G.V.W. cab card showing the expiration of the G.V.W. fees paid. The cab card will be either an owner's registration receipt, G.V.W. Form 3, or a G.V.W. Form 63 computer-generated G.V.W. fee receipt.

AUTH: 61-10-155, MCA
IMP: 61-10-209, MCA

REASON: Computer-generated forms have replaced the G.V.W. form 63.

18.8.422 TEMPORARY TRIP PERMITS (1) through (4)(d) remain the same.

(e) Non-reciprocal transit plates- or reciprocal transit plates displayed on vehicles operated by a carrier whose base state of operation does not have a reciprocal agreement with Montana.

(f) through (5)(d) remain the same.

(e) Trailers drawn by trucks or tractors licensed under Schedule ~~II~~ I fees are not subject to trip permits if currently licensed and the registration receipt accompanies the vehicle.

(f) through (8) remain the same.

AUTH: 61-10-155, MCA
IMP: 61-10-211, 61-10-212, 61-10-213 and 61-10-214, MCA

REASON: The amendment to (4)(e) clarifies the options available to a transporter of new vehicles and who is based in a jurisdiction that does not have reciprocity with Montana. The transport company may purchase a temporary trip permit as provided in 61-10-211, MCA or the company may purchase Montana transit plates as provided in 61-4-301 through 61-4-303, MCA.

The amendment to (5)(e) is made because Schedule II fees were repealed by the Laws of 2001, Chapter 327, Section 3.

18.8.504 DURATION OF PERMIT (1) through (1)(b) remain the same.

~~(c) the permit is transmitted electronically or by any type of communication service except mail;~~

(d) remains the same but is renumbered (c).

(2) Term permits issued on financial stationery or computer-generated permits are valid from January 1 through December 31. Term permits issued on the apportioned registration (cab card) to Montana based vehicles licensed under the International Registration Plan (IRP), expire with the registration. Term permits issued under regional permit agreements are valid for a maximum of one year and expire on a date determined by the rules of the agreement. A term permit may only be issued to a power unit which is properly licensed with Montana.

AUTH: 61-10-155, MCA

IMP: 61-10-101, 61-10-102, 61-10-103, 61-10-104,
61-10-106, 61-10-107, 61-10-108, 61-10-109, 61-10-110,
61-10-113, 61-10-121, 61-10-122, 61-10-123, 61-10-124,
61-10-125, 61-10-126, 61-10-127, 61-10-128, 61-10-129,
61-10-130, 61-10-141, 61-10-142, 61-10-143, 61-10-144,
61-10-145, 61-10-146, 61-10-147, and 61-10-148, MCA

REASON: The reason for the amendment is to provide clarification and explanation of the different methods of issuing an expiring oversize and/or overweight permit. Prior to implementation of the department's computerized permit system, term permits were hand-issued on financial stationery or as part of the IRP registration cab card. Computer-generated permits are valid for the same registration period as permits issued on financial stationery.

Montana is a member of the Western Regional Permit Agreement, the purpose of which is to promote uniformity in the issuance of oversize and/or overweight permits in the western United States. Uniformity may include, but is not limited to, standard effective and expiration dates for these permits, and the dates may differ from a permit that is issued for travel only within Montana.

18.8.509 GENERAL PERMIT RESTRICTIONS (1) through (3) remain the same.

(4) The original or legible copy of a computer-generated term permit must be carried in the assigned vehicle, unless the vehicle is being operated on a telephonic permit. ~~The motor carrier services division administrator may, under certain circumstances, grant verbal authorization for movement under a single trip special permit.~~ A term permit issued to a Montana implement dealer, or a term permit issued on financial stationery or a self-issuing prepaid term permit must be the original document and carried in the assigned vehicle.

(5) remains the same.

(6) Extreme caution in the operation of a motor vehicle shall be exercised when hazardous conditions such as those caused by snow, ice, sleet, fog, mist, rain, dust or smoke adversely affect visibility or traction. Speed shall be reduced when such conditions exist. The driver of any vehicle equipped with vehicular hazard warning lights may activate

such lights whenever necessary to warn the operators of following vehicles of the presence of a traffic hazard ahead of the signaling vehicle, or to warn the operators of other vehicles that the signaling vehicle may itself constitute a traffic hazard. When conditions become sufficiently dangerous, the company or the operator shall discontinue operations, and operations shall not be resumed until the vehicle can be safely operated. No travel is allowed when a route has been placed under emergency travel conditions as determined by the department of transportation. The department of transportation road report is available between November 1 and May 1, 24 hours a day by calling 511 or (800) ~~332-6171~~ 226-7623 and on the department of transportation internet site at www.mdt.state.mt.us.

(7) through (13) remain the same.

AUTH: 61-10-155, MCA

IMP: 61-10-121, 61-10-122, 61-10-123, 61-10-124, and 61-10-125, MCA

REASON: The purpose of this amendment is to promote more efficient use of current technology while still assuring that state and federal laws and regulations are enforced. Advances in photocopiers and facsimile machines have resulted in the ability to make copies that are as clear and easy-to-read as the original document. Additionally, computer-generated permits can be accessed by MCS officers for enforcement verification and/or printing even when the permit is a telephonic permit that was issued in another location. Permits issued on financial stationery are hand-written with no database record or means of accessing information other than the original document. Implement dealer permits and pre-paid self-issuing permits are not vehicle specific when issued. The Montana implement dealer is allowed by law to transfer one permit from one vehicle to another but cannot use a photocopy of one permit to allow two or more moves to take place simultaneously. For users of pre-paid self-issuing permits, the power unit information is added by the permittee which could allow two or more vehicles to use the same permit. The rule is reasonably necessary to prevent this practice.

18.8.510B REGULATIONS AND EQUIPMENT FOR VEHICLES OR LOADS EXCEEDING 10 FEET WIDE (1) A sign with the words "OVERSIZE LOAD" or similar wording shall be mounted at any visible height on the front and rear of the load. Letters shall not be less than 8 eight inches in height. The letters shall be dark in color on a light colored background.

(2) On the power unit, flashing amber lights, a minimum of 5 five inches in diameter, 50 candlepower, 60 to 90 flashes per minute, shall be mounted at each end of the ~~wide~~ oversize load sign. A revolving light or strobe light may be substituted for flashing lights. Lights shall be flashing at all times when moving an oversize vehicle or load.

(3) and (4) remain the same.

AUTH: 61-10-155, MCA

IMP: 61-10-121 and 61-10-122, MCA

REASON: The proposed amendment is reasonably necessary in order to clarify sign requirements and provide uniformity. Although "oversize" is the recommended wording, permittees transporting oversized and/or overweight loads may use signs containing different wording that means the same thing as oversized. In section (2) wide was changed to oversized for uniformity.

18.8.511A WHEN FLAG VEHICLES ARE REQUIRED (1) and (2) remain the same.

(3) If a vehicle or load is not required to have a flag vehicle for interstate travel, no flag vehicle is required for a radius of two miles of an interstate interchange.

AUTH: 61-10-155, MCA

IMP: 61-10-121, 61-10-122, 61-10-123, and 61-10-124, MCA

REASON: The proposed amendment is necessary to allow a carrier to transport oversized and/or overweight loads more economically and efficiently by reducing the amount of "down time" incurred when waiting for a flag vehicle. The two-mile radius is uniform with current statute, 61-10-124(2)(d) and 61-10-124(4)(a), MCA.

18.8.902 ADMINISTRATIVE PENALTIES (1) through (1)(f) remain the same.

(2) In addition to the penalties set forth above, in order to protect the safety of the traveling public, permit privileges may be revoked by the administrator of the motor carrier services division for failure by the permittee to comply with any state or federal commercial motor carrier requirements. In making a determination whether to revoke permit privileges under this rule, the administrator shall take into consideration the nature and number of violations by the permittee as well as the need to protect the safety of the traveling public and the protection of personal and public property.

(3) Notice of administrative penalties or revocation of privileges pursuant to this rule shall:

(a) be given in writing;

(b) clearly state the reason or reasons for revocation;
and

(c) advise the permittee of the right to appeal the decision to the Montana transportation commission.

AUTH: 61-10-155, MCA

IMP: 61-10-121, 61-10-122, and 61-10-143, MCA

REASON: It is reasonably necessary to amend the rule in order to protect the traveling public and to protect private and public property from harm inflicted by permittees who intentionally or repeatedly ignore and circumvent federal and state commercial motor carrier requirements. Under the

current statutes, a permittee may continually violate applicable requirements and yet still be allowed to operate by paying a relatively small fine such as those found in 61-10-145, MCA. In some cases, allowing such a permittee to continue to operate would be to the detriment of the safety of other motorists. With this proposed amendment the administrator can revoke permit privileges of such a permittee when the nature and/or number of violations indicate the need to eliminate the privileges of an individual or entity that will not, or cannot, abide by the rules that protect the people of the state of Montana and their property.

18.8.1101 MOVEMENT OF HOUSES, BUILDINGS, EXTREMELY HEAVY MACHINERY, AND OTHER LARGE AND UNUSUAL OBJECTS (1) and (2) remain the same.

(3) Application shall be made upon an M.C.S. form 32-j or other form specified by the department of transportation. These forms are available from the Motor Carrier Services Division, 2701 Prospect Avenue, Helena, Montana; by mail request to P.O. Box 4639, Helena, Montana 59604-4639; by phone (406) 444-6130; or on-line at the department web site: www.mdt.state.mt.us.

(4) Any special permit must be approved by the Helena M.C.S. office. Special permits in this rule must be approved by the department and may require written approval of local jurisdictions, utility companies and private property owners before the special permit may be issued. The administrator of the motor carrier services division may disapprove a 32-j application.

(5) through (10) remain the same.

(11) Convoys of a maximum of two buildings will be allowed on a case-by-case basis, and an application must be submitted in writing to the administrator of the motor carrier services division. Additional restrictions may apply to assure safety and convenience for the traveling public and protection of public and private property.

(12) through (12)(b) remain the same.

(c) M.C.S. The form 32-j will be approved in two working days;

(d) remains the same.

(e) Class one buildings or loads may be moved only during daylight hours, Monday through Friday. No travel is allowed on holidays or holiday weekends. No travel is allowed after 3:00 p.m. on Friday until sunrise on Monday on routes indicated on the "red route restrictions" map. In the best interests of the traveling public, the administrator of the motor carrier services division may authorize travel at times other than those specified in this rule.

(f) remains the same.

(13) through (13)(d) remain the same.

(e) M.C.S. The form 32-j will be approved within a maximum of ~~ten~~ 10 working days;

(f) Four flag vehicles are required. Additional flag vehicles may be required if road construction, route of travel, or other conditions impose a hazard;

(g) Travel is allowed during daylight hours only, from sunrise Monday until Friday at 3:00 p.m. In the best interests of the traveling public, the administrator of the motor carrier services division may authorize travel at times other than those specified in this rule.

AUTH: 61-10-155, MCA

IMP: 61-10-121, 61-10-122, and 61-10-124, MCA

REASON: Amendments to this rule were necessary to correct word omissions, spelling errors and to provide overall clarification. Additional language was necessary to allow the department more flexibility in its ability to determine conditions and requirements for special permits that will assure safety for the traveling public and protection of public and private property.

5. The department proposes to repeal the following rules:

18.8.203 TERM PERMIT AND TRAILER IMPLEMENTATION found at page 18-269 of the Administrative Rules of Montana.

AUTH: 61-3-716 and 61-10-155, MCA

IMP: 61-3-313, 61-3-711 through 61-3-733, 61-10-107 and 61-10-121, MCA

REASON: The provisions of ARM 18.8.203 expired December 31, 1996.

18.8.208 TERM PERMIT EXPIRATION found at page 18-271 of the Administrative Rules of Montana.

AUTH: 61-3-716 and 61-10-155, MCA

IMP: 61-10-107 and 61-10-121, MCA

REASON: The expiration of term permits is contained in ARM 18.8.504.

6. Concerned persons may submit their data, views or arguments concerning the proposed actions in writing to Drew Livesay at the Montana Department of Transportation, 2701 Prospect Ave, P.O. Box 4639, Helena, MT 59604-4639; Fax: (406) 444-9263; or E-mail: mdtmcscontact@state.mt.us. Any comments must be received no later than September 7, 2004.

7. If persons who are directly affected by the proposed actions wish to express their data, views or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Drew Livesay at the Montana Department of Transportation, 2701 Prospect Ave, P.O. Box 4639, Helena, MT 59604-4639; Fax: (406) 444-9263; or E-mail:

mdtmcscontact@state.mt.us. A written request for hearing must be received no later than September 3, 2004.

8. If the agency receives requests for a public hearing on the proposed actions from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed actions; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 2,300 based on 23,000 companies or individuals who have permit accounts.

9. The Department of Transportation maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices proposed by the Administration Division, Aeronautics Division, Highways and Engineering Division, Maintenance Division, Motor Carrier Services Division, and/or Rail, Transit and Planning Division. Such written request may be mailed or delivered to Legal Services, Montana Department of Transportation, 2701 Prospect Ave, P.O. Box 201001, Helena, MT 59620-1001; Fax: (406) 444-7206; or E-mail: rwuertley@state.mt.us or may be made by completing a request form at any rules hearing held by the Department of Transportation. All department rulemaking notices and adoptions may be reviewed at the Department of Transportation's website at www.mdt.state.mt.us.

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

DEPARTMENT OF TRANSPORTATION

/s/ James Currie
James Currie
Deputy Director

/s/ Lyle Manley
Lyle Manley, Attorney
Rules Reviewer

Certified to the Secretary of State, July 12, 2004.

BEFORE THE BOARD OF PROFESSIONAL
ENGINEERS AND LAND SURVEYORS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed) NOTICE OF PUBLIC HEARING
amendment of ARM 24.183.1001,) ON PROPOSED AMENDMENT
pertaining to form of corner)
records)

TO: All Concerned Persons

1. On August 20, 2004, at 2:00 p.m., a public hearing will be held in room 489 of the Park Avenue Building, 301 South Park Avenue, Helena, Montana to consider the proposed amendment of the above-stated rule.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or who need an alternative accessible format of this notice. If you require an accommodation, contact Todd Boucher no later than 5:00 p.m., August 16, 2004, to advise us of the nature of the accommodation you need. Please contact Todd Boucher, Board of Professional Engineers and Land Surveyors, 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 dlibsdpels@state.mt.us.

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

24.183.1001 FORM OF CORNER RECORDS - INFORMATION TO BE INCLUDED (1) The form for recordation of corners pursuant to the Corner Recordation Act of Montana (Title 70, chapter 22, part 1, MCA) has been approved by the board of professional engineers and land surveyors. The approved version was adopted by the board on ~~July 1, 1981~~ February 20, 2004. Blank corner record forms can be obtained from the Montana Association of Registered Land Surveyors, ~~82 Stonecrest Drive, Kalispell~~ P.O. Box 359, Columbia Falls, Montana 59901 59912, or by contacting the association directly at (406) 756-0680.

(2) The information to be included in a corner record is as follows:

(a) ~~Original and subsequent record: This item should describe or quote~~ A description or quotation of those portions of the original or subsequent record which were used in evaluating the corner position. The original record for corners of government surveys will usually be the general land office field notes. The original record for non-government surveys will usually be subdivision plats, certifications of survey or other surveys of record. Subsequent record can come from several sources: previously filed corner records, maps and plats, private and public records, etc. Some of the

subsequent record, even though not in the public record, but known to have validity by the surveyor, may be quoted and appropriately noted. The record data helps support the reestablished corner position because they clearly show what history the surveyor based ~~his~~ the corner position on. In some cases, however, the record may be unknown or not pertinent. A statement to that effect, ~~should if applicable,~~ must appear on the corner record.

~~(b) Description of evidence found or method of locating corner position: This item will describe~~ A description of the original or subsequent record evidence found that locates the corner position. If portions of the found evidence cannot be reconciled with the record, then the disregarded record ~~should~~ must be noted, and if possible, an opinion as to its cause narrated. If no physical evidence of the original or subsequent monuments and accessories can be found, then the method used to reestablish the lost or obliterated corner (single proportion, fence intersection, parol evidence, terrain calls, centerline or road, etc.) shall be indicated. Measurements used to establish proportioned positions must be shown on the corner recordation form or on a filed certificate of survey or subdivision plat referenced on the recordation form.

~~(c) Description of monuments and accessories set to perpetuate the corner position: This item should list~~ A listing of all details about the corner and its location which will help exclusively identify the corner position, including size and type of monument and accessory, how marked if not shown in sketch, and distinguishing topographic calls which help locate the corner. In many cases, instructions on how to find the corner should be included. For public land survey system corners requiring recordation, sufficient information must be shown on the form to enable subsequent surveyors to verify the corner position identified on the form, and to re-establish the corner position if the monument is obliterated. Ideally, the references will be to at least two identifiable accessories or surveyed dimensions to two survey monuments. References or ties to other corners are optional and may be drawn on the face or back of the corner record form, or references to certificate of survey may be made. Separate drawings may be attached to the corner form. If state plane coordinate values for the corner position are shown, then the control upon which they are based should be indicated.

~~(d) Sketch of corner: This item will usually~~ A sketch of the corner, to show how a found or set corner is marked and may also or show topography or accessory monuments found or set and their relation to the corner. There is no stipulated format; the sketch could be transcribed field note entries. For corners which were first shown on subdivision plats or on recorded or filed surveys, enough information must be shown so that the corner can be identified.

~~(e) Certification: The name and signature of the ground party chief is optional. The surveyor who performed or directed the field work which is depicted on the~~ certified

~~corner record"~~ corner record shall sign and affix ~~his~~ the licensee's seal in the certification. The affixing of the licensee's seal constitutes a certification by the surveyor that the corner record has been prepared in conformance with the Corner Recordation Act of Montana and the rules implementing the Act. The employer blank is optional but useful in tracking down original field note data or adjacent record if, in the future, questions arise about the corner. The name and signature of the ground party chief is also optional information on the record form.

(f) ~~Cross index and section diagram:~~ The For public land survey system corners, the cross index at the bottom of the page should must be completed by the surveyor. Only the single township and range index where the corner is filed shall is to be completed. For corner records to be filed under the survey of record index, the index information must be filled in as completely as possible by the surveyor and make clear the name and number(s) of the recorded survey and the lot or parcel designation. The lower righthand corner is a corner location diagram and should must have the pertinent section number filled in at the top and a closed circle indicating the appropriate corner position in the section filled in. This is intended to be an aid in searching the "record" record once it has been filed.

AUTH: 70-22-107, MCA

IMP: 70-22-107, MCA

REASON: There is reasonable necessity for the Board of Professional Engineers and Land Surveyors (the Board) to amend ARM 24.183.1001 to update the references to the most recently adopted corner recordation form, which was approved by the Board in February 2004 at the request of the Montana Association of Registered Land Surveyors. In addition, there is reasonable necessity to amend the rule by clarifying the various items of information that are to be included by the surveyor on the form, in order to update terminology and usage. Finally, there is reasonable necessity to amend the rule to delete the so-called internal catchphrases, pursuant to ARM 1.2.215(1), and to make usage consistent with the style guidelines promulgated in the Legislative Services Division's Bill Drafting Manual.

4. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted by mail to Todd Boucher, Board of Professional Engineers and Land Surveyors, Department of Labor and Industry, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdpels@state.mt.us and must be received no later than 5:00 p.m., August 27, 2004.

5. An electronic copy of this Notice of Public Hearing is available through the Department and Program's site on the

World Wide Web at <http://discoveringmontana.com/dli/pel>, 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 Professional Engineers and Land Surveyors 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 Professional Engineer and Land Surveyors administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Professional Engineers and Land Surveyors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsdpels@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 notice requirements of 2-4-302, MCA, do not apply.

BOARD OF PROFESSIONAL ENGINEERS
AND LAND SURVEYORS
JANET MARKLE, PRESIDING OFFICER

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

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

Certified to the Secretary of State July 12, 2004

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

| | | |
|-------------------------------|---|--------------------------|
| In the matter of the adoption |) | NOTICE OF PUBLIC HEARING |
| of new rules I through VII, |) | ON PROPOSED ADOPTION, |
| the amendment of ARM |) | AMENDMENT AND REPEAL |
| 37.5.304, 37.5.307, |) | |
| 37.47.315, 37.47.601, |) | |
| 37.47.602, 37.47.607 and |) | |
| 37.47.608, and the repeal of |) | |
| ARM 37.47.301, 37.47.304, |) | |
| 37.47.609, 37.97.125, |) | |
| 37.100.313 and 37.100.413 |) | |
| pertaining to substantiation |) | |
| of child abuse and neglect |) | |
| and fair hearing rights |) | |

TO: All Interested Persons

1. On August 11, 2004, at 11:00 a.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed adoption, amendment and repeal of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on August 4, 2004, to advise us of the nature of the accommodation that you need. Please contact Gwen Knight, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951; telephone (406)444-9503; FAX (406)444-9744; Email dphhslegal@state.mt.us.

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

RULE I CHILD PROTECTIVE SERVICES: LEVELS OF SUBSTANTIATED REPORTS (1) The department will maintain a level system of substantiated reports of child abuse, neglect or exploitation based on the severity of the abuse, neglect or exploitation and the risk of reoccurrence, as follows:

(a) "Level one" is child abuse, neglect or exploitation which resulted in or was likely to have resulted in physical or psychological harm to a child, with a moderate risk of future child abuse, neglect or exploitation reoccurring; and

(b) "Level two" is child abuse, neglect or exploitation which resulted in or was likely to have resulted in serious physical or psychological harm to a child, with a high risk of future child abuse, neglect or exploitation reoccurring.

AUTH: Sec. 41-3-208, MCA
IMP: Sec. 41-3-202, and 41-3-205, MCA

RULE II CHILD PROTECTIVE SERVICES: DEFERRED SUBSTANTIATION (1) After investigation, the department may defer a substantiation determination if the incident in a report of child abuse, neglect or exploitation:

- (a) was a one time occurrence;
- (b) resulted in or was likely to have resulted in minimal physical or psychological harm to the child; and
- (c) has a low risk of reoccurring due to preventive measures taken by the subject.

(2) A report containing a deferred substantiation will not be disclosed as a substantiated report for purposes in [RULE III].

(3) A subject is only entitled to one deferred determination. A subject's subsequent report of child abuse, neglect or exploitation that meets the requirements of being substantiated will be determined as either a level one or two determination, in accordance with [RULE I].

AUTH: Sec. 41-3-208, MCA
IMP: Sec. 41-3-202 and 41-3-205, MCA

RULE III CHILD PROTECTIVE SERVICES: DETERMINATION DISCLOSURE (1) Reports of child abuse, neglect or exploitation will be retained in the department's protective services information system provided in ARM 37.47.315.

(2) In accordance with the confidentiality and disclosure requirements in 41-3-205, MCA, the department will disclose case record determinations for the following time periods:

- (a) deferred substantiation report: no disclosure;
- (b) level one substantiated report: five years past the date of the department's final determination; and
- (c) level two substantiated report: 25 years past the date of the department's final determination.

AUTH: Sec. 41-3-208, MCA
IMP: Sec. 41-3-202 and 41-3-205, MCA

RULE IV CHILD PROTECTIVE SERVICES: RIGHT TO FAIR HEARING TO CONTEST SUBSTANTIATED REPORTS (1) The subject of a level one or level two substantiated report may request a fair hearing unless the circumstances provided in [RULE VII] exist. No fair hearing right exists for subjects of deferred substantiation reports.

(2) The request for a fair hearing must be in writing and be sent within 30 days after the date of mailing of the department's initial notice of its substantiation determination. The request must be sent to: Division Administrator, Department of Public Health and Human Services, Child and Family Services Division, 1400 Broadway, P.O. Box 8005, Helena, MT 59604-8005.

(3) Upon receipt of the request for a fair hearing, the department will conduct an informal review of the substantiated

report and the case record information.

(a) The informal review is limited to the records and documentation relevant to the case, and any written material provided by the subject. The informal review is not subject to the provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, MCA.

(b) If, after the informal review, the department determines that the substantiated report is in error, the department will amend the finding to reflect that the report is unsubstantiated, and notify the subject of the decision.

(c) If, after the informal review, the department determines that the substantiated report is not in error, the department will notify the department's office of fair hearings so that a hearing date and time may be scheduled.

(4) The fair hearing will be conducted pursuant to Title 2, chapter 4, part 6, MCA, of the Montana Administrative Procedure Act and [RULE VII].

(5) A hearsay statement of the child victim is admissible evidence in the fair hearing if the statement is sufficiently indicative of its reliability, in accordance with Montana law. The factors to be considered include:

(a) the attributes of the child making the hearsay statement;

(b) the witness relating the child's hearsay statement;

(c) the child's statement itself; and

(d) any other factors that provide for the reliability of the child's statement.

(6) The hearing officer's decision is the final agency decision for purposes of judicial review under ARM 37.5.334.

AUTH: Sec. 2-4-201 and 41-3-208, MCA

IMP: Sec. 2-4-201, 2-4-612, 41-3-202 and 41-3-205, MCA

RULE V CHILD PROTECTIVE SERVICES: LISTING OF DETERMINATION IN THE PROTECTION INFORMATION SYSTEM (1) When the department substantiates a level one or two report of child abuse, neglect or exploitation, the department will list in its protective services information system, as provided in ARM 37.47.315, that the report's final determination is pending. The report will be pending for a period of 30 days from the date of the department's initial notice of its substantiation determination.

(2) If, after receiving the initial notice of the department's level one or two substantiation, the subject does not request a fair hearing within the 30 day time period required by [RULE IV(2)], the department will list the report in its protective services information system as being substantiated at the designated level.

(3) If the subject requests a fair hearing pursuant to [RULE IV(2)], the department's determination will be listed as pending in its protective services information system until the outcome of the informal reconsideration, the fair hearing or appeal, whichever decision is considered final.

AUTH: Sec. 2-4-201 and 41-3-208, MCA
IMP: Sec. 2-4-201, 41-3-202 and 41-3-205, MCA

RULE VI CHILD PROTECTIVE SERVICES: EXCEPTIONS TO RIGHT TO FAIR HEARING (1) The subject of a level one or two substantiated report of child abuse, neglect or exploitation is not entitled to a fair hearing if:

(a) the subject has been criminally convicted, as defined in 45-2-101(15), MCA, of an offense related to child abuse, neglect or exploitation which contains the same facts as the substantiated report and involves the same child victim; or

(b) pursuant to 41-3-437(2) or 41-3-434, MCA, there has been a district court adjudication that the child in the substantiated report is a youth in need of care, as defined in 41-3-102, MCA; and

(i) the facts of the district court adjudication are the same as that of the substantiated report; and

(ii) the subject of the substantiated report has been determined by the district court to be the perpetrator of the child abuse, neglect or exploitation; or

(c) a court or administrative hearing officer has made any adjudication in a prior proceeding as to the factual findings of the child abuse, neglect or exploitation contained in the substantiated report.

AUTH: Sec. 2-4-201 and 41-3-208, MCA
IMP: Sec. 2-4-201 and 41-3-205, MCA

RULE VII LEVEL ONE AND TWO SUBSTANTIATED REPORTS OF CHILD ABUSE OR NEGLECT: APPLICABLE HEARING PROCEDURES (1) Hearings contesting levels one or two substantiated reports of child abuse, neglect or exploitation are available to the extent provided in [RULE IV]. The procedures specified in ARM 37.5.304, 37.5.307, 37.5.313, 37.5.322, 37.5.325, 37.5.334 and 37.5.337 apply to such hearings, subject to the limitations specified in [RULE VI].

AUTH: Sec. 2-4-201 and 41-3-208, MCA
IMP: Sec. 2-4-201, 2-4-612 and 41-3-202, MCA

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

37.5.304 DEFINITIONS For purposes of this subchapter, unless the context requires otherwise, the following definitions apply:

~~(1)~~ (6) "Department" means the department of public health and human services provided for in 2-15-2201, MCA.

~~(2)~~ (1) "Adverse action" means:

(2)(a) through (2)(k) remain the same but are renumbered (1)(a) through (1)(k).

(1) an action by the department denying or reducing a provider's quality incentive adjustment as provided in ARM

37.80.205; ~~or~~

(m) an action by the department denying or reducing a special needs adjustment as provided in ARM 37.80.205-; or

(n) a department's level one or two substantiation determination of a report of child abuse, neglect or exploitation under ARM Title 37, chapter 47, subchapter 6.

~~(3)~~ (2) "Authorized representative" means legal counsel, relative, friend or other spokesman specifically authorized by the claimant in writing or by law to represent the claimant in matters pertaining to the receipt of benefits from this department.

~~(4)~~ (3) "Benefit" means any form of assistance provided by or through the department to an eligible recipient under the department's administrative rules.

~~(5)~~ (4) "Board" means the board of public assistance provided for in 2-15-2203, MCA.

~~(6)~~ (5) "Claimant" means:

(a) an applicant for or recipient of benefits from the department whether an individual or household and includes the claimant's authorized representative;

(b) a resident or financially responsible person as defined in 53-1-401, MCA;

(c) a medical assistance provider appealing an eligibility determination as a real party in interest; ~~or~~

(d) a subject of a level one or two substantiated report of child abuse or neglect; or

~~(d)~~ (e) any other person or entity as provided by department rule.

(7) through (12)(d) remain the same.

AUTH: Sec. 2-4-201, 41-3-208, 41-3-1142, 52-2-111, 52-2-112, 52-2-403, 52-2-704, 52-3-304, 52-3-804, 53-2-201, 53-2-606, 53-2-803, 53-3-102, 53-3-107, 53-4-111, 53-4-212, 53-4-403, 53-4-503, 53-5-304, 53-5-504, 53-6-111, 53-6-113, 53-7-102 and 53-20-305, MCA

IMP: Sec. 2-4-201, 41-3-202, 41-3-208, 41-3-1103, 52-2-704, 52-2-726, 53-2-201, 53-2-306, 53-2-606, 53-2-801, 53-3-107, 53-4-112, 53-4-404, 53-4-503, 53-4-513, 53-5-304, 53-6-111, 53-6-113 and 53-20-305, MCA

37.5.307 OPPORTUNITY FOR HEARING (1) A claimant who is aggrieved by an adverse action of the department shall be afforded the opportunity for a hearing as provided in this chapter.

(a) and (b) remain the same.

(c) A request for a hearing by a claimant must be received by the department within 90 days after the date of mailing of notice of the adverse action, except as otherwise provided in these rules.

(i) A hearing request from a claimant must be received in writing within 30 days of the date of mailing of notice of the adverse action regarding:

(A) a department determination of ability to pay for the cost of care in an institution under 53-1-405, MCA; ~~or~~

(B) a nursing facility's transfer or discharge of a nursing facility resident-; or

(C) a level one or two substantiated report of child abuse, neglect or exploitation;

(ii) Hearing requests must be mailed or delivered to the department's Office of Fair Hearings, P.O. Box 202953, Helena, MT 59620-2953, except hearing requests to contest a level one or two substantiated report of child abuse, neglect or exploitation must be mailed or delivered to the Division Administrator, Department of Public Health and Human Services, Child and Family Services Division, 1400 Broadway, P.O. Box 8005, Helena, MT 59604-8005.

(d) through (4) remain the same.

AUTH: Sec. 2-4-201, 41-3-208, 41-3-1142, 52-2-111, 52-2-112, 52-2-403, 52-2-704, 52-3-304, 52-3-804, 53-2-201, 53-2-606, 53-2-803, 53-3-102, 53-4-111, 53-4-212, 53-4-403, 53-4-503, 53-5-304, 53-6-111, 53-6-113, 53-7-102 and 53-20-305, MCA

IMP: Sec. 2-4-201, 41-3-202, 41-3-205, 41-3-1103, 52-2-603, 52-2-704, 52-2-726, 53-2-201, 53-2-306, 53-2-606, 53-2-801, 53-4-112, 53-4-212, 53-4-404, 53-4-503, 53-4-513, 53-5-304, 53-6-111, 53-6-113 and 53-20-305, MCA

37.47.315 CHILD PROTECTIVE SERVICES: INFORMATION SYSTEM OPERATION (1) Requirements: "Protective services information systems" means a collection of records in a central location of all reports relating to investigations of child abuse or neglect cases. The department is responsible for maintaining the protective services information system.

~~(a) The department is responsible for maintaining a protective services information system on all reports of child abuse and neglect.~~

~~(b) The protective services information system is maintained and administered by the program and planning division, hereafter referred to as the division.~~

~~(2) Confidentiality of reports:~~

~~(a) through (d) remain the same, but are renumbered (2) through (5).~~

(6) Persons who are subjects of the reports have the right to examine the protective services information system material on their case in accordance with ARM Title 37, chapter 47, subchapter 6.

~~(3) Operation of central file:~~

~~(a) Definitions:~~

~~(i) "Protective services information system" means a collection of records in a central location of all reports of child abuse or neglect cases.~~

~~(ii) "Substantiated" has the meaning as defined by ARM 37.47.602.~~

~~(iii) "Unsubstantiated" has the meaning as defined by ARM 37.47.602.~~

~~(b) Unless an investigation of a report conducted pursuant to state law determines there is some credible evidence of alleged abuse or neglect, all information identifying the~~

~~subject of the report may be expunged from the protective services information system forthwith. The decision to expunge the record shall be made by the appropriate regional administrator.~~

~~(c) Persons who are subjects of the reports have the right to examine the protective services information system material on their case and request amendment or expungement of the record on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with this rule.~~

~~(d) Request for examination of protective services information system records or changes in the information shall be made to program and planning division.~~

~~(e) At no time shall the identity of the referral source making the initial referral or providing information in the course of the investigation be shared with the person or persons about whom the referral is made.~~

AUTH: Sec. 41-3-208, MCA

IMP: Sec. 41-3-202, MCA

37.47.601 CHILD PROTECTIVE SERVICES: PURPOSE (1) The rules of this subchapter govern the disclosure and amendment of case records containing reports of child abuse, neglect ~~and~~ or exploitation.

AUTH: Sec. 41-3-208, MCA

IMP: Sec. 41-3-205, MCA

37.47.602 CHILD PROTECTIVE SERVICES: DEFINITIONS

~~(1)~~ For purposes of this ~~part~~ subchapter, the following definitions shall apply:

~~(a) (1)~~ "Case records ~~containing reports of abuse, neglect or exploitation~~" means any records maintained by the department alleging relating to reports and investigations of child abuse, neglect or exploitation. Photographs, video and audio tapes may also be included as part of the case record. The term does not include:

~~(i)~~ confidential reports or evaluations, such as psychological evaluations, provided to the department by other professionals, ~~or~~

~~(ii)~~ licensing or registration files of providers licensed, ~~or~~ registered, or certified by the department.

(2) "Child abuse or neglect" means that defined in 41-3-102, MCA, including the various definitions for the types of abuse, neglect and exploitation.

~~(b) (3)~~ "Confidential information" means information ~~that is subject to being withheld from disclosure~~ in case records that is restricted by law from being disclosed.

(4) "Department" means the department of public health and human services.

~~(c) (5)~~ "Disclosure" means to release for inspection or copying or to make known or reveal in any manner any information contained in case records ~~containing reports of abuse, neglect or exploitation.~~

~~(d) (6) "Any other A person responsible for a child's welfare" means those persons specified in 41-3-102, MCA, and includes the child's parent, guardian, foster parent, staff at a day care facility and an employee of a residential facility. For the purpose implementing this title and Mont. Code Ann. Title 41, chapter 3 only, "any other person legally responsible for the child's welfare in a residential setting" also may include:~~

~~(i) any adult living in the child's household; and~~

~~(ii) any minor living in the child's household where the circumstances of the living arrangement indicate that the minor should be treated as a person responsible for the child's welfare in a residential setting.~~

~~(e) (7) "Reports of child abuse, neglect or exploitation" means a referral alleging that a person child may be abused, neglected or exploited.~~

~~(f) (8) "Subject" means the person alleged to have been abused, dependent, neglected or exploited or if the person is a child alleged to be abused, dependent, or neglected, the parents, guardian or other person who was responsible for the child's welfare in connection with the alleged abuse, dependency or neglect, or, in the case of an adult alleged to be abused, neglected, or exploited, the alleged perpetrator of the abuse, neglect, or exploitation responsible for a child's welfare who is the alleged perpetrator of the child abuse, neglect or exploitation.~~

~~(g) (9) "Substantiated report" means that, upon after an investigation, the investigating worker has determined there is reasonable cause to suspect, based upon credible information or facts that abuse, neglect or exploitation caused or is causing harm or threatened harm to the person alleged to be abused, neglected or exploited by a preponderance of the evidence that the reported child abuse, neglect or exploitation occurred, based upon credible information or facts.~~

~~(h) (10) "Unfounded report" means that, upon after an investigation, the investigating worker has determined the reported abuse, neglect or exploitation has not occurred.~~

~~(i) (11) "Unsubstantiated report" means that, upon after an investigation, the investigating worker investigator was unable to determine whether any by a preponderance of the evidence that the reported abuse, neglect or exploitation occurred.~~

AUTH: Sec. 2-4-201, 41-3-208, and 52-3-205, MCA

IMP: Sec. 2-4-201, 41-3-102, 41-3-202, 41-3-205, and 52-3-205, MCA

37.47.607 CHILD PROTECTIVE SERVICES: DISCLOSURE

~~(1) Records Case records may be disclosed to those individuals or entities referred to in the applicable provisions of 41-3-205, MCA, and 52-3-813, MCA, subject to any limitations imposed by those statutes. In addition, records shall be disclosed to employees of the department of public health and human services if disclosure is necessary for the administration~~

~~of programs designed to benefit the person alleged to be abused, neglected or exploited.~~

(2) The department may prevent the disclosure of any portions of the case record if:

(a) the disclosure of the information is determined to be detrimental to the child or harmful to any person named in the records, in accordance with 41-3-205, MCA; or

(b) the disclosure is prohibited by:

(i) the federal Health Insurance Portability and Accountability Act (HIPAA), found at 42 USC 1320d et seq., and associated federal regulations;

(ii) the Government Health Care Information Act found in Title 50, chapter 16, part 6, MCA; or

(iii) the Montana Criminal Justice Information Act found in Title 44, chapter 5, MCA.

(3) At no time shall the identity of the referral source making the initial referral or providing information in the course of the investigation be shared with the person or persons about whom the referral is made.

(4) Case records will be disclosed to employees if disclosure is necessary for the administration of programs designed to benefit the child deemed to be abused, neglected or exploited.

AUTH: Sec. 41-3-208, MCA

IMP: Sec. 41-3-205, MCA

37.47.608 CHILD PROTECTIVE SERVICES: DISCLOSURE PROCEDURES (1) ~~Requests for disclosure may be made orally or must be~~ in writing to the department.

(a) The department shall respond to a request for disclosure within ~~15 working~~ 30 calendar days of the request.

(b) remains the same.

(2) Upon receiving a request for disclosure, the department shall determine if the person or entity who is requesting disclosure is authorized by statute or these rules to receive such information.

(a) remains the same.

(b) If the person or entity requesting disclosure is authorized by statute or these rules to receive the requested information, the department may disclose the information to the requesting person or entity except as provided in ARM 37.47.607.

(i) The person or entity requesting the information may inspect the case records at the department offices and may request copies of any portion of the case record.

(ii) No fee will be charged for inspection. The department may charge a reasonable fee for the costs of copying the case records. No fee will be charged for copies of the case record that are provided to a parent, a guardian or a parent's or guardian's attorney.

(iii) If the information cannot be disclosed within 30 calendar days of receiving the request, the department shall notify the requesting person or entity in writing of the reason for the delay.

AUTH: Sec. 41-3-208, MCA
IMP: Sec. 41-3-205, MCA

4. The rule 37.47.301 as proposed to be repealed is on page 37-10631 of the Administrative Rules of Montana.

AUTH: Sec. 41-3-208 and 52-2-111, MCA
IMP: Sec. 41-3-102, 41-3-202, and 41-3-302, MCA

The rule 37.47.304 as proposed to be repealed is on page 37-10632 of the Administrative Rules of Montana.

AUTH: Sec. 41-3-208 and 52-2-111, MCA
IMP: Sec. 41-3-102, 41-3-202, 41-3-302, 41-3-1142, and 52-2-741, MCA

The rule 37.47.609 as proposed to be repealed is on page 37-10722 of the Administrative Rules of Montana.

AUTH: Sec. 2-4-201, 41-3-208 and 52-3-205, MCA
IMP: Sec. 2-4-201, 41-3-205 and 52-3-205, MCA

The rule 37.97.125 as proposed to be repealed is on page 37-23795 of the Administrative Rules of Montana.

AUTH: Sec. 41-3-1103, 41-3-1142 and 52-2-111, MCA
IMP: Sec. 2-4-201, 41-3-1103, 41-3-1142 and 52-2-111, MCA

The rule 37.100.313 as proposed to be repealed is on page 37-24545 of the Administrative Rules of Montana.

AUTH: Sec. 2-4-201 and 53-20-305, MCA
IMP: Sec. 2-4-201 and 53-20-305, MCA

The rule 37.100.413 as proposed to be repealed is on page 37-24607 of the Administrative Rules of Montana.

AUTH: Sec. 2-4-201 and 52-4-205, MCA
IMP: Sec. 2-4-201 and 52-4-203, MCA

5. The Child and Family Services Division of the Department of Public Health and Human Services (the Department) is charged with investigating reports of child abuse or neglect, maintaining records of its investigations, and providing protective services. The Department also licenses family foster care homes, child placing agencies, and adoption agencies, among other duties.

This rule proposal provides:

- 1) updates on the rules regarding disclosure of investigative records;
- 2) time periods for the disclosure of investigative

determinations; and

3) procedures for persons contesting the Department's substantiation determinations regarding child abuse or neglect.

ARM 37.47.315

This rule deals with the Department's computerized Statewide Automated Child Welfare Information that has been created pursuant to 41-3-202(6), MCA. The mainframe information system is called CAPS (Child and Adult Protection System), and it contains the Department's official records of child abuse and neglect investigations and the types of protective services provided. Most, if not all, states have similar systems.

The definition of "protective services information system" was moved from ARM 37.47.315(3)(a)(i) to (1). In ARM 37.47.315(2)(d), reference was made to ARM Title 37, chapter 47, subchapter 6 for the rules governing requests for and disclosures of case records.

The Department proposes to eliminate ARM 37.47.315(1)(b) because the Department no longer has a program and planning division.

Also proposed to be removed is ARM 37.47.315(3) because the definitions of "substantiated" and "unsubstantiated" exist in ARM 37.47.602. Also, the process to "expunge the record" under (3) is proposed to be changed, as seen in Rule IV, described below. ARM 37.47.315(3)(e), which prohibits the disclosure of the identity of a person who reports a suspected case of child abuse or neglect, was moved to ARM 37.47.607(3).

ARM 37.47.601, 37.47.602, 37.47.607 and 37.47.608

The Department placed the term "child" before "protective services" in all of the rule titles to clarify that they pertain only to child protective services. In their current form, the rules apply to both child and adult protective services. The rules were originally enacted when both protective services programs existed in the Department of Family Services. In 1995, the State Legislature dissolved the Department of Family Services and moved its programs to the newly-formed Department of Public Health and Human Services. Child protective services now exist in the Department's Child and Family Service Division, while adult protective services are operated through the Senior and Long Term Care Division. The adult protective service program no longer adheres to the provisions in ARM Title 37, chapter 47, subchapter 6.

ARM 37.47.602

The Department renumbered the definition sections so they would be consistent with the Secretary of State's rulemaking format.

In ARM 37.47.602(1), the Department simplified the wording of

"case records" by excluding the phrase "containing reports of abuse, neglect or exploitation". Also, "case records" was redefined as those "relating to reports and investigations of child abuse or neglect", instead of records "alleging abuse". The word change reflects that records may not always contain allegations of abuse or neglect. The phrase contained in ARM 37.47.602(1)(a)(i) was eliminated because case records do include evaluations, as specified in 41-3-205(3), MCA. The Department also added the term "certified" regarding licensing and registration files of providers because the Department's Human and Community Services Division certifies legally unregistered child care providers, as specified in Title 37, chapter 80, subchapter 3.

In ARM 37.47.602(2), the Department added a definition of "child abuse or neglect" to refer to the statutory definitions found in 41-3-102, MCA.

ARM 37.47.602(3) pertaining to the definition of "confidential information" was changed to clarify that applicable law prohibits disclosure. The Department believed the current wording "is subject to being withheld from disclosure" was too general.

ARM 37.47.602(4) contains the definition of "department" because the ensuing rules refer to that term.

In ARM 37.47.602(6), the Department simplified the term "a person responsible for a child's welfare" by citing to the corresponding definition in 41-3-102, MCA. The current rule language in (6) exceeds the statutory definition. Section 2-4-305(6)(a), MCA, requires administrative rules to be consistent and not be in conflict with the statutes.

In ARM 37.47.602(8), the definition of "subject" was simplified to mean only the person who is alleged to be the perpetrator of child abuse or neglect. As currently worded, the definition lists a "subject" as the abused victim, the person responsible for the child's welfare, and the alleged perpetrator. The all-inclusive definition is confusing.

In ARM 37.47.602(9), the Department modified the definition of a "substantiated report". The change reflects the Department's current practice of confirming reports of child abuse or neglect if there is a showing by a "preponderance of the evidence" that the abuse or neglect occurred, rather than "reasonable cause to suspect". "Preponderance of the evidence" is a stronger standard of proof, and it promotes better due process protections for persons accused of perpetrating the abuse or neglect before the substantiation appears on their record. The standard also reflects the wording in the definition of "unsubstantiated" in 41-3-102(27), MCA, which was newly enacted by the State Legislature in 2003. The statutory definition for "unsubstantiated" means the abuse or neglect could not be

determined "by a preponderance of the evidence".
In ARM 37.47.602(10), the Department modified the definition of "unfounded report" to duplicate the exact wording of its statutory definition in 41-3-102(26), MCA.

In ARM 37.47.602(11), the definition of "unsubstantiated" was changed to mirror the statutory definition of "unsubstantiated" in 41-3-102(27), MCA.

ARM 37.47.607(1) and (3), and ARM 37.47.608(2)(b)(i) and (ii)

The Department clarified that "records" mean "case records" as specified in the definition under ARM 37.47.602(1). The Department added the wording so the term would be consistent throughout the rules.

ARM 37.47.607

For ARM 37.47.607(1), the Department eliminated the citation to 52-3-813, MCA. That statute pertains to adult protective services, which are not covered by these rules.

The Department also listed applicable laws that may limit disclosures of some or all of the information contained in case records in ARM 37.47.607(2). For example:

1) ARM 37.47.607(2)(a): Section 41-3-205(3), MCA, limits disclosure when it is determined to be detrimental to the child victim or another person who is named in the case records (i.e., an abused spouse);

2) ARM 37.47.607(2)(b)(i): The federal Health Insurance Portability and Accountability Act (HIPAA), which went into effect in April, 2003, may limit disclosure of health care information contained in case records;

3) ARM 37.47.607(2)(b)(ii): Montana's Government Health Care Information Act, 50-16-603(6), MCA, limits disclosure of child health care information to the district court in a youth in need of care proceeding; and

4) ARM 37.47.607(2)(b)(iii): The Montana Criminal Justice Information Act, found in Title 44, chapter 5, MCA, limits disclosure of criminal information; e.g., criminal investigations cannot be disclosed until either prosecution commences or the prosecutor declines to prosecute.

Authority for ARM 37.47.607(2) is found in 41-3-205, MCA, which permits the disclosure of confidential case records in certain instances. Section 41-3-205(8), MCA, provides that the provisions for disclosing case records "is not intended to affect the confidentiality of criminal court records, records of law enforcement agencies, or medical records covered by state or federal disclosure limitations".

The new provisions in ARM 37.47.607(2) are needed to list the most common legal provisions that may prohibit some or all of the case record information. An alternative considered included having a general provision without specific legal authority. This option was rejected because the Department wanted to enumerate the legal authorities in order to facilitate the general public's understanding.

In ARM 37.47.607(3), the Department added that identities of reports of suspected child abuse or neglect cannot be disclosed to the person for whom the report was made. Section 41-3-205(3)(d), MCA, provides that case records may be disclosed to a parent or guardian of a child who is at issue in the records "without disclosure of the identity of any person who reported or provided information on the alleged child abuse or neglect incident contained in the records".

For ARM 37.47.607(4), the phrase "of public health and human services" was eliminated because of the added definition defining "the department" in ARM 37.47.602(4).

ARM 37.47.608

In ARM 37.47.608(1)(a), the Department eliminated oral requests for records, and changed the time for the Department to respond to requests from 15 days to 30 calendar days. In the Department's experience, responding to disclosure requests takes longer than 15 days. Additional time is needed so the Department can adequately address the requests. The Department also changed the response time in ARM 37.47.608(2)(b)(iii) to 30 calendar days.

In ARM 37.47.608(2)(b), the Department added the proviso that disclosure is limited to that specified in ARM 37.47.607.

The Department changed ARM 37.47.608(2)(b)(ii) by stating that no fee will be charged for copies of case records provided to parents, guardians, or attorneys for the parents or guardians. The additional phrase is consistent with 41-3-205(9), MCA, which provides: "Copies of records, evaluations, reports, or other evidence obtained or generated pursuant to this section that are provided to the parent, the guardian or the parent or guardian's attorney must be provided without cost".

Alternatives to amending ARM 37.47.601 through 37.47.608 regarding record disclosure include leaving the rules as they currently exist. Doing so may lead to confusion over the fact that the rules apply only to child protective services and not to adult protective services. Also, much of the rules' present language contradicts what currently exists in statute. Section 2-4-305(6)(a), MCA, mandates that administrative rules be consistent with the statutes.

ARM 37.5.304 and 37.5.307

Rules I through VII provide fair hearing rights to persons contesting certain levels of substantiation decisions on reports of child abuse or neglect. Those rules are discussed below.

ARM 37.5.304 and 37.5.307 are general provisions for all Department fair hearings. The Department proposes to amend them so they clearly pertain to fair hearings where substantiated reports are challenged.

ARM 37.5.304

This rule provides definitions for all of the actions before the Department's Office of Fair Hearings. The Department renumbered the sections under the rule so that the definitions would appear in alphabetical order, as required by the Secretary of State's requirements for formatting administrative rules.

For ARM 37.5.304(1)(n), the Department proposes to include levels one and two substantiation determinations under the definition of "adverse action".

For ARM 37.5.304(5)(d), the Department proposes to have the definition of a "claimant" include a subject of a level one or two report.

ARM 37.5.307

This rule lists all of the actions that allow opportunities to request fair hearings before the Department, and how to request hearings.

The Department added a new subsection in ARM 37.5.307(1)(c)(i)(C) so that persons contesting substantiation reports have 30 days from the date of the mailing of the substantiation notice to request hearings. This amendment is needed for consistency with the 30-day request requirement in Rule IV(2).

The Department also added a new subsection in ARM 37.5.307(1)(c)(ii) so that requests for fair hearings to contest substantiated reports are directly sent to the Department's Child and Family Services Division. This amendment is necessary to facilitate informal reviews specified in Rule IV(3).

Rules I through VII

The Department proposes new Rules I through VII to be placed in ARM Title 37, chapter 47, subchapter 6, after ARM 37.47.608. These new rules aim to distinguish between the severity and reoccurrence risks of specific child abuse or neglect instances; provide various time limits for disclosing substantiation determinations; and provide procedures for administrative fair

hearings for persons challenging substantiation determinations.

Background information is required to explain the new rules.

41-3-205(3)(n) and (o), MCA, permit the Department to disclose determinations of reports of child abuse or neglect to persons or agencies conducting background checks on current or prospective employees of jobs that encompass unsupervised contact with children. All background information is garnered from CAPS.

Substantiated reports of child abuse or neglect effectively bar license applicants, licensees, or potential employees from working in various child care fields such as day care, youth residential programs, child placing agencies and adoption agencies, to name a few. They also may preclude a person from becoming a foster care provider. Because of the implication on licensing and employment, a process is required to allow people who are subjects of substantiated reports to contest the determinations if they feel the Department erred.

Between 1987 to 2000, the Department provided informal reviews of substantiated cases to persons who felt that the determinations were inaccurate. The review process is provided in ARM 37.47.609, which the Department proposes to repeal (explained below).

In 2000, the Department determined that administrative fair hearings were needed to provide better due process protections than the review procedure in ARM 37.47.609. Since the fall of 2000, the Department has provided fair hearing opportunities despite the provisions in ARM 37.47.609. Between December 2000 to the present, there have been over 150 substantiation cases before fair hearing officers. All the while, the Department has been without specific rules governing the process.

In 2001, the Department formed a task force composed of community social workers, community social worker supervisors, administrators and a department attorney to work on issues concerning substantiated reports. The task force met between the fall of 2001 and summer of 2002. Its recommendations are contained in the new rules.

Rules I, II and III reflect the task force's recommendation of a three-level system for substantiation determinations, and corresponding disclosure periods for each level. The task force relied on an equivalent three-level system that exists in Virginia. Delaware recently enacted a similar level system. The level system allows for degrees of substantiation based on the frequency of the child abuse or neglect incident, the severity of the harm or potential harm to the child, and the probability that the abuse or neglect will reoccur. Substantiation determinations can be disclosed for longer periods relative to the degree of the substantiation.

Virginia (22 VAC 40-700-20 (1)-(3), 22 VAC 40-700-30) keeps the most severe level of reports for 18 years past the date of the initial complaints, moderate level reports for seven years, and reports with the least severe level for three years. Delaware (16 Del.C. § 923 (2003)) retains level two reports (low to moderate risk cases) for three years and level three cases for seven years. Delaware has no time limit for level four reports (the most severe).

Rule I

This rule provides for two levels of substantiated reports. A level one determination applies if the abuse or neglect happened, with the risk of reoccurrence being moderate, meaning that the parent or caretaker is cooperative with taking measures to prevent its reoccurrence. A level two determination is made if the child suffered serious harm or death, and the risk of reoccurring abuse or neglect is high given the parent or caretaker's uncooperativeness or inability to prevent future instances.

Rule II

This rule provides for a "deferred substantiation" if the reported child abuse or neglect incident was a one-time occurrence, resulted in or was likely to result in minimal physical or psychological harm to the child, and has a low risk of reoccurring because the parent or caretaker took preventive measures to assure it would not happen again. The rule allows for only one deferred substantiation. If another report of child abuse or neglect is substantiated against the same person, the subsequent report will be listed as a level one or two substantiation, depending on the circumstances listed in Rule I.

Rule II is necessary because many incidents exist where a parent or caretaker has made a mistake but is remorseful and strives to prevent the incident from happening again. Under those circumstances, the Department believes that a parent or caretaker should not be marked as being substantiated and lose any license or employment rights. The Department further believes that Rule II has enough deterrence value because subsequent reports can be determined as substantiated, thereby affecting license and employment opportunities.

Delaware's system has a level one substantiation that is similar to the Department's proposal for a deferred substantiation. A person who is substantiated at level one in Delaware is still eligible for employment in child care.

Overall, the Department believes that the level system provided in Rules I and II are needed to recognize the degrees of severity that substantiated reports really entail.

Substantiated incidents are all fact-driven, which warrant different treatment. It is believed that the rules provide more fairness to the people substantiated against so that the consequences fit the nature of the abuse or neglect.

Rule III

Rule III permits the Department to disclose level one substantiated reports for five years and level two reports for 25 years. The disclosure periods correspond with the severity level of the child abuse or neglect, as previously discussed above.

Rule IV

This rule lists the procedure for obtaining fair hearings for persons contesting substantiated reports. The Department developed this rule based on its past policies, practices and experience.

Rule IV(1) limits hearing rights to persons who are the subjects of level one or two reports. They are the only people whose licensure and employment rights are affected.

Rule IV(2) lists a 30-day limit to request a fair hearing. The Department has required 30 days for reviewing contested reports, as specified in ARM 37.47.609 (proposed for repeal), and it has adhered to that time period for requests for fair hearings as a matter of practice. A time limit is needed for requests so that evidence contained in the substantiated case records remains fresh for the review and hearing processes.

Rule IV(3) provides how the Department will conduct an informal review of the case before referring it to the Department's Office of Fair Hearings. The Department currently conducts these reviews prior to the hearings. The reviews entail department personnel who have not been involved in the reviewed cases making determinations as to whether the substantiated reports were justified. On average, the reviews occur once per month.

The Department chose to retain informal reviews in order to resolve disputed cases before they go any further in the hearing process. The Department believes informal reviews have been proven effective in overturning substantiated cases. Between 1996, when informal reviews started, and 2003, an average of 25% of the substantiation determinations were overturned.

It should be noted that other states have informal review processes before challenges to substantiated reports are heard at the hearing level. Those states include Arizona, New York, Virginia and Nebraska, to name a few.

Alternatives considered for Rule IV(3) included disbanding the

current informal review practice. The Department rejected that option because it believes that the reviews are highly effective in weeding out cases that should not have to go to hearings officers. The review practice corresponds with other programs within the Department that use either the informal review or more formal administrative review process to resolve cases before they are presented to fair hearing officers for resolution.

Rule IV(4) refers to the applicable Montana Administrative Procedure Act provisions and proposed Rule VII. All Department administrative hearings are conducted in accordance with the contested case provisions in Title 2, chapter 4, part 6, MCA, of the Montana Administrative Procedure Act. Rule VII is discussed in more detail below.

Rule IV(5) provides for the admissibility of child hearsay. Hearsay statements are out-of-hearing statements where the person making the statements is not at the hearing to testify. In general, hearsay statements are inadmissible as evidence unless they fit within exceptions specified in the Montana Rules of Evidence.

Under Montana law, hearsay statements of child victims of sexual abuse are admissible in criminal prosecution cases as long as certain standards are met in accordance with the Montana Supreme Court's 2003 decision in State v. S.T.M., 2003 MT 221, 317 Mont. 159, 75 P.3d 1257. The admission of child hearsay statements in criminal matters is now codified in 46-16-220, MCA.

The standards for allowing child hearsay in State v. S.T.M. include:

1) the attributes of the child making the hearsay statement, e.g., the child's age, ability to communicate verbally, ability to comprehend the questions asked, ability to tell the difference between truth and falsehood, mental ability and ability to retain the recollection of the events at issue;

2) the witness relating the hearsay statement, e.g., the witness's relationship to the child, whether the witness is motivated to fabricate or distort the child's statement, and the circumstances under which the witness heard the statement;

3) the child's statement itself, e.g., whether the child's statement contains knowledge not normally attributable to a child of the same age, whether the statement was volunteered spontaneously, the suggestiveness of prior statements by the witness relating the statement or by third parties present when the statement was made, the consistency of the child's statement if told to more than one person, and the nearness in time the child made the statement in relation to the incident at issue. Other factors may also be considered to prove the falseness or truthfulness of the child's statement. The Department placed

the standards of State v. S.T.M. in Rule IV(5).

Child hearsay statements were permitted by statute for past administrative hearings on substantiated reports. Formerly, 41-3-403(1)(c), MCA, allowed hearsay statements of the affected youth for district court hearings dealing with protective services matters, and at fair hearings regarding licensure issues. That statute was repealed in 2001, when the State Legislature overhauled the statutory provisions on district court protective service proceedings. Child hearsay statements are routinely allowed in district court hearings on protective services matters in accordance with the various statutes in Title 41, chapter 3, part 4, MCA.

The allowance of child hearsay statements in substantiation fair hearings is necessary because in many instances the child victim may not want to face the accused abuser. Doing so may retraumatize the child. Other states have the same practice for fair hearings, including Arizona and New York. Rule IV(5) is therefore needed to allow the statements as long as the reliability of the child's statements is shown.

Alternatives considered included not providing a child hearsay exception in Rule IV(5). The Department rejected this alternative because of the emotional risks associated with having child victims testify at fair hearings. Also, not having the provision contributes to the confusion over whether child hearsay statements are admissible, which has occurred in countless substantiation fair hearings. Rule IV(5) provides solid guidance on this issue.

Rule V

Under this rule, substantiated level one and two reports will be initially listed as "pending determination" for 30 days after the investigating worker's decision. The 30 days corresponds with the 30-day time limit to request a fair hearing specified in Rule IV(2). Rule V preserves the substantiated person's right to request a fair hearing before a level one or two substantiated report can be disclosed pursuant to Rule III.

Rule V also keeps the listing of the determination as pending while the fair hearing process takes place, which will be beyond 30 days. Until the matter is fully adjudicated, either through informal review, fair hearing, or appeal of the fair hearing decision, no final determination will be listed. Rule V is necessary so a substantiated person will not be unfairly listed until the final adjudication.

Alternatives to Rule V include allowing disclosure of level one and two determinations despite a substantiated person's hearing rights, then reversing the determination afterwards if it is overturned. This option would unfairly jeopardize a person's rights. The person may lose license or employment opportunities

between the time the determination is made and the time of the final appeal decision.

Rule VI

This rule precludes the right to a fair hearing if the substantiated person has been convicted of a criminal offense that is factually the same as the substantiated abuse; if a district court has adjudicated the child victim of the substantiated report as a youth in need of care based on the same facts of the substantiated abuse; or if there has been any other final adjudication in a court or other administrative hearing that has been based on the same facts as the substantiated abuse.

Regarding adjudications of youth in need of care, 41-3-102(29), MCA, defines a "youth in need of care" as a "youth who has been adjudicated or determined, after a hearing, to be or to have been abused, neglected or abandoned". 41-3-437(2), MCA, provides how the determination is made in district court:

- 1) the court determines that the child has been abused or neglected by a preponderance of the evidence;
- 2) the Montana Rules of Civil Procedure and Rules of Evidence apply at the court hearing; and
- 3) the court's order must determine the nature of the abuse and establish the facts.

Youth in need of care adjudications, criminal convictions of charges directly related to child abuse or neglect, and any other court or hearing officer's orders finding child abuse or neglect occurred are final determinations showing that the substantiated report has been proven. All are about the same subject: the specific instance of child abuse or neglect. All involve the same party: the person who committed the abuse or neglect. All decisions are based on the weight of the evidence that proves that the child abuse or neglect occurred. The Department's Office of Fair Hearings uses the preponderance of evidence standard of proof, meaning the evidence is more likely than not showing that the abuse or neglect occurred. The preponderance of evidence standard is used in youth in need of care and other civil proceedings (unless the federal Indian Child Welfare Act, 25 U.S.C. 1901 et seq., applies). Proof beyond a reasonable doubt for criminal convictions is a much higher evidentiary standard than the preponderance of the evidence standard.

A prior adjudication invokes the legal principle of issue preclusion, which means that an issue already decided in a prior case cannot be relitigated again in a subsequent case. In fair hearings where substantiated abuse or neglect reports are at issue, the hearing officer is precluded from hearing the

evidence again when the issue regarding the substantiation has already been decided. Rule VI is needed for that reason.

Alternatives to Rule VI include not excluding fair hearings despite prior adjudications. Allowing cases to be re-contested is contrary to the long-standing legal principle of issue preclusion. It also would lead to wasting administrative resources when the same issue has already been decided.

Rule VII

This rule is proposed to be included in ARM Title 37, chapter 5 which contains the provisions for all department fair hearings (see explanation for amending ARM 37.5.304 and 37.5.307, above). Rule VII specifies all the applicable fair hearing provisions in ARM Title 37, chapter 5, subchapter 3. It follows the format that exists for other subjects of fair hearings, as seen in ARM Title 37, chapter 5, subchapter 1.

As provided in Rule VII:

ARM 37.5.304 provides the definitions for fair hearing rules.

ARM 37.5.307 explains when fair hearings may be requested, including time limitations for making the requests.

ARM 37.5.313 provides when fair hearings may be dismissed.

ARM 37.5.322 lists the hearing officer's powers and duties.

ARM 37.5.325 specifies how fair hearings are conducted.

ARM 37.5.334 explains a person's right to appeal the hearing officer's decision to district court.

ARM 37.5.337 provides for the submission of the fair hearing record to district court if an appeal is pursued.

Rule Repeals

ARM 37.47.301

This rule provides definitions for "identifiable and substantial impairment for the child's welfare" and "parent". Those definitions are not used in any statutory or administrative provision. "Any other person legally responsible for the child's welfare" is found in ARM 37.47.602.

ARM 37.47.304

This rule covers when the Department investigates reports of child abuse or neglect in licensed or registered care facilities or in assistance with law enforcement. The Department has these

investigative authorities in 41-3-202, MCA, so a rule is not needed. Also, the Department does not substantiate "child maltreatment" for persons who are not "responsible for a child's welfare".

ARM 37.47.609

The Department proposes to repeal this rule because it does not provide for a procedure that is necessary to protect the due process rights of those who are the subject of a level one or two substantiation. Rules IV through VII, and the amendments to ARM 37.5.304 and 37.5.307, are proposed to replace the procedure in ARM 37.47.609.

ARM 37.97.125

This rule pertains to licensing and being employed in youth residential facilities such as foster care homes. The Department proposes to repeal this rule because it is based solely on ARM 37.47.609.

ARM 37.100.313 and 37.100.413

ARM 37.100.313 provides that license applicants, licensees and potential/existing employees of community homes for persons with developmental disabilities may request a review of a substantiated adult protective service report under ARM 37.47.609. ARM 37.100.413 contains the same provisions, but deals with community homes for persons with physical disabilities. The Department proposes to repeal both rules because they are solely based on ARM 37.47.609. Also, ARM Title 37, chapter 47, subchapter 6 no longer applies to adult protective services.

Alternatives to the Department's rule proposal include leaving the rules as they now exist with no changes. Doing so would lead to no distinction regarding the severity of instances of child abuse or neglect, and would be inconsistent with the Department's current practice of providing fair hearing rights to persons challenging substantiated reports of child abuse or neglect.

With the exception of the proposed rule repeals, this proposal aims to clarify that the Department's Office of Fair Hearings has jurisdiction to hear appeals of level one and two substantiated reports. ARM 37.5.307(6) states that there is no hearing before the department "on departmental activities that are not defined" in rule. ARM 37.5.313(1)(e) specifies that a hearing officer may dismiss a hearing request when "the department does not have jurisdiction over the subject matter or the appeal procedure".

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

data, views or arguments may also be submitted to Gwen Knight, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than 5:00 p.m. on August 19, 2004. Data, views or arguments may also be submitted by facsimile (406)444-9744 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

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

Eleanor A. Parker
Rule Reviewer

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

Certified to the Secretary of State July 12, 2004.

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

| | | |
|------------------------------------|---|----------------------|
| In the matter of the proposed |) | NOTICE OF PUBLIC |
| amendment of ARM 38.2.5001, |) | HEARING ON PROPOSED |
| 38.2.5002, 38.2.5004, 38.2.5007, |) | AMENDMENT AND REPEAL |
| 38.2.5008, 38.2.5012, 38.2.5014, |) | |
| 38.2.5016, 38.2.5017, 38.2.5020, |) | |
| 38.2.5021, 38.2.5022, 38.2.5023, |) | |
| 38.2.5024, 38.2.5027, 38.2.5028 |) | |
| and the proposed repeal of ARM |) | |
| 38.2.5003 and 38.2.5010 pertaining |) | |
| to Protective Orders and |) | |
| Protection of Confidential |) | |
| Information |) | |

TO: All Concerned Persons

1. On September 10, 2004, at 10:00 a.m., a public hearing will be held in the Bollinger Room, Public Service Commission (commission) offices, 1701 Prospect Avenue, Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules.

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the PSC no later than 5:00 p.m. on September 3, 2004, to advise us of the nature of the accommodation that you need. Please contact Connie Jones, PSC Secretary, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601, telephone number (406) 444-6170, TTD number (406) 444-6199, fax number (406) 444-7618, e-mail conniej@state.mt.us.

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

38.2.5001 DEFINITIONS Terminology used in these rules ~~shall have~~ has the following meanings, except where the context clearly indicates otherwise ~~clearly demands~~:

(1) "Confidential information" ~~generally~~ means information ~~which includes, or is claimed to include, the required elements of a law which allows for limitations on public disclosure or access by others, but in context of these rules it means information the commission has identified, either specifically, by category, or generally, as being subject to protection that the commission may lawfully withhold from public disclosure by issuing in accordance with a protective order in accordance with and these rules;~~

(2) and (3) remain the same.

(4) "Provider" or "providing party" means the person in possession of confidential or claimed confidential information

~~who requests a protective order; and having the right, through ownership, control, or other reason, to claim information is confidential and to provide the information to others under protective order and these rules; and~~

(5) remains the same.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is reasonable necessity to amend in order to improve language style, remove unnecessary language, and to clarify and make the definitions consistent with subsequent rule amendments.

38.2.5002 PROTECTIVE ORDERS AND RULES -- RELATIONSHIP, WAIVER, SPECIAL PROVISIONS, PROVIDER DISCRETION, INAPPLICABILITY

(1) ~~In the event If that conflict is determined to exists between a provision within these rules and a provision within the protective order, applicable in a proceeding before the commission, the provision within the protective order will controls.~~

(2) ~~Requests for waiver of one or more of these rules, in whole or in part, will not be routinely granted, but may be granted by the commission upon clear showing of for good cause. Requests for waiver must include be accompanied by a clear identification of the provision for which waiver is sought and a concise statement of the reasons facts and law supporting the request.~~

(3) ~~Requests that special provisions or terms and conditions not provided by these rules be included in a protective order will not be routinely granted, but may be granted by the commission upon a clear showing of for good cause. Requests for special provisions or terms and conditions must be include accompanied by an exact statement of the special provision or term and condition proposed language and a concise statement of the facts reasons and law supporting the request.~~

(4) ~~The providing party has discretion to provide confidential information to a requesting party under special terms and conditions agreed to by the provider and the requesting party, so long as the purpose of the agreement is to expedite or simplify the providing of confidential information and the terms and conditions imposed on the requesting party are either not more strict in relation to the receiving party than those included in these rules or will be replaced by the provisions or terms and conditions of a protective order when issued.~~

(5) (4) ~~Except as the commission may otherwise order, access to information, whether through protective orders and these rules or otherwise, will not be available in regard to information lawfully protected, temporarily or permanently as the law may permit, in regard to matters such as the identity of an informant or complainant, or when access to or disclosure of the information will create a risk of personal~~

safety or impede law enforcement efforts. These rules do not apply to all information in the possession of the commission which may be lawfully withheld from public disclosure. Generally, these rules apply to confidential information necessary to commission regulation and decision-making, normally but not exclusively in a contested case process. Information to which these rules do not apply includes agency personnel records or identities of certain informants or complainants. Also, these rules do not apply to access to information that will create a risk of personal safety or impede law enforcement efforts.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is reasonable necessity to amend in order to improve language style, clarify, and remove unnecessary language and provisions.

38.2.5004 ~~GENERIC PROTECTIVE ORDERS~~ TERM PROTECTIVE ORDERS (1) The commission, in its discretion, on the motion of a provider, may issue a "generic protective order," which is a protective order applicable to specified information or general categories of information expected to be supplied by a provider in certain specified or general categories of proceedings, compliance with reporting requirements, response to certain inquiries, or other matters, for a period of time (e.g., term of years) rather than by specific proceeding. The generic protective order and these rules govern access to confidential information provided under the generic protective order. On the motion of a provider, the commission may issue a "term protective order," which is a protective order applicable to specific confidential information expected to be required periodically by the commission. An example of such information would be information supplied in response to routine or repetitive reporting requirements, such as commission annual reports or information required by special commission order. A term protective order may be effective for a period of not more than four years. The requirements for requesting, for issuing, and for gaining access to confidential information under a term protective order are the same as the requirements applicable to protective orders under these rules.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is reasonable necessity to amend in order to respond to the Montana Supreme Court's decision in Great Falls Tribune et al. v. Montana Public Service Commission, and Montana Power Company, a/k/a NorthWestern Energy, 2003 MT 359, 319 Mont. 38, 82p.3d 876. In Great Falls Tribune the Court held that certain commission "regulations have created an unconstitutional presumption of confidentiality" and that to

the extent commission rules or practices allow the protection of information on "mere representations" of a provider, those rules and practices are unlawful and must be changed. ¶¶ 49-55. The Court then described the process the commission and providers must use before the commission can protect confidential information. While it is not absolutely clear that ARM 38.2.5004 is inconsistent with Great Falls Tribune, the commission nonetheless finds that it is prudent to amend the rule.

38.2.5007 PROTECTIVE ORDER -- REQUESTS, TIMING OF REQUESTS, AND PROCEDURE (1) ~~In general, information will be designated eConfidential information will be protected only upon on commission approval of a request by a provider. It is the responsibility of the provider or other person asserting a right to protection of information to specifically advise the commission of the claim to confidentiality and to request, assert by motion, prior to submitting the information, that the commission designate the information as confidential.~~

(2) Prior to requesting a protective order, the provider must determine, following a thorough legal and factual examination, that all information claimed to be confidential is a ~~bona fide~~ trade secret, ~~a matter of constitutionally protected privacy,~~ or otherwise legally protectible.

~~(3) The motion for protective order must comply with commission procedural rules on format of motions in general, but need not include a proposed protective order.~~

~~(4) (3) The factual showing and legal analysis must make a prima facie showing and must make clear to the commission the basis for the claim of confidential information. The motion request for protective order must be thorough but brief and must include:~~

(a) an identification of the person, including contact information (phone number and e-mail address) information allowing that person to be readily contacted (e.g., phone number), to whom communications from commission staff, parties, and interested persons may be made; ~~in regard to the information for which protection is requested and the bases for protection;~~

(b) a complete and specific non-confidential identification, item by item or by category of items which are alike, of all information for which protection is requested;

(c) a complete and specific factual basis, including a thorough identification and explanation of the specific facts, ~~assertions of which (e.g., information is a trade secret) to be supported by affidavit of an expert~~ a qualified person where necessary or advisable (e.g., in a case of first impression before the commission, in an instance when the provider anticipates a challenge to the claim of protection, or when the provider anticipates an expert's view will be helpful to the commission in reaching a determination) or when ordered by the commission, supporting protection of the information for which protection is requested; and making a prima facie showing that supports a claim of confidential

information; and

(d) a complete and specific legal basis analysis, including but not limited to a thorough identification and explanation of the specific elements of trade secret, constitutionally protected privacy, or other lawful basis for protection, where applicable, explaining why the information for which protection is requested is lawfully entitled to protection. is confidential information.

(4) Requests for a protective order must demonstrate the following:

(a) If the claimed basis for protection is individual privacy, that:

(i) the provider has made a reasonable effort to contact the individual to ascertain whether the individual waives the right to privacy for the information at issue;

(ii) the individuals with potential privacy interests have actual, subjective expectations of privacy in the information at issue;

(iii) society recognizes such expectations of privacy as reasonable; and

(iv) the demand of individual privacy clearly exceeds the merits of public disclosure.

(b) If the claimed basis for protection is trade secret, that:

(i) a trade secret claim is a strict business necessity and that the provider has considered that the commission is a public agency and that there is a constitutional presumption of access to documents and information in the commission's possession;

(ii) the claimed trade secret material is information;

(iii) the information is in fact secret;

(iv) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy;

(v) the secret information is not readily ascertainable by proper means; and

(vi) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy.

(5) The demonstrations required by (4) are not necessarily sufficient for the issuance of a protective order.

(6) If there are bases for confidential information other than individual privacy or trade secret, requests for protection must explain and demonstrate compliance with the standards required for protection.

(7) A request for protective order must not include the claimed confidential information. Generally, claimed confidential information must not be filed at the commission before the issuance of a requested protective order. If it is necessary for the commission to access claimed confidential information prior to the issuance of a protective order, such access will be by special commission order.

~~(5) (8) The commission may rule on a request for protective order or may notice a request for protective order for comment or hearing. When the commission determines that a~~

request for protective order constitutes a prima facie showing that the information is confidential information, it will issue a protective order. Notice of issuance of protective orders will be given in the next commission weekly agenda.

~~(6)~~ (9) In the interests of preventing delays in proceedings, the commission encourages providers to make requests for protection of confidential information at the earliest possible time in a proceeding, including in anticipation of a proceeding if the provider ~~has reason to believe~~ knows that claimed confidential information will be submitted ~~or is likely to be requested~~ in the proceeding. Failure to heed this section may result in a commission conclusion that a filing is incomplete, which in turn may change the anticipated date on which a commission decision will issue.

AUTH: 69-3-103, MCA
IMP: 69-3-105, MCA

REASON: Generally there is a reasonable necessity to amend in order to improve language, make the use of terms consistent with defined terms, clarify, and remove unnecessary language and provisions. In addition, Great Falls Tribune suggests certain changes, and requires that a request for protective order must be supported by an affidavit. Also, in informal discussions it was suggested that the commission describe in rule the basic elements that must be demonstrated to support a request for protective order based on individual privacy or trade secret. PLEASE NOTE: A majority of commissioners did not support including a section in this rule addressing notice of requests for protective orders. Commissioner Rowe believes that all protective order requests should be noticed at least one calendar week before consideration by the commission. This would allow interested persons to comment or request additional time to comment. A notice could be included automatically in the commission weekly utility division (or transportation/centralized services) agenda. Commissioner Rowe believes this would not significantly delay commission consideration and would significantly increase notice to persons interested in the subject. The commission invites persons who comment on these proposed amendments and deletions to also address this proposal of Commissioner Rowe.

38.2.5008 PROTECTIVE ORDER -- ISSUANCE, RECONSIDERATION, CHALLENGE TO CONFIDENTIALITY, INTERIM PROTECTIVE ORDERS

~~(1) When justified the commission will issue a protective order, with liberal reference to these rules and with attachments as necessary, including to identify the protected information and any waivers and special terms and conditions which may apply. Protective orders will include all or part of these rules by reference, will include a general non-confidential description of the protected information, may waive certain of these rules and may include special terms and~~

conditions.

~~(2) Reconsideration of issuance of a protective order is not allowed. Challenges to a commission determination that information is protectible protective order shall must be in accordance with (3).~~

~~(3) Protective orders and these rules establish a procedure for the expeditious handling of confidential information, that a provider claims is confidential. Commission issuance of a protective order and designation of information as confidential information means the commission has determined at least that the provider has shown good and sufficient cause in fact and law, i.e., has made a prima facie showing, that the information for which protection is requested is entitled to protection confidential information. A party to the proceeding in which information has been designated confidential, or a A person or entity with proper standing, or the commission on its own motion, may challenge the provider's claim of confidentiality at any time, a protective order at any time in accordance with by using the following procedure:~~

~~(a) A motion challenging protection of the information a protective order must be filed with the commission and served upon on the providing party. The providing party must file a response to the motion within 14 10 days. Requests for hearing or oral argument may be granted for good cause, or may be scheduled on the commission's own motion; or~~

~~(b) If the commission determines on the motion that information should be removed from protection, the information will remain protected under the governing protective order and these rules for a reasonable period, to be established in the commission ruling, to allow the provider time to appeal the commission decision, or to request that the information be returned to the provider.~~

~~(4) Upon challenge of a protective order, the provider shall bear the burden of demonstrating that information is entitled to protection confidential information.~~

~~(5) In any proceeding in which a protective order does not exist because there has been no need known to the provider, the commission may issue an interim protective order to expedite complete and immediate access to information necessary in the proceeding (e.g., during pre-discovery on-site audits by the commission and consumer counsel). The rights and obligations of providers, requesting parties, and the commission relating to protection of information under the interim protective order are the same as protection under a final protective order, except the provider need only make a reasonable effort in determining that fact and law support the provider's assertion that the information is protectible. Within 10 days of providing information protected under an interim protective order the provider must file a motion for protection of the information on a final basis in accordance with these rules. If the provider, following the thorough legal and factual examination required in support of protection on a final basis, determines all or part of the~~

~~information protected on an interim basis is not protectible, the provider shall so notify the commission and requesting parties.~~

AUTH: 69-3-103, MCA
IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend in order to improve language style, to make the use of terms consistent with defined terms, to clarify, to remove unnecessary language and provisions, to add suggested provisions, and to add certain language suggested by Great Falls Tribune. In addition, deleting ARM 38.2.5008(5) is arguably required by Great Falls Tribune, and the section is in any event not necessary.

38.2.5012 NONDISCLOSURE AGREEMENTS -- GENERAL (1) All persons, including legal counsel, having a right pursuant to protective order ~~and these rules~~ to access confidential information, shall sign and file with the commission and serve on the provider a nondisclosure agreement, ~~on the commission a form or commission approved form~~ as attached to each protective order, prior to receiving or reviewing the confidential information.

(2) Commissioners and commission staff shall sign a "commission nondisclosure agreement" which must certify, permanently and for all confidential information in all proceedings before the commission, in substantial compliance with the following:

"I understand that in my capacity as commissioner or commission staff, I may be called upon to access, review, and analyze, ~~directly or through reports directed to me,~~ information that is protected as confidential information. I have reviewed all commission rules applicable to protection of confidential information and I am familiar with the standard terms and conditions of protective orders issued by the commission. I understand and will abide by my obligations in regard to confidential information.

"I agree that I will use confidential information only for commission purposes and I will discuss and disclose confidential information only with the provider and persons, including commissioners and commission ~~personnel~~ staff, having also signed a nondisclosure agreement. I agree to be bound by the terms and conditions of protective orders and these rules. I will neither use nor disclose protected information except for lawful purposes in accordance with the governing protective order and these rules so long as such information remains protected.

"I understand that this nondisclosure agreement may become part of my permanent personnel file and the files of the division to which I am assigned and may be freely copied and distributed to other files and persons having interest in it, including the provider and other parties in proceedings before the commission."

(3) Counsel, expert witnesses, and others entitled to access confidential information for parties to a proceeding in which ~~information has been designated as confidential and~~ a protective order has been issued shall sign and file with the commission, and on the same day must serve on the provider, a nondisclosure agreement, ~~applicable to the proceeding,~~ on a form as attached to each protective order, certifying in substantial compliance with the following:

"I understand that in my capacity as counsel or expert witness for a party to this proceeding before the commission, or as a person otherwise lawfully so entitled, I may be called upon to access, review, and analyze information that is protected as confidential information. I have reviewed all commission rules and protective orders governing the protected information that I am entitled to receive. I fully understand, and agree to comply with and be bound by, the terms and conditions thereof. I will neither use nor disclose confidential information except for lawful purposes in accordance with the governing protective order and commission rules so long as such information remains protected.

"I understand that this nondisclosure agreement may be copied and distributed to any person having an interest in it and that it may be retained at the offices of the provider, commission, consumer counsel, or any party and may be further and freely distributed."

(4) remains the same.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend in order to make minor edits and remove unnecessary language.

38.2.5014 PROTECTIVE ORDER -- STANDARD TERMS AND CONDITIONS -- GENERAL (1) Confidential information must not be provided to, disclosed to, discussed with, or accessed by any person, including legal counsel, who has not first signed a commission-approved nondisclosure agreement, ~~and~~ thereby agreeing to access, maintain, use, and disclose confidential information in strict accordance with the governing protective order and these rules. All persons who ~~may be~~ are entitled to receive or access confidential information shall neither use nor disclose the confidential information for any purpose other than the purposes of preparation for and conduct of proceedings before the commission, and then solely as contemplated in the governing protective order and these rules, and shall take reasonable precautions to keep the confidential information secure in accordance with the purposes and intent of the protective order and these rules.

~~(2) Neither commission designation of information as confidential information nor party access to confidential information pursuant to a protective order and these rules affect the rights of the provider to continue to claim confidentiality or challenge the admissibility (e.g.,~~

~~relevance) of the information into the evidentiary record in a commission proceeding.~~

AUTH: 69-3-103, MCA
IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend in order to make minor edits and to remove an unnecessary provision.

38.2.5016 PROTECTIVE ORDER -- STANDARD TERMS AND CONDITIONS -- PROVIDING CONFIDENTIAL INFORMATION -- NON-CONFIDENTIAL WRITTEN SUMMARY (1) For all confidential information supplied ~~in accordance with a~~ under protective order, ~~and these rules~~ the provider must prepare for each item of information a concise, written, non-confidential description and summary suitable for meaningful inclusion in party testimony and arguments, commission orders, and the public record of the proceeding. The description and summary must be filed and served within 5 five days of the filing and service of the confidential information to which it relates.

AUTH: 69-3-103, MCA
IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend in order to make a minor edit and remove unnecessary language.

38.2.5017 PROTECTIVE ORDER -- STANDARD TERMS AND CONDITIONS -- PROVIDING CONFIDENTIAL INFORMATION -- GENERAL

(1) On request of a requesting party, ~~the~~ provider shall provide confidential information pursuant to the governing protective order, ~~and these rules.~~ The commission and all requesting parties having access to confidential information shall take appropriate action in good faith to mitigate the effect of provider errors in supplying confidential information, such as mismarking or misdirecting, upon discovery of the error or upon notice of the error by the provider or the commission.

(2) ~~Except as the commission may otherwise order following notice and an opportunity to be heard, or as the provider may otherwise agree,~~ described below, confidential information is only available from the provider and only available in accordance with the governing protective order ~~and these rules,~~ and confidential information is not to be obtained from the commission or others, including the consumer counsel. However, the commission may allow inspection of confidential information maintained at the commission office, by any person having ~~lawful access pursuant to the terms of the governing protective order and these rules.~~ signed, and filed with the commission, and served on the provider a nondisclosure agreement 10 days before asking to inspect the confidential information.

AUTH: 69-3-103, MCA
IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend in order to make minor edits and remove unnecessary language. Also, a provision is added to make sure that access to protected information at the commission office is controlled and with the knowledge of the provider.

38.2.5020 PROTECTIVE ORDER -- STANDARD TERMS AND CONDITIONS -- MAINTENANCE AND USE OF CONFIDENTIAL INFORMATION -- GENERAL

(1) The commission and ~~all~~ other persons having lawful access to confidential information may access confidential information in accordance with the governing protective order, ~~and these rules.~~ The commission and ~~all~~ other persons having lawful access shall at all times maintain and process the confidential information in strict accordance with the governing protective order, ~~and these rules.~~ ~~Confidential information must be maintained by all persons at all times in accordance with protective order and these rules.~~

(2) Confidential information must not be used except for purposes of the proceeding in which the protective order is issued. ~~However, the commission, on its own motion or on motion of a party, after notice and an opportunity to be heard, may allow confidential information from one commission proceeding to be used for purposes of another proceeding before the commission, in accordance with a protective order and these rules.~~

AUTH: 69-3-103, MCA
IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend in order to make minor edits and remove unnecessary language and provisions.

38.2.5021 PROTECTIVE ORDER -- STANDARD TERMS AND CONDITIONS -- USE OF CONFIDENTIAL INFORMATION -- GENERAL

(1) Where written or oral reference to confidential information is required, ~~in pleadings, motions, examinations, testimony, objections, arguments, briefs, or other procedure,~~ reference must be by general citation of title or exhibit number or by non-confidential description and summary, such as the non-confidential summary supplied by the provider. If further reference to confidential information is necessary, oral reference must be presented in camera and written reference must be separated, clearly marked, filed with the commission under seal, and served only on counsel of record for each party.

(2) Where ~~written or oral~~ reference to confidential information is required in a commission decision, every effort will be made to make such reference ~~must be~~ through non-confidential, ~~general or summary, form.~~ If it is not possible to make such further reference ~~to~~ by non-confidential summary,

~~information is necessary oral~~ such reference must be ~~stated in camera and written reference must be~~ separated, clearly marked, sealed, and served only on counsel of record for each party.

(3) Where in camera proceedings are recorded, stenographically or otherwise, the recording and all transcription of the recording must be separated, clearly marked, sealed, and maintained in accordance with the governing procedural order, ~~and these rules~~. The person recording the in camera proceeding and the person transcribing the recording of the in camera proceeding must comply with the governing protective order ~~and these rules~~ and must sign a nondisclosure agreement.

AUTH: 69-3-103, MCA
IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend in order to improve language style, make minor edits and remove unnecessary language.

38.2.5022 PROTECTIVE ORDER -- STANDARD TERMS AND CONDITIONS -- ACCESS AND MAINTENANCE OF CONFIDENTIAL INFORMATION -- COMMISSION AND CONSUMER COUNSEL (1) The commissioners and commission staff and the consumer counsel and consumer counsel staff may have access to all confidential information made available pursuant to protective order, and shall be bound by the terms of the protective order, ~~and these rules~~.

(2) While in the custody of the commission or consumer counsel, confidential information ~~shall~~ must remain on yellow paper and remain marked with a clear indication that the information has been designated confidential information in a proceeding before the commission. Confidential information maintained by the commission will be sealed and segregated in the files of the commission. Confidential information maintained by the consumer counsel will be sealed and segregated in the files of the consumer counsel.

~~(3) Confidential information maintained by the commission or the consumer counsel will not be considered public information or public records of any type for purposes of public access, right to participate, right to know, open meetings, or similar matters.~~

~~(4) (3) The consumer counsel, whether or not a party to a proceeding in which confidential information exists, including in a commission proceeding where parties do not exist, shall have access to all confidential information which is subject to a protective order, and these rules so long as access is in accordance with the governing protective order, and these rules and a nondisclosure agreement has been signed.~~

AUTH: 69-3-103, MCA
IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend in order to improve language style and remove unnecessary language and provisions.

38.2.5023 PROTECTIVE ORDER -- STANDARD TERMS AND CONDITIONS -- ACCESS AND MAINTENANCE OF CONFIDENTIAL INFORMATION -- PARTIES (1) Confidential information must be provided by the provider to legal counsel for the ~~receiving requesting~~ party- when legal counsel has signed a nondisclosure agreement, ~~agreeing to shall~~ be bound by the terms of the protective order, ~~and these rules.~~ Access to confidential information may be authorized by legal counsel to expert witnesses of the ~~receiving requesting~~ party. Except as otherwise agreed to by the provider, the designated expert may not be an officer, director, or employee of any party, or an officer, director, employee, stockholder, or member of an association or corporation of which any party is a member or affiliate. Prior to giving access to an expert, legal counsel shall deliver a copy of the governing protective order and these rules to the expert and the expert shall sign a nondisclosure agreement. A copy of the nondisclosure agreement must be provided to the provider.

(2) When it is not feasible that confidential information be provided to counsel and experts, confidential information may be made available by the provider for inspection ~~and be reviewed~~ by legal counsel and experts at a place and a time mutually agreed on by the provider and the party, or as directed by the commission.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend in order to make minor edits, remove unnecessary language, and make language consistent with defined terms.

38.2.5024 PROTECTIVE ORDER -- STANDARD TERMS AND CONDITIONS -- ACCESS AND MAINTENANCE OF CONFIDENTIAL INFORMATION -- EMPLOYEE EXPERTS OF PARTIES (1) Counsel for the ~~receiving requesting~~ party may propose access to confidential information by an employee expert of the ~~receiving requesting~~ party in accordance with the following procedure.

(a) Counsel for the ~~receiving requesting~~ party shall notify legal counsel for the provider, in writing, of the intent to provide confidential information to an employee expert of the ~~receiving requesting~~ party. The notice must contain the name, title, job description, description or previous positions and experience, and area of expertise of the employee expert accessing the information.

(b) Within 5 five days of the provider's receipt of notice, if it is the good faith position of the provider that the designated employee expert should not be given access to the information, the provider must object in writing.

(c) If the ~~receiving requesting~~ party does not receive an objection within the time required, counsel for the ~~receiving requesting~~ party may provide access to the information by the designated employee expert in accordance with the governing protective order, ~~and these rules.~~

(d) If the ~~receiving requesting~~ party receives an objection within the time required, the requesting party and provider ~~shall~~ must attempt to resolve the objection. If the parties are unable to resolve the objection, either may apply to the commission for a ruling, ~~as to the access proposed.~~ Access to the information shall not be given to the designated employee expert pending ruling by the commission.

(e) The standard ~~to be~~ applied by the commission in determining a question of employee expert access to confidential information ~~shall be~~ is whether access would be reasonably likely to jeopardize the confidential nature of the information. ~~A factor will be whether the employee's duties are solely dedicated to regulatory activities on behalf of the receiving party and not related to marketing or strategic planning of competitive products or services.~~

(f) A party dissatisfied with a ruling by the commission may appeal to the district court, and, pending appeal, the information ~~shall~~ must not be disclosed to the designated employee expert.

(2) To avoid unnecessary delay, ~~counsel~~ for the ~~receiving requesting~~ party proposing access to confidential information by an employee expert ~~of the receiving party shall~~ should commence the above procedure as early as possible in a proceeding. ~~so proceedings to determine employee expert access will not cause a delay.~~

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is reasonable necessity to amend in order to make minor edits, remove unnecessary language and provisions, improve language style and make language consistent with defined terms.

38.2.5027 PUBLIC ACCESS TO CONFIDENTIAL INFORMATION

(1) Access to confidential information by persons other than the commission, the consumer counsel, and parties to a proceeding in which the confidential information has been provided is allowed in accordance with the governing protective order, ~~and these rules.~~ ~~If access to confidential information is allowed following all necessary or requested proceedings on the petition, including an allowance of time for the provider to appeal the matter, access will be in accordance with the governing protective order and these rules.~~

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is reasonable necessity to amend in order to remove unnecessary language.

38.2.5028 PROTECTIVE ORDER -- STANDARD TERMS AND CONDITIONS -- ACCESS AND MAINTENANCE OF CONFIDENTIAL INFORMATION -- PUBLIC (1) A person not ~~being~~ a party to a proceeding in which a protective order has been issued may propose access to confidential information in accordance with the following procedure.

(a) remains the same.

(b) Within 10 days of the provider's receipt of notice, if it is the good faith position of the provider that the person should not be given access to the information, the provider must object in writing, clearly stating the reasons for the objection, and copy the objection to ~~so notifying~~ the person and the commission.

(c) If the person and the commission do not receive an objection within the time required, the person may access the information in accordance with the governing protective order, ~~and these rules.~~

(d) If the person and the commission receive an objection within the time required, the person and the provider shall attempt to resolve the objection. If unable to resolve the objection, either the person or the provider may apply to the commission for a ruling, ~~as to the access proposed.~~ Access to the information ~~shall~~ must not be given to the person pending ruling by the commission.

(e) The standard ~~to be~~ applied by the commission in determining a question of access to confidential information ~~shall be~~ is whether access would be reasonably likely to jeopardize the confidential nature of the information.

(f) Dissatisfaction with a ruling by the commission may be appealed to the district court, and, pending appeal, the information ~~shall~~ must not be disclosed to the designated person.

AUTH: 69-3-103, MCA
IMP: 69-3-105, MCA

REASON: There is reasonable necessity to amend in order to make minor edits, clarify, improve language style and remove unnecessary language.

4. The commission proposes to repeal the following rules:

38.2.5003 PROTECTION OF INFORMATION -- "90-DAY RULE" found at Administrative Rules of Montana page 38-99.

AUTH: 69-3-103, MCA
IMP: 69-3-105, MCA

REASON: There is reasonable necessity to repeal this rule because there is serious question about its

constitutionality after Great Falls Tribune and other decisions. Also, the rule is unnecessary in order to effectuate the statutory authority at 69-3-105, MCA.

38.2.5010 PROTECTIVE ORDER - EXTENSION TO ADDITIONAL INFORMATION, EXTENSION TO OTHER PROVIDERS found at Administrative Rules of Montana page 38-105.

AUTH: 69-3-103, MCA
IMP: 69-3-105, MCA

REASON: There is reasonable necessity to repeal this rule because it is unnecessary, creates small if any administrative efficiency, and is questionable following Great Falls Tribune.

5. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments (original and 10 copies) may also be submitted to Legal Division, Public Service Commission, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601, and must be received no later than September 3, 2004, or may be submitted to the PSC through the PSC's web-based comment form at <http://psc.state.mt.us/> and must be received no later than September 3, 2004. (PLEASE NOTE: When filing comments pursuant to this notice please reference Docket No. L-04.7.2-RUL)

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

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

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

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

/s/ Bob Rowe
Bob Rowe, Chairman
Public Service Commission

/s/ Robin A. McHugh
Reviewed By: Robin McHugh

CERTIFIED TO THE SECRETARY OF STATE JULY 12, 2004.

BEFORE THE BOARD OF HOUSING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment) NOTICE OF AMENDMENT
of ARM 8.111.409 pertaining to)
cash advances made to)
borrowers or third parties)

TO: All Concerned Persons

1. On May 6, 2004, the Board of Housing published MAR Notice No. 8-111-44 regarding the proposed amendment of the above-stated rule at page 1096 of the 2004 Montana Administrative Register, Issue No. 9.

2. No comments or testimony were received.

3. The department has amended the rule as proposed.

DEPARTMENT OF COMMERCE
BOARD OF HOUSING

By: /s/ MARK A. SIMONICH
MARK A. SIMONICH, DIRECTOR
DEPARTMENT OF COMMERCE

By: /s/ G. MARTIN TUTTLE
G. MARTIN TUTTLE, RULE REVIEWER

Certified to the Secretary of State July 12, 2004.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

| | | |
|--------------------------------|---|---------------------|
| In the matter of the |) | NOTICE OF AMENDMENT |
| amendment of ARM 10.7.101, |) | |
| 10.7.109, 10.7.110, 10.7.111, |) | |
| 10.7.115, 10.7.118, 10.10.202, |) | |
| 10.10.309, 10.10.316, |) | |
| 10.10.320, 10.10.611, |) | |
| 10.10.614, 10.15.101, |) | |
| 10.20.102, 10.20.106, |) | |
| 10.21.101B, 10.21.101C, |) | |
| 10.21.101F, 10.21.101I, |) | |
| 10.21.102A, 10.21.102B, |) | |
| 10.21.102E, 10.22.102, |) | |
| 10.23.102, 10.30.102, and |) | |
| 10.30.403 relating to school |) | |
| finance and transportation |) | |

TO: All Concerned Persons

1. On June 3, 2004, the Superintendent of Public Instruction published MAR Notice No. 10-7-111 regarding the public hearing on the proposed amendment of the above-stated rules concerning school finance and transportation at page 1255 of the 2004 Montana Administrative Register, Issue Number 11.

2. The Superintendent of Public Instruction has amended the following rules exactly as proposed:

| | |
|--------------|--|
| ARM 10.7.101 | INTRODUCTION |
| 10.7.109 | BUS TRANSPORTATION REIMBURSEMENT - SCHOOL DISTRICT APPLICATION TR-1 FOR REGISTRATION OF SCHOOL BUSES AND STATE REIMBURSEMENT |
| 10.7.110 | STANDARDS FOR SCHOOL BUSES |
| 10.7.111 | QUALIFICATION OF BUS DRIVERS |
| 10.7.115 | SCHEDULE FOR BUS TRANSPORTATION |
| 10.7.118 | SCHOOL TRANSPORTATION FORMS LISTED BY FORM NUMBER |
| 10.10.202 | MONTHLY TRANSFERS TO EQUAL WARRANTS ISSUED PLUS UNREMITTED PAYROLL LIABILITIES |
| 10.10.309 | DISTRIBUTION AND REAPPROPRIATION OF COUNTYWIDE FUNDS |
| 10.10.316 | DISTRICT RETIREMENT FUND |
| 10.10.611 | ESTABLISHMENT OF INVESTMENT ACCOUNTS |
| 10.10.614 | PAYMENTS INTO AN INVESTMENT ACCOUNT |
| 10.15.101 | DEFINITIONS |
| 10.20.102 | CALCULATION OF AVERAGE NUMBER BELONGING (ANB) |
| 10.20.106 | STUDENTS PLACED IN EDUCATION PROGRAMS |
| 10.21.101B | CALCULATION OF STATEWIDE GTBA |
| 10.21.101C | NOTIFICATION OF MILL VALUES PER ANB AND GTB RATIOS |
| 10.21.101F | CALCULATION OF GENERAL FUND GTBA TO |

| | |
|------------|---|
| | QUALIFYING DISTRICTS |
| 10.21.101I | SCHOOL FACILITY ADVANCES AND REIMBURSEMENTS |
| 10.21.102A | GTBA ON GENERAL FUND AND RETIREMENT MILLS AND SCHOOL FACILITY ADVANCE AND REIMBURSEMENT |
| 10.21.102B | CALCULATION OF COUNTY MILL VALUES PER ANB |
| 10.21.102E | CALCULATION OF GTBA TO QUALIFYING COUNTIES |
| 10.22.102 | GENERAL FUND SPENDING LIMITS |
| 10.23.102 | FUNDING THE BASE BUDGET LEVY |
| 10.30.102 | APPROVAL CRITERIA |
| 10.30.403 | TRANSITION TO K-12 DISTRICTS |

3. The Superintendent of Public Instruction has amended the following rule with the following changes, stricken matter interlined, new matter underlined:

10.10.320 CASH AND BUDGET TRANSFERS BETWEEN SCHOOL DISTRICT FUNDS (1) through (2)(f) remain as proposed.

(g) transfers of any portion of the balance of a bus depreciation fund approved by the voters as provided in ~~(5)~~(4); and

(h) through (3) remain as proposed.

~~(4) Pursuant to 20 9 208, MCA, trustees shall not transfer cash into or out of the general fund except as otherwise specifically provided by law. Trustees shall not transfer cash from the compensated absences fund, which is funded using general fund transfers authorized by law, to any fund other than the general fund.~~

(5) through (7) remain as proposed but are renumbered (4) through (6).

~~(8) Pursuant to 20 10 145 and 20 10 146, MCA, state and county transportation aid is a reimbursement for expenditures paid from the district transportation fund and, as such, is not available for transfer to any other fund of the district.~~

(9) through (13) remain as proposed but are renumbered (7) through (11).

4. The Superintendent of Public Instruction has thoroughly considered the comments and testimony received on the proposed rules. The following is a summary of the comments received and the Superintendent's responses:

COMMENT 1: A comment was received questioning the bus reimbursement language in the proposed amendments and objected to one bus ridership count date being used.

RESPONSE 1: The commentor's opinion is noted, but is based on an incorrect assumption. SB 424 required that a bus be reimbursed for each mile traveled on an approved route for the actual days traveled, up to 180 school days. Ridership is no longer a factor in the reimbursement rate. This means pupils who ride a bus will not be counted during the year and the

ridership does not impact the amount of payment for a bus route in any way.

COMMENT 2: A comment was received regarding ARM 10.10.316 stating that "to the extent county taxpayers were originally overcharged, that overcharge should be refunded to the county taxpayers."

RESPONSE 2: The commentor's opinion is noted, but is based on an incorrect assumption. The method of repayment proposed in ARM 10.10.316 would refund the money to the county taxpayers. By repaying the retirement fund using other district money, the district would have funds available and would therefore reduce the amount charged in the next year to the county taxpayers. By lowering the next year's levy, the offset will appropriately apply the "refund" to the county taxpayers, who were originally overcharged.

COMMENT 3: A comment was received objecting to the definition of average daily attendance and one count date being used to determine funding. The commentor suggested waiting on the outcome of the state school funding lawsuit before amending the rule.

RESPONSE 3: The commentor's opinion is noted, but is based on the incorrect assumption that funding is based on the attendance on certain count dates. Funding is based on enrollment on count dates which are prescribed by state law. Absence on a count date does not affect funding, i.e., if a student is enrolled on the count date, he is counted even though he may be absent from school that day.

COMMENT 4: A comment was received regarding ARM 10.15.101 stating that the amended language was fine as long as it included individualized education programs (IEPs) for gifted and talented students in the same manner as special education students.

RESPONSE 4: The commentor's opinion is noted, however the term individualized education program (IEP) is defined by federal law to include students with disabilities as defined in the Individuals with Disabilities Education Act (IDEA). Administrative rules cannot expand on this definition to include gifted and talented students.

COMMENT 5: A comment was received questioning why a district cannot include students placed in private, nonsectarian day treatment programs for purposes of calculating ANB. The commentor was concerned that this amendment would discourage alternative schools.

RESPONSE 5: Day treatment is a special education related service. The state funding for students placed in private day treatment programs is contained in 20-5-324, MCA. This law

provides a year-end state payment to a district for a resident pupil placed by trustees in a private day treatment program. The law requires the payment be used by the district to pay tuition to the private facility for the day treatment services. Therefore, the student is omitted from ANB counts to avoid duplication of state funding. This rule does not limit the ability of public schools to provide alternative education programs to address individual student needs.

COMMENT 6: A comment was received questioning why students placed in regional detention centers are not counted as "enrolled" for ANB funding.

RESPONSE 6: State law places the responsibility for providing education at youth detention centers on the counties that run those centers. The law does not make a provision for state funding for students being educated in the youth detention facilities. This cannot be changed by administrative rule.

COMMENT 7: A comment was received in favor of the amendments to ARM 10.30.403.

RESPONSE 7: The State Superintendent thanks commentor for her comments.

COMMENT 8: Four written comments were received regarding ARM 10.10.320(4) and (8) including comments from the Montana School Boards Association and the Montana Rural Education Association objecting to the restriction on transfers from the district transportation and compensated absences funds.

RESPONSE 8: The State Superintendent thanks the commentors for their comments and has determined that this issue should be resolved by the legislature. The State Superintendent has deleted these amendments.

/s/ Linda McCulloch
Linda McCulloch
Superintendent of Public Instruction

/s/ Catherine K. Warhank
Catherine K. Warhank
Rule Reviewer

Certified to the Secretary of State July 12, 2004.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

| | |
|----------------------------------|---------------------|
| In the matter of the amendment) | CORRECTED NOTICE OF |
| of ARM 17.30.502, 17.30.615,) | AMENDMENT |
| 17.30.619, 17.30.651,) | |
| 17.30.653, 17.30.656,) | (WATER QUALITY) |
| 17.30.657, 17.30.702,) | |
| 17.30.715, 17.30.1001,) | |
| 17.30.1006, and 17.30.1007) | |
| pertaining to water use) | |
| classifications and department) | |
| Circular WQB-7) | |

TO: All Concerned Persons

1. On December 24, 2003, the Board of Environmental Review published MAR Notice No. 17-203 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2808, 2003 Montana Administrative Register, issue number 24. On April 8, 2004, the Board published the notice of amendment of the rules at page 725, 2004 Montana Administrative Register, issue number 7.

2. This corrected notice of amendment is being published to reflect an amendment to an internal reference cite in ARM 17.30.1006(5) that should have been proposed and adopted under MAR Notice No. 17-203 because of renumbering of sections. The amendment is shown below:

17.30.1006 CLASSIFICATIONS, BENEFICIAL USES, AND SPECIFIC STANDARDS FOR GROUND WATERS (1) through (4)(c) remain as adopted.

(5) For Class III or IV waters, where it can be demonstrated to the satisfaction of the department that the field hydraulic conductivity is less than 0.1 feet per day in an affected or potentially affected ground water zone, the nitrate nitrogen and nitrate plus nitrite nitrogen standards in (3)~~(e)~~(b)(i) and (4)~~(e)~~(b)(ii) do not apply, provided that all existing and anticipated uses of the ground waters are protected.

(6) and (7) remain as adopted.

3. The replacement pages for this corrected notice of amendment were filed with the Secretary of State's office on June 30, 2004.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

James M. Madden
JAMES M. MADDEN
Rule Reviewer

By: Joseph W. Russell
JOSEPH W. RUSSELL, M.P.H.,
Chairman

Certified to the Secretary of State, July 12, 2004.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment) CORRECTED NOTICE OF
of ARM 17.40.206, 17.40.212) AMENDMENT
and 17.40.213 pertaining to)
certification and fees for) (WATER AND WASTEWATER
water and wastewater operators) OPERATORS)

TO: All Concerned Persons

1. On March 11, 2004, the Department of Environmental Quality published MAR Notice No. 17-207 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 543, 2004 Montana Administrative Register, issue number 5. On May 6, 2004, the Department published the notice of amendment of the rules at page 1143, 2004 Montana Administrative Register, issue number 9.

2. This corrected notice of amendment is being published to reflect an amendment to an internal reference cite in ARM 17.40.213 that should have been proposed and adopted under MAR Notice No. 17-207 because of renumbering of sections. The amendment is shown below:

17.40.213 CONTINUING EDUCATION REQUIREMENTS (1) through (4) remain as adopted.

(5) Only an operator who fulfills the credit requirements before the end of each two-year period may renew a certificate. Except as provided in (1) and ~~(12)~~ (13), the certificate of an operator who does not fulfill the credit requirements expires on June 30 of the applicable two-year period and the person may receive a new certificate on submission of an application, payment of the appropriate application and examination fees, and passage of the appropriate examination.

(6) through (16) remain as adopted.

(17) The department shall reactivate the certificate temporarily inactivated under ~~(15)~~ (16) upon the return of the operator to the continental United States if the operator:

(a) and (b) remain as adopted.

(18) After a certificate has been reactivated under ~~(16)~~ (17), the operator shall meet the continuing education credit requirements for the current continuing education two-year period by the June 30 deadline or within 18 months of the operator's return, whichever is longer.

3. The replacement pages for this corrected notice of amendment were filed with the Secretary of State's office on June 30, 2004.

Reviewed by: DEPARTMENT OF ENVIRONMENTAL QUALITY

James M. Madden BY: Jan P. Sensibaugh
JAMES M. MADDEN JAN P. SENSIBAUGH, Director
Rule Reviewer

Certified to the Secretary of State, July 12, 2004.

BEFORE THE BOARD OF PARDONS AND PAROLE
DEPARTMENT OF CORRECTIONS
OF THE STATE OF MONTANA

In the matter of the) NOTICE OF ADOPTION
adoption of new rule I)
concerning training of board)
of pardons and parole)
members)

TO: All Concerned Persons

1. On May 20, 2004, the Board of Pardons and Parole published MAR Notice No. 20-7-31 regarding the proposed adoption of new rule I pertaining to training of board of pardons and parole members at page 1186 of the 2004 Montana Administrative Register, Issue Number 10.

2. The board has adopted new rule I (20.25.102) exactly as proposed.

3. No comments or testimony were received.

/s/ Kenneth D. Peterson
KENNETH D. PETERSON, Chair
Board of Pardons and Parole

/s/ Bill Slaughter
BILL SLAUGHTER, Director
Department of Corrections

/s/ Colleen A. White
Colleen A. White, Rule Reviewer
Department of Corrections

Certified to the Secretary of State July 12, 2004.

BEFORE THE BOARD OF FUNERAL SERVICE
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the) NOTICE OF AMENDMENT
amendment of ARM 24.147.302,) AND ADOPTION
funeral service definitions,)
ARM 24.147.401, fee schedule,)
ARM 24.147.1101, crematory facility) regulation, ARM 24.147.1114,)
licensure as a crematory operator,)
ARM 24.147.1115, licensure as a)
crematory technician,)
ARM 24.147.1304, perpetual care and) maintenance fund reports, and the)
adoption of NEW RULE I)
pertaining to audit expenses)

TO: All Concerned Persons

1. On April 8, 2004, the Board of Funeral Service published MAR Notice No. 24-147-30 regarding the public hearing on the proposed amendment and adoption of the above-stated rules at page 709 of the 2004 Montana Administrative Register, issue no 7.

2. On May 11, 2004, a public hearing on the proposed amendment and adoption of the above-stated rules was conducted in Helena. The Board of Funeral Service (Board) has thoroughly considered all of the comments made. A summary of the comments received (grouped by rule) and the Board's responses are as follows:

ARM 24.147.302 FUNERAL SERVICE DEFINITIONS

Comment 1: One commenter suggested that "or substances" be added after "any foreign object" and that "or processor" be added after "to the crematory retort."

Response 1: The Board agreed that "or substances" should be added after "any foreign object" and that "or related equipment" should be added after "to the crematory retort." The Board was desirous of leaving the definition of "hazardous implant" as broad as possible to accommodate yet unknown and undeveloped "objects" and "substances" that would fall within the definition.

ARM 24.147.1114 LICENSURE AS A CREMATORY OPERATOR

Comment 2: One commenter stated that he was unaware as to whether or not eliminating the requirement to obtain a letter of good moral character from a mortician was a good idea.

Response 2: The Board wishes to thank the commenter for his concern. The Board believes that an applicant should be able to submit letters from persons attesting to his/her good moral character regardless of their profession or occupation. The Board adopts the rule as proposed.

ARM 24.147.1304 PERPETUAL CARE AND MAINTENANCE FUND REPORTS

Comment 3: One commenter stated that she would like to have the rule define what circumstance would cause the Board to require an audit.

Response 3: The Board's responsibility is to protect the public health, safety and welfare. If the Board had reasonable cause to believe that there were financial or accounting irregularities with a perpetual care and maintenance fund it could order an audit. It is not appropriate to attempt to specify, with particularity, what the triggering events would be to move the Board to order an audit.

3. The Board has amended ARM 24.147.401, 24.147.1101, 24.147.1114, 24.147.1115, 24.147.1304 and NEW RULE I (ARM 24.147.1305) exactly as proposed.

4. After consideration of the comments, the Board has amended ARM 24.147.302 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

24.147.302 FUNERAL SERVICE DEFINITIONS (1) and (2) remain as proposed.

(3) "Hazardous implants" is defined as being any foreign object or substance that has been surgically or otherwise placed in the human body that may present a threat of injury to the operator or crematory retort or related equipment during the cremation process, or to the public.

(3) through (12) remain as proposed.

AUTH: 37-1-131, 37-19-202, MCA

IMP: 37-19-705, 37-19-827, 37-19-828, 37-19-829, MCA

BOARD OF FUNERAL SERVICE
JERED SCHERER, CHAIRMAN

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

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

Certified to the Secretary of State July 12, 2004

14-7/22/04

Montana Administrative Register

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

| | | |
|-------------------------------|---|----------------------|
| In the matter of the adoption |) | NOTICE OF ADOPTION, |
| of rules I and II and the |) | AMENDMENT AND REPEAL |
| amendment of ARM 37.83.805, |) | |
| 37.83.820, 37.86.5102, |) | |
| 37.86.5103 and 37.86.5104 and |) | |
| the repeal of 37.85.205 |) | |
| pertaining to the medicaid |) | |
| restricted card program and |) | |
| Passport to Health Program |) | |

TO: All Interested Persons

1. On May 20, 2004, the Department of Public Health and Human Services published MAR Notice No. 37-331 pertaining to the public hearing on the proposed adoption, amendment and repeal of the above-stated rules relating to the medicaid restricted card program and Passport to Health Program, at page 1201 of the 2004 Montana Administrative Register, issue number 10.

2. The Department has adopted rules I [37.86.5303] and II [37.86.5306] as proposed.

3. The Department has amended ARM 37.83.805, 37.83.820, 37.86.5102, 37.86.5103 and 37.86.5104 and repealed ARM 37.85.205 as proposed.

4. No comments or testimony were received.

Ellie Parker
Rule Reviewer

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

Certified to the Secretary of State July 12, 2004.

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

In the matter of the adoption)
of Rules I through VIII and)
the amendment of ARM)
37.88.101, 37.88.1101 and)
37.88.1106 pertaining to)
reimbursement of inpatient)
psychiatric hospitals)

CORRECTED NOTICE OF
AMENDMENT

TO: All Interested Persons

1. On December 11, 2003, the Department of Public Health and Human Services published MAR Notice No. 37-309 regarding the proposed adoption and amendment of the above-stated rules at page 2725 of the 2003 Montana Administrative Register, issue number 23, and on June 3, 2004, published notice of the adoption and amendment on page 1328 of the 2004 Montana Administrative Register, issue number 11.

2. This corrected notice is being filed to correct errors in ARM 37.88.101.

3. The Department discovered some inconsistencies between the text of ARM 37.88.101 in the notice of adoption published June 3, 2004 on page 1328 of the 2004 Montana Administrative Register, issue number 11 (MAR Notice No. 37-309) and the text of ARM 37.88.101 as amended in the notice of notice of adoption published on December 24, 2003 on page 2886 of the 2003 Montana Administrative Register, issue number 24.

Due to an oversight, the amended text did not appear in the MAR Notice No. 37-309 adoption notice. This notice is intended to correct the text of ARM 37.88.101, so that it reflects amendments from both MAR Notices. In this notice, ARM 37.88.101(4) through (4)(c)(ii) are added, as adopted pursuant to MAR Notice No. 37-304. ARM 37.88.101(4) through (9) have been renumbered (5) through (10), respectively.

Amendments pertaining to adult mental health services were proposed in a notice of proposal published October 30, 2003 as MAR Notice No. 37-304 on page 2395 of the 2003 Montana Administrative Register, issue number 20. The proposed amendments would have affected ARM 37.88.101 and other rules.

Amendments pertaining to reimbursement of inpatient hospitals were proposed in a notice of proposal published December 11, 2003 as MAR Notice No. 37-309 on page 2725 of the 2003 Montana Administrative Register, issue number 23. The proposed amendments also would have affected ARM 37.88.101.

A notice of adoption of the amendments proposed in MAR Notice No. 37-304 was published on December 24, 2003 on page 2886 of the 2003 Montana Administrative Register, issue number 24.

A notice of adoption of the amendments proposed in MAR Notice No. 37-309 was published June 3, 2004 on page 1328 of the 2004 Montana Administrative Register, issue number 11. It amended ARM 37.88.101 but it did not include the amendments adopted in MAR Notice No. 37-304.

4. The rule is corrected as follows:

37.88.101 MEDICAID MENTAL HEALTH SERVICES, AUTHORIZATION REQUIREMENTS (1) through (3) remain as amended.

(4) Adult intensive outpatient therapy services may be medically necessary for a person with safety and security needs who has demonstrated the ability and likelihood of benefit from continued outpatient therapy. The person must meet the requirements of (4)(a) or (b). The person must also meet the requirements of (4)(c). The person has:

(a) a DSM-IV diagnosis with a severity specifier of moderate or severe of mood disorder (293.83, 295.70, 296.2x, 296.3x, 296.4x, 296.5x, 296.6x, 296.7, 296.80, 296.89, 296.90, 396.40); or

(b) a DSM-IV diagnosis borderline personality disorder (301.83), personality disorder (NOS) (301.9) with prominent features of 301.83; and

(c) ongoing difficulties in functioning because of mental illness for a period of at least six months or for an obviously predictable period over six months, as indicated by:

(i) dysregulation of emotion, cognition, behavior and interpersonal relationships;

(ii) recurrent suicidal, parasuicidal, serious self-damaging impulsive behaviors, or serious danger to others;

(iii) a history of treatment at a higher level of care, and

(iv) evidence that lower levels of care are inadequate to meet the needs of the client.

~~(4)~~ (5) The department may waive a requirement for prior authorization when the provider can document that:

(a) there was a clinical reason why the request for prior authorization could not be made at the required time; or

(b) a timely request for prior authorization was not possible because of a failure or malfunction of equipment that prevented the transmittal of the request at the required time.

~~(5)~~ (6) The prior authorization requirement shall not be waived except as provided in this rule.

~~(6)~~ (7) Under no circumstances may a waiver under ~~(4)~~ (5) be granted more than 30 days after the initial date of service.

~~(7)~~ (8) Review of authorization requests by the department or its designee will be made with consideration of the clinical management guidelines (2003). A copy of the clinical management guidelines (2003) can be obtained from the department by a request in writing to the Department of Public Health and Human

Services, Addictive and Mental Disorders Division, 555 Fuller, P.O. Box 202905, Helena, MT 59620-2905 or can be viewed on the department's website at www.dphhs.state.mt.us.

~~(8)~~ (9) The department may review the medical necessity of services or items at any time either before or after payment in accordance with the provisions of ARM 37.85.410. If the department determines that services or items were not medically necessary or otherwise in compliance with applicable requirements, the department may deny payment or may recover any overpayment in accordance with applicable requirements.

~~(9)~~ (10) The department or its designee may require providers to report outcome data or measures regarding mental health services, as determined in consultation with providers and consumers.

AUTH: Sec. 53-6-113, MCA

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

5. All other rule changes adopted remain as adopted.

Dawn Sliva
Rule Reviewer

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

Certified to the Secretary of State July 12, 2004.

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

In the matter of adoption) NOTICE OF ADOPTION
of new Rules I through XIII,)
pertaining to transportation of)
high-level radioactive waste and)
transuranic waste)

TO: All Concerned Persons

1. On February 26, 2004, the Department of Public Service Regulation, Public Service Commission (PSC) published MAR Notice No. 38-2-176 regarding a public hearing on the proposed adoption of new rules I through XIII, concerning transportation of high-level radioactive waste and transuranic waste, at page 407 of the 2004 Montana Administrative Register, issue number 4.

2. The PSC has adopted new Rules I through XIII, ARM 38.9.101 through 38.9.113 exactly as proposed:

NEW RULE I (38.9.101) PURPOSE, SCOPE, AND LIMITATIONS

AUTH: 10-3-1309, MCA
IMP: 10-3-1302, 10-3-1309, MCA

NEW RULE II (38.9.102) DEFINITIONS

AUTH: 10-3-1309, MCA
IMP: 10-3-1309, MCA

NEW RULE III (38.9.103) PRIMARY CONTACT POINT

AUTH: 10-3-1309, MCA
IMP: 10-3-1309, MCA

NEW RULE IV (38.9.104) RESPONSIBILITIES OF OWNER, ORIGINATING SHIPPER, AND TRANSPORTER

AUTH: 10-3-1309, MCA
IMP: 10-3-1305, 10-3-1306, 10-3-1309, MCA

NEW RULE V (38.9.105) RESPONSIBILITIES OF DISASTER AND EMERGENCY SERVICES DIVISION

AUTH: 10-3-1309, MCA
IMP: 10-3-1306, 10-3-1309, MCA

NEW RULE VI (38.9.106) RESPONSIBILITIES OF DEPARTMENT OF TRANSPORTATION

AUTH: 10-3-1309, MCA
IMP: 10-3-1306, 10-3-1307, 10-3-1309, MCA

NEW RULE VII (38.9.107) RESPONSIBILITIES OF HIGHWAY PATROL

AUTH: 10-3-1309, MCA
IMP: 10-3-1308, 10-3-1309, MCA

NEW RULE VIII (38.9.108) RESPONSIBILITIES OF PUBLIC SERVICE COMMISSION

AUTH: 10-3-1309, MCA
IMP: 10-3-1309, MCA

NEW RULE IX (38.9.109) STATE AUTHORITIES: NOTIFICATION BY DISASTER AND EMERGENCY SERVICES DIVISION

AUTH: 10-3-1309, MCA
IMP: 10-3-1306, 10-3-1309, MCA

NEW RULE X (38.9.110) LOCAL AUTHORITIES: NOTIFICATION BY DISASTER AND EMERGENCY SERVICES DIVISION

AUTH: 10-3-1309, MCA
IMP: 10-3-1309, MCA

NEW RULE XI (38.9.111) RESPONSIBILITIES OF LOCAL AUTHORITIES

AUTH: 10-3-1309, MCA
IMP: 10-3-1309, MCA

NEW RULE XII (38.9.112) PROCESS AND QUALIFICATIONS FOR LOCAL GOVERNMENTS AND LOCAL EMERGENCY RESPONSE ENTITIES TO RECEIVE TRAINING

AUTH: 10-3-1309, MCA
IMP: 10-3-1309, MCA

NEW RULE XIII (38.9.113) COLLECTION OF FEES, ACCOUNTING, AND DISBURSEMENT OF FUNDS

AUTH: 10-3-1309, MCA
IMP: 10-3-1304, 10-3-1306, 10-3-1309, MCA

3. The following comment was received and appears with the PSC's response:

COMMENT: Burlington Northern/Santa Fe (BNSF) and Montana Rail Link (MRL) provided information and comments. BNSF suggests the rulemaking is redundant as the federal government, Department of Energy, totally governs the subject matter. BNSF also commented there are vagaries in how the proposed rules will be implemented. MRL commented that the rules are ambiguous.

RESPONSE: The PSC appreciates the information and comments. Redundancy, if any, should be directed to the legislation implemented by the proposed rules. The PSC does not agree the proposed rules present vagaries or are ambiguous. The PSC is willing to work with any concerned person regarding the meaning of the rules and how the rules will be administered.

/s/ Bob Rowe
Bob Rowe, Chairman
Public Service Commission

/s/ Robin A. McHugh
Reviewed By: Robin McHugh

CERTIFIED TO THE SECRETARY OF STATE July 12, 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 Subject | 1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued. |
| Statute Number and Department | 2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers. |

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through 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.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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BOARD APPOINTEES AND VACANCIES

Section 2-15-108, MCA, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of 2-15-108, MCA, is that the Secretary of State publish monthly in the *Montana Administrative Register* a list of appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments effective in June 2004, appear. Vacancies scheduled to appear from August 1, 2004, through October 1, 2004, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of July 2, 2004.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES FROM JUNE 2004

| <u>Appointee</u> | <u>Appointed by</u> | <u>Succeeds</u> | <u>Appointment/End Date</u> |
|---|--|-----------------|-----------------------------|
| Board of Dentistry (Labor and Industry) | | | |
| Dr. Robert Jestrab | Governor | McCarthy | 6/7/2004 |
| Havre | | | 3/29/2009 |
| Qualifications (if required): | dentist | | |
| Ms. Deana Standley | Governor | reappointed | 6/7/2004 |
| Great Falls | | | 3/29/2009 |
| Qualifications (if required): | dental hygienist | | |
| Board of Pardons and Parole (Governor) | | | |
| Ms. Margaret Hall | Governor | Wilson | 6/17/2004 |
| Pablo | | | 1/2/2006 |
| Qualifications (if required): | Indian culture knowledges | | |
| Commission on Practice of the Supreme Court (Justice) | | | |
| Mr. Milton O. Wordahl | elected | not listed | 6/8/2004 |
| Great Falls | | | 6/8/2008 |
| Qualifications (if required): | elected | | |
| Governor's Council on Worklife Wellness (Public Health and Human Services) | | | |
| Ms. Carol Strasheim | Governor | Littlelight | 6/2/2004 |
| Billings | | | 12/1/2005 |
| Qualifications (if required): | representative of Indian Health Service | | |
| Peace Officers Standards and Training Advisory Council (Justice) | | | |
| Sheriff John Grainger | Governor | Troutwine | 6/15/2004 |
| Wolf Point | | | 2/9/2006 |
| Qualifications (if required): | representative of the Montana Sheriff and Peace Officers Association | | |

BOARD AND COUNCIL APPOINTEES FROM JUNE 2004

| <u>Appointee</u> | <u>Appointed by</u> | <u>Succeeds</u> | <u>Appointment/End Date</u> |
|--|---------------------|-----------------|-----------------------------|
| Public Safety Communications Council (Administration) | | | |
| Mr. John Blackler Helena | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): representative of state government | | | |
| Mr. Harold Blattie Helena | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): representative of county government | | | |
| Mr. Jeff Brandt Helena | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): designee of the Director of the Department of Administration | | | |
| Mr. Tim Burton Helena | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): representative of local government | | | |
| Mr. Jim DeTienne Helena | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): representative of the emergency medical services community | | | |
| Ms. Jane Ellis Missoula | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): representative of the 9-1-1 community | | | |
| Mr. Larry Fasbender Helena | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): designee of the Attorney General | | | |

BOARD AND COUNCIL APPOINTEES FROM JUNE 2004

| <u>Appointee</u> | <u>Appointed by</u> | <u>Succeeds</u> | <u>Appointment/End Date</u> |
|---|---------------------|-----------------|-----------------------------|
| Public Safety Communications Council (Administration) cont. | | | |
| Mr. George Feiss Helena | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): representative of private utilities participating as private entities | | | |
| Mr. George Groesbeck Butte | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): representative of citizens at large | | | |
| Mr. William Jameson Bozeman | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): representative of citizens at large | | | |
| Chief Robert Jones Great Falls | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): representative of Montana Association of Chiefs of Police | | | |
| Mr. Doug King Billings | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): representative of federal government | | | |
| Mr. Dwight MacKay Billings | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): representative of federal government | | | |
| Mr. Chuck Maxwell Billings | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): representative of law enforcement | | | |
| Mr. Ken Mergenthaler East Helena | Governor | not listed | 6/14/2004 6/14/2006 |
| Qualifications (if required): representative of volunteer fire protection services | | | |

BOARD AND COUNCIL APPOINTEES FROM JUNE 2004

| <u>Appointee</u> | <u>Appointed by</u> | <u>Succeeds</u> | <u>Appointment/End Date</u> |
|--|---------------------|-----------------|-----------------------------|
| Public Safety Communications Council (Administration) cont. | | | |
| Colonel Stan Putnam | Governor | not listed | 6/14/2004 |
| Helena | | | 6/14/2006 |
| Qualifications (if required): representative of state government | | | |
| Mr. Larry Wetsit | Governor | not listed | 6/14/2004 |
| Scobey | | | 6/14/2006 |
| Qualifications (if required): representative of the Tribes | | | |
| Mr. Chuck Winn | Governor | not listed | 6/14/2004 |
| Bozeman | | | 6/14/2006 |
| Qualifications (if required): representative of fire protection services | | | |
| Western Interstate Commission for Higher Education (Education) | | | |
| Mr. Ed Jasmin | Governor | Kerins | 6/19/2004 |
| Bigfork | | | 6/19/2008 |
| Qualifications (if required): public member | | | |

VACANCIES ON BOARDS AND COUNCILS -- AUGUST 1, 2004 through OCTOBER 31, 2004

| <u>Board/current position holder</u> | <u>Appointed by</u> | <u>Term end</u> |
|--|---------------------|-----------------|
| Alternative Health Care Board (Governor) Dr. Margaret Beeson, Billings Qualifications (if required): Naturopath | Governor | 9/1/2004 |
| Board of Medical Examiners (Commerce) Dr. Beth Thompson, Missoula Qualifications (if required): doctor of medicine | Governor | 9/1/2004 |
| Board of Outfitters (Governor) Mr. Jack Billingsley, Glasgow Qualifications (if required): fishing and hunting outfitter | Governor | 10/1/2004 |
| Board of Private Security Patrol Officers and Investigators (Labor and Industry) Mr. Gary Gray, Great Falls Qualifications (if required): representative of a contract security company | Governor | 8/1/2004 |
| Mr. Charles Geary, Belt Qualifications (if required): representative of a proprietary security organization | Governor | 8/1/2004 |
| Board of Psychologists (Commerce) Dr. Paul Silverman, Missoula Qualifications (if required): licensed psychologist engaged in the teaching of psychology | Governor | 9/1/2004 |
| Dr. George Watson, Bozeman Qualifications (if required): psychologist in private practice | Governor | 9/1/2004 |
| Board of Veterans' Affairs (Military Affairs) Mr. Donald Kettner, Glendive Qualifications (if required): veteran | Governor | 8/1/2004 |

VACANCIES ON BOARDS AND COUNCILS -- AUGUST 1, 2004 through OCTOBER 31, 2004

| <u>Board/current position holder</u> | <u>Appointed by</u> | <u>Term end</u> |
|--|---------------------|-----------------|
| Burial Preservation Board (Administration) | | |
| Mr. Mickey Nelson, Helena Qualifications (if required): representative of the Montana Coroners Association | Governor | 8/22/2004 |
| Mr. Duncan Standing Rock, Sr., Box Elder Qualifications (if required): representative of the Chippewa-Cree Tribe | Governor | 8/22/2004 |
| Mr. George Reed, Sr., Crow Agency Qualifications (if required): representative of the Crow Tribe | Governor | 8/22/2004 |
| Ms. Sherri Deaver, Billings Qualifications (if required): representative of the Archeological Society | Governor | 8/22/2004 |
| Mr. Ben Speak Thunder, Harlem Qualifications (if required): representative of the Fort Belknap Tribe | Governor | 8/22/2004 |
| Mr. Ryan C. Rusche, Wolf Point Qualifications (if required): attorney | Governor | 8/22/2004 |
| Family Support Services Advisory Council (Public Health and Human Services) | | |
| Sen. Mike Cooney, Helena Qualifications (if required): representative of public awareness and education organizations | Governor | 10/1/2004 |
| Ms. Sylvia Danforth, Miles City Qualifications (if required): Provider/Part C Agency | Governor | 10/1/2004 |
| Ms. Elizabeth J. Harter, Glasgow Qualifications (if required): agency rep/foster care | Governor | 10/1/2004 |
| Mr. Ted Maloney, Missoula Qualifications (if required): representative at large | Governor | 10/1/2004 |

VACANCIES ON BOARDS AND COUNCILS -- AUGUST 1, 2004 through OCTOBER 31, 2004

| <u>Board/current position holder</u> | <u>Appointed by</u> | <u>Term end</u> |
|--|---------------------|-----------------|
| Family Support Services Advisory Council (Public Health and Human Services) cont. | | |
| Mr. Dan McCarthy, Helena Qualifications (if required): SEA Agency representative/preschool specialist | Governor | 10/1/2004 |
| Ms. Sandi Marisdotter, Helena Qualifications (if required): Provider/Part C Agency | Governor | 10/1/2004 |
| Ms. Cristin Volinkaty, Missoula Qualifications (if required): Provider/Part C Agency | Governor | 10/1/2004 |
| Ms. Barbara Stefanic, Laurel Qualifications (if required): LEA representative for special education cooperatives | Governor | 10/1/2004 |
| Ms. Jackie Jandt, Helena Qualifications (if required): agency rep/mental health | Governor | 10/1/2004 |
| Sen. Gerald Pease, Lodge Grass Qualifications (if required): representative of Parents Region III and the legislature | Governor | 10/1/2004 |
| Ms. Lynda Korth, Helena Qualifications (if required): agency rep/adoption programs | Governor | 10/1/2004 |
| Rep. Mary Anne Guggenheim, Helena Qualifications (if required): representative of medical/health care services | Governor | 10/1/2004 |
| Ms. Patti Russ, Helena Qualifications (if required): agency rep/child care | Governor | 10/1/2004 |
| Ms. Ann Marie Johnson, Missoula Qualifications (if required): representative of Headstart | Governor | 10/1/2004 |
| Ms. Lucy Hart-Paulson, Missoula Qualifications (if required): representative of therapists | Governor | 10/1/2004 |

VACANCIES ON BOARDS AND COUNCILS -- AUGUST 1, 2004 through OCTOBER 31, 2004

| <u>Board/current position holder</u> | <u>Appointed by</u> | <u>Term end</u> |
|---|---------------------|-----------------|
| Family Support Services Advisory Council (Public Health and Human Services) cont. | | |
| Ms. Sandy McGennis, Great Falls | Governor | 10/1/2004 |
| Qualifications (if required): Provider/Montana School for the Deaf and Blind | | |
| Ms. Denise King, Helena | Governor | 10/1/2004 |
| Qualifications (if required): agency rep/EPSTD/Medicaid | | |
| Ms. Phyllis Astheimer, Bozeman | Governor | 10/1/2004 |
| Qualifications (if required): family support specialist | | |
| Ms. Barbara Smith, Helena | Governor | 10/1/2004 |
| Qualifications (if required): agency representative from Children's Special Health Services | | |
| Mr. Brian Lenhardt, Havre | Governor | 10/1/2004 |
| Qualifications (if required): representative of Parents Region II | | |
| Ms. Rene Lenhardt, Havre | Governor | 10/1/2004 |
| Qualifications (if required): representative of Parents Region II | | |
| Ms. Novelene Martin, Miles City | Governor | 10/1/2004 |
| Qualifications (if required): field services specialist | | |
| Ms. Kelly Johnson, Frenchtown | Governor | 10/1/2004 |
| Qualifications (if required): representative of Parents at Large | | |
| Mr. Ron Herman, Helena | Governor | 10/1/2004 |
| Qualifications (if required): representative of a state agency and the state insurance commissioner | | |
| Ms. Susie Morrison, Missoula | Governor | 10/1/2004 |
| Qualifications (if required): representative of Personnel Preparation for Higher Education | | |

VACANCIES ON BOARDS AND COUNCILS -- AUGUST 1, 2004 through OCTOBER 31, 2004

| <u>Board/current position holder</u> | <u>Appointed by</u> | <u>Term end</u> |
|--|---------------------|-----------------|
| Family Support Services Advisory Council (Public Health and Human Services) cont. | | |
| Ms. Krista Bodvig, Glendive Qualifications (if required): representative of parents in Region 1 | Governor | 10/1/2004 |
| Ms. Micah Mitchell, Helena Qualifications (if required): parent representative in Region IV | Governor | 10/1/2004 |
| Mr. Matthew Rotar, Helena Qualifications (if required): parent representative in Region IV | Governor | 10/1/2004 |
| Ms. Diana Colgrove, Eureka Qualifications (if required): parent representative in Region V | Governor | 10/1/2004 |
| Ms. Becky Grey Bear, Wolf Point Qualifications (if required): parent representative from Region I | Governor | 10/1/2004 |
| Ms. Mary Huston, Richland Qualifications (if required): parent representative from Region 1 | Governor | 10/1/2004 |
| Historical Records Advisory Council (Historical Society) | | |
| Ms. Samantha K. Pierson, Libby Qualifications (if required): public member | Governor | 9/24/2004 |
| Ms. Donna McCrea, Missoula Qualifications (if required): public member | Governor | 9/24/2004 |
| Ms. Ellen Crain, Butte Qualifications (if required): public member | Governor | 9/24/2004 |
| Ms. Jodi L. Allison-Bunnell, Missoula Qualifications (if required): public member | Governor | 9/24/2004 |

VACANCIES ON BOARDS AND COUNCILS -- AUGUST 1, 2004 through OCTOBER 31, 2004

| <u>Board/current position holder</u> | <u>Appointed by</u> | <u>Term end</u> |
|---|---------------------|-----------------|
| Historical Records Advisory Council (Historical Society) cont. Ms. Judy Ellinghausen, Great Falls Qualifications (if required): public member | Governor | 9/24/2004 |
| Ms. Lory Morrow, Helena Qualifications (if required): public member | Governor | 9/24/2004 |
| Ms. Molly Miller, Helena Qualifications (if required): state archivist | Governor | 9/24/2004 |
| Ms. Peggy Gow, Deer Lodge Qualifications (if required): public member | Governor | 9/24/2004 |
| Homeland Security Task Force (Military Affairs) Mr. Dan McGowan, Helena Qualifications (if required): DES Administrator and Chairman | Governor | 10/1/2004 |
| K-12 Public School Renewal Commission (None) Rep. Carol C. Juneau, Browning Qualifications (if required): representing American Indian education | Governor | 9/15/2004 |
| Mr. John McNeil, Savage Qualifications (if required): representing rural schools | Governor | 9/15/2004 |
| Mr. Steve Gibson, Helena Qualifications (if required): representing youth correctional facilities | Governor | 9/15/2004 |
| Rep. Pat Wagman, Livingston Qualifications (if required): representing Montana at large | Governor | 9/15/2004 |
| Ms. Carmen McSpadden, Bozeman Qualifications (if required): representing school boards of trustees | Governor | 9/15/2004 |

VACANCIES ON BOARDS AND COUNCILS -- AUGUST 1, 2004 through OCTOBER 31, 2004

| <u>Board/current position holder</u> | <u>Appointed by</u> | <u>Term end</u> |
|--|---------------------|-----------------|
| K-12 Public School Renewal Commission (None) cont. | | |
| Mr. Eric Feaver, Helena Qualifications (if required): representing teachers | Governor | 9/15/2004 |
| Mr. Darrell Rud, Helena Qualifications (if required): representing school administrators | Governor | 9/15/2004 |
| Mr. Tim Lund, Hamilton Qualifications (if required): representing the business community | Governor | 9/15/2004 |
| Mr. Scott Seilstad, Denton Qualifications (if required): representing taxpayers | Governor | 9/15/2004 |
| Mr. Ron Laferriere, Belgrade Qualifications (if required): representing special needs education | Governor | 9/15/2004 |
| Mr. Steve Johnson, Bozeman Qualifications (if required): representing school business officials | Governor | 9/15/2004 |
| Mr. Jules Waber, Great Falls Qualifications (if required): representing students | Governor | 9/15/2004 |
| Mr. Bruce Messinger, Helena Qualifications (if required): representing large schools | Governor | 9/15/2004 |
| Ms. Cathy Day, Great Falls Qualifications (if required): representing parents | Governor | 9/15/2004 |
| Mr. Keith Allen, East Helena Qualifications (if required): representing organized labor | Governor | 9/15/2004 |
| Mr. Mike Nicosia, Columbia Falls Qualifications (if required): representing education groups | Governor | 9/15/2004 |

VACANCIES ON BOARDS AND COUNCILS -- AUGUST 1, 2004 through OCTOBER 31, 2004

| <u>Board/current position holder</u> | <u>Appointed by</u> | <u>Term end</u> |
|--|---------------------|-----------------|
| K-12 Public School Renewal Commission (None) cont. | | |
| Ms. Lorri Coulter, Brusett Qualifications (if required): representing Montana at large | Governor | 9/15/2004 |
| Mr. Robert Murray, Poplar Qualifications (if required): representing Montana at large | Governor | 9/15/2004 |
| Lewis and Clark Bicentennial Commission (Historical Society) | | |
| Mr. Hal J. Stearns, Missoula Qualifications (if required): public member | Governor | 10/1/2004 |
| Mr. Wyman McDonald, Helena Qualifications (if required): representative of a Montana Indian tribe | Governor | 10/1/2004 |
| Ms. Jeanette W. Rasmussen, Choteau Qualifications (if required): public member | Governor | 10/1/2004 |
| Montana Organic Commodity Advisory Council (Agriculture) | | |
| Ms. Nancy Matheson, Helena Qualifications (if required): producer | Director | 9/4/2004 |
| Mr. John Hoffland, Helena Qualifications (if required): consumer | Director | 9/4/2004 |
| Mr. Mikel Lund, Scobey Qualifications (if required): producer | Director | 9/4/2004 |
| Montana State Historic Preservation Review Board (Historical Society) | | |
| Mr. Steve Aaberg, Lewistown Qualifications (if required): archeologist | Governor | 10/1/2004 |
| Mr. Paul Filicetti, Missoula Qualifications (if required): historical architect | Governor | 10/1/2004 |

VACANCIES ON BOARDS AND COUNCILS -- AUGUST 1, 2004 through OCTOBER 31, 2004

| <u>Board/current position holder</u> | <u>Appointed by</u> | <u>Term end</u> |
|---|---------------------|-----------------|
| Montana State Historic Preservation Review Board (Historical Society) cont. Mr. Rafael Chacon, Lolo Qualifications (if required): architectural historian | Governor | 10/1/2004 |
| Water and Wastewater Operators Advisory Council (Environmental Quality) Ms. Joanne Hall Emrick, Kalispell Qualifications (if required): representative of a municipality | Governor | 10/16/2004 |
| Wheat and Barley Committee (Agriculture) Ms. Janice Mattson, Chester Qualifications (if required): Democrat representing District III | Governor | 8/20/2004 |
| Mr. Donald L. Fast, Glasgow Qualifications (if required): Republican representing District II | Governor | 8/20/2004 |