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 The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

In the matter of the amendment of ARM 17.56.502 and 17.56.507 and the adoption of new rules I and II pertaining to underground storage tanks release reporting and corrective action	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION (UNDERGROUND STORAGE TANKS)

TO: All Concerned Persons

1. On November 29, 2004, at 10:00 a.m., the Department of Environmental Quality will hold a public hearing in Room 112, 1100 North Last Chance Gulch, Helena, Montana, to consider the proposed amendment and adoption 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., November 19, 2004, to advise us of the nature of the accommodation that you need. Please contact Helenann Cannon, Department of Environmental Quality, P.O. Box 200902, Helena, Montana 59620-0902; phone (406) 841-5002; fax (406) 841-5050; or email hcannon@state.mt.us.

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

17.56.502 REPORTING OF SUSPECTED RELEASES (1) Owners and operators, any person who installs or removes an UST, or who performs subsurface investigations for the presence of regulated substances, and any person who performs a tank tightness or line tightness test pursuant to ARM 17.56.407 or 17.56.408, must report suspected releases to a person within the remediation division of the department and the implementing agency or to the 24-hour disaster and emergency services officer available at telephone number (406) 841-3911 within 24 hours of discovery of the existence of any of the following conditions:

(a) through (d) remain the same.

(e) the presence of ~~product~~ liquid in the tank secondary containment system;

(f) remains the same.

(g) an unexplained presence of water in the tank system;

(h) through (2) remain the same.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-309, 75-11-505, MCA

REASON: The proposed change at ARM 17.56.502(1)(e) is necessary because the presence of any liquid, not just product, in the tank secondary containment system may indicate that water is leaking into the tank system. Any evidence that an

underground storage tank system is not liquid tight must be investigated as a suspected release in order to rule out the possibility of the occurrence of a release from the tank system.

The proposed change at ARM 17.56.502(1)(g) requires that the unexplained presence of water in any part of the tank system be reported as a suspected release. Under the existing rule, owners and operators, and other persons required to report releases, are required to report a suspected release within 24 hours of discovery of the unexplained presence of water in the tank. The change is necessary to include potential sources of leaks, other than the tank, within the tank system. Other components of the underground storage tank system that may be the source of a release, if not liquid tight, include secondary containment equipment, sumps, and piping.

17.56.507 ADOPTION BY REFERENCE (1) For purposes of this subchapter, the department ~~hereby~~ adopts and incorporates by reference:

(a) Department Circular WQB-7, "Montana Numeric Water Quality Standards" (January ~~2002~~ 2004);

(b) remains the same.

(c) U.S. Environmental Protection Agency, "Region 9 Preliminary Remediation Goals" (~~November 22, 2000~~ February 10, 2003); and

(d) through (3) remain the same.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-309, 75-11-505, MCA

REASON: The amendments to ARM 17.56.507 update two documents referred to in subchapter 5 and incorporated by reference in this rule. The two referenced documents are Department Circular WQB-7 and the USEPA Region 9 Preliminary Remediation Goals. The most recent versions of those documents are referenced in this amendment to the rule.

Department Circular WQB-7, "Montana Numeric Water Quality Standards" (January 2004) (herein "WQB-7") contains numeric water quality standards and trigger values for surface and ground waters in the state of Montana. The numeric water quality standards and trigger values in WQB-7 are designed to protect present and future beneficial uses of state waters. WQB-7 is updated regularly as additional information becomes available.

None of the concentrations listed in the current January 2004 version of WQB-7 were changed from the January 2002 version. However, it is necessary to adopt the latest version because prior versions of the document are no longer in effect and are not readily available to the public.

Contaminant concentrations listed in the U.S. Environmental Protection Agency's "Region 9 Preliminary Remediation Goals" (February 10, 2003) (herein "PRG") are used to evaluate whether listed contaminants pose an unacceptable risk to public health given generic assumptions about exposure scenarios. Owners and operators of petroleum storage tanks and the Department must

evaluate the potential risk a release poses to public health. Some chemical levels listed in this document were changed from the February 22, 2000, version. Many of the updated levels are constituents of petroleum products, and are typically present in petroleum storage tank releases. It is necessary to adopt the latest version of the PRG so owners and operators can identify accurate risks from petroleum storage tank releases, based upon the latest toxicology data. Also, now that EPA has adopted the updated 2003 version of this document, the older 2000 version is not readily available to the public.

4. The proposed new rules provide as follows:

NEW RULE I RELEASE CATEGORIZATION (1) The department shall categorize all releases from USTs and PSTs regulated under this chapter as active, transferred, resolved, or ground water management releases.

(2) Releases that do not meet the criteria set forth in (3), (4), or (7) must be categorized as active.

(3) The department may categorize a release as transferred if another state or federal program assumes jurisdiction over the facility and all releases and threatened releases of hazardous or deleterious substances from USTs or PSTs regulated under this chapter are to be addressed by that program at the facility. The department shall notify the owner or operator before categorizing the release as transferred. The notice must state which state or federal program has jurisdiction over the release.

(4) The department may categorize a release as resolved if the department has determined that all cleanup requirements have been met and that conditions at the site ensure present and long-term protection of human health, safety and the environment. The following requirements must also be met before a release may be categorized as resolved:

(a) documented investigations, conducted in accordance with ARM 17.56.604, identify the extent or absence of contamination in the soil, ground water, surface water, and other environmental media relevant to the release;

(b) risks to human health, safety and the environment from residual contamination at the site have been evaluated using methods listed in (4)(b)(i) or (ii) and the evaluation indicates that unacceptable risks do not exist and are not expected to exist in the future. The department considers a total hazard index that does not exceed 1.0 for noncarcinogenic risks, and a total cancer risk that does not exceed 1×10^{-5}, to be an acceptable risk level. Owners or operators, or other persons may, with department approval, use either of the following methods to evaluate risks from a release:

(i) Montana Tier 1 Risk-based Correction Action Guidance for Petroleum Releases (RBCA) for evaluation of risks to human health, safety and the environment associated with surface and subsurface soil and ground water contamination; or

(ii) a site-specific risk assessment method approved by the department for evaluation of risks to human health, safety

and the environment associated with contamination, or likely contamination, of surface water or aquatic sediments, or for evaluation of risks associated with contaminant vapors, that demonstrates to the department's satisfaction that current and potential future exposure pathways are incomplete;

(c) all appropriate corrective actions associated with the release and required by the department, including compliance monitoring and confirmatory sampling, have been completed;

(d) all free product has been removed to the maximum extent practicable; and

(e) all applicable environmental laws associated with the release have been met. These applicable requirements may include, but are not limited to, air quality, drinking water and monitoring well requirements, solid waste management requirements, hazardous waste management requirements, national pollutant discharge elimination system (NPDES) and Montana pollutant discharge elimination system (MPDES) requirements, underground injection controls and standards, UST requirements, noxious weed control, ground water and surface water quality standards, nondegradation requirements, storm water requirements, and requirements for the protection of endangered species, historic sites, wetlands and floodplains.

(5) The department may recategorize a resolved release as active if the department receives information with which it determines that further corrective action is necessary. Such information may include, but is not limited to, changes in land use or site conditions that may increase the potential for adverse impacts to human health, safety or to the environment from residual contamination. The department shall notify the owner or operator of the department's determination to recategorize a resolved release as active.

(6) If a release is categorized as resolved, the department shall send a letter to the owner or operator that:

(a) states that, based on information available, no further corrective action will be required at that time;

(b) requires that all monitoring wells, piezometers, and other ground water sampling points either be abandoned or maintained by the owner or operator in accordance with applicable rules and requirements;

(c) describes the nature, extent, concentration, and location of any residual contamination;

(d) states the reasons why the department believes the release does not pose a present or future risk to human health, safety or to the environment; and

(e) states that the department reserves the right to conduct or to require further corrective action if a new release occurs or if the department receives new or different information related to the release.

(7) The department may categorize a release as ground water management if:

(a) site conditions satisfy all criteria listed under (4)(a) and (d);

(b) risk evaluations conducted in accordance with (4)(b) demonstrate that there are no unacceptable risks to human

health, safety, ecological receptors, surface water, or aquatic sediments from exposure or likely exposure to contamination;

(c) all cleanup actions required by the department have been completed except for continued monitoring required under (8);

(d) ground water quality parameters exceed:

(i) a water quality standard or nondegradation requirement;

(ii) a standard established as a drinking water maximum contaminant level published in 40 CFR Part 141; or

(iii) a risk-based screening level published in RBCA;

(e) ground water performance monitoring and natural attenuation data collected in accordance with U.S. Environmental Protection Agency Office of Solid Waste and Emergency Response Directive 9200.4-17P indicate that the extent, magnitude, and concentration of the dissolved contaminant plume have been stable or decreasing under fluctuating hydrogeologic conditions for a period of monitoring, not less than five years, which is determined by the department to be sufficient to detect unacceptable risks to human health, safety or to the environment;

(f) the source area contamination has been eliminated, controlled, or reduced to the maximum extent practicable, in accordance with U.S. Environmental Protection Agency Office of Solid Waste and Emergency Response Directive 9200.4-17P, and any remaining source area contamination presents a low long-term threat to human health, safety or to the environment;

(g) documented investigations demonstrate that taking additional or different cleanup action is not feasible and will not meet site corrective action objectives within a reasonable timeframe as compared to monitored natural attenuation; and

(h) institutional controls are in place to ensure that identified risks to human health and safety are reduced to acceptable levels. For the purposes of this rule, institutional controls must consist of:

(i) deed restrictions or restrictive covenants that run with the land and that have been approved by the department and duly recorded;

(ii) a designated controlled ground water area as provided for in 85-2-506, MCA;

(iii) environmental control easements created and approved in accordance with 76-7-101 through 76-7-213, MCA; or

(iv) another method approved by the department that has been shown to ensure that risk to human health has been reduced to acceptable levels.

(8) If the department categorizes a release as ground water management, the owner or operator shall monitor ground water in accordance with a monitoring program developed for the site and approved by the department.

(a) The monitoring program must specify the location, frequency, and type of sampling required to evaluate site conditions and confirm that residual contamination at the site is either decreasing in extent and concentration or remaining stable.

(b) The frequency of monitoring must not be less often than one monitoring event every three years.

(c) Monitoring must continue until the corrective action objectives for the site are achieved and the release may be categorized as resolved in accordance with (4).

(d) In developing a ground water monitoring program, the department shall consider:

(i) the nature, extent, and concentration of the contaminant plume;

(ii) the locations of human health and environmental receptors relative to the predicted migration path of the plume;

(iii) historical or reasonably anticipated land use in the area; and

(iv) any other factors that the department determines may affect the risk from residual contamination to human health, safety, or the environment.

(9) If the department categorizes a release as ground water management, the department shall send a letter to the owner or operator that:

(a) states that contamination from the release will be addressed by monitored natural attenuation;

(b) contains the information in (6)(b), (c) and (e);

(c) states the reasons why the department believes that the release does not pose an unacceptable present or future risk to human health, safety, or ecological receptors;

(d) includes a monitoring program that complies with (8);

(e) includes a schedule for review of any institutional controls;

(f) states that the release is not categorized as resolved and documents all conditions that preclude the site from being categorized as resolved; and

(g) states that the department may require further remedial investigation or corrective action to determine whether the requirements in (4) are met if the owner, operator or department proposes to recategorize the release as resolved.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-309, 75-11-505, MCA

REASON: Proposed new rule I requires the department to maintain four categories of petroleum releases. These categories are: active, transferred, resolved and ground water management releases. The proposed rule describes the criteria for assigning releases to the categories, and requires the Department to provide notice to owners and operators of the status of the release. The proposed rule is necessary to clarify, for the public and for owners and operators, the Department's procedures and requirements for categorizing releases and for providing notice about the status of corrective action at a site and the potential for future action. Maintaining the four categories is also necessary to assist the department with workload management and site prioritization.

Active releases under New Rule I(2) include all petroleum releases from underground storage tanks (USTs) and petroleum

storage tanks (PSTs) that have not been transferred to another jurisdiction under New Rule I(3), categorized as resolved under New Rule I(4) or categorized as ground water management under New Rule I(7). The resolved release category, at New Rule I(4), includes all releases for which cleanup requirements have been met. The transferred release category at New Rule I(3), includes releases for which another state or federal program has assumed primary responsibility.

Section (5) of proposed New Rule I allows the department to recategorize a resolved release as active if the department receives information upon which it determines that further corrective action is necessary. Such information may include changes in land use or site conditions that increase the potential for adverse impacts to human health, safety or to the environment from residual contamination. This rule amendment is necessary to describe when the department would recategorize a release as active that had been categorized as resolved.

Section (6) of New Rule I requires the department to send a letter to the owner or operator of the UST or PST with a release at the time the release is categorized as resolved. Proposed (6) also describes the contents of the letter.

The groundwater management category, at New Rule I(7), includes all petroleum releases from USTs and PSTs that have residual contamination that will be addressed through monitored natural attenuation. Ground water monitoring is required to evaluate site conditions and compliance with water quality standards, nondegredation requirements, drinking water standards or other applicable standards. Proposed (7) describes the criteria for placing a release in the ground water management category.

Proposed (8) requires owners and operators to monitor ground water contamination plumes at releases categorized as ground water management no less frequently than once every three years in accordance with a department approved monitoring plan. The Department has determined that three years between ground water monitoring events is a reasonable minimum monitoring frequency because monitoring wells left in place currently require maintenance and monitoring in accordance with regulations at ARM 36.21.801 through 36.21.810 that require monitoring every three years.

Proposed (9) requires the Department to send the owner or operator a letter when a release is categorized as ground water management. Proposed (9) also describes the contents of the letter.

NEW RULE II ADOPTION BY REFERENCE (1) For purposes of this subchapter, the department adopts and incorporates by reference:

(a) Department Circular WQB-7, "Montana Numeric Water Quality Standards" (January 2004);

(b) Drinking Water Maximum Contaminant Levels published at 40 CFR Part 141 (2001);

(c) Montana Tier 1 Risk-based Corrective Action Guidance for Petroleum Releases (RBCA) (October 2003); and

(d) U.S. Environmental Protection Agency Office of Solid Waste and Emergency Response Directive 9200.4-17P, "Use of Monitored Natural Attenuation at Superfund, RCRA Corrective Action, and Underground Storage Tank Sites" (April 1999).

(2) All references in this subchapter to the documents incorporated by reference in this rule are to the edition specified in this rule.

(3) Copies of the documents incorporated by reference in this rule may be obtained from the Department of Environmental Quality, Remediation Division, P.O. Box 200901, Helena, MT 59620-0901.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-309, 75-11-505, MCA

REASON: Proposed New Rule II will incorporate by reference all documents referred to in subchapter 6. Having a separate adoption by reference rule will save the department from having to update numerous references whenever there is a new edition of one of the referenced documents.

Department Circular WQB-7, "Montana Numeric Water Quality Standards" (January 2004) is used as a regulatory standard for cleanup levels of listed contaminants in state waters. It is necessary to incorporate WQB-7 by reference because a petroleum storage tank release cannot be resolved until contamination in state waters is reduced to levels below those listed in this document, and the goals of protecting human health, safety and the environment are met.

Drinking Water Maximum Contaminant Levels published at 40 CFR Part 141 (2001) are used in this subchapter as regulatory standards for cleanup levels of listed contaminants in water used for human consumption. It is necessary to incorporate this document by reference because a petroleum storage tank release cannot be resolved until contamination in drinking water sources is reduced to levels below those listed in this document.

Risk-based screening levels listed in Montana Tier 1 Risk-based Corrective Action Guidance for Petroleum Releases (RBCA) (October 2003) are used to evaluate whether concentrations of listed contaminants pose an unacceptable risk to human health, safety or the environment given generic assumptions about the contaminated media and exposure scenarios. Incorporation of this document is necessary for owners and operators of petroleum storage tanks and the department to evaluate the potential risk a release poses to human health, safety or the environment without conducting a complete site-specific risk assessment.

U.S. Environmental Protection Agency Office of Solid Waste and Emergency Response Directive 9200.4-17P, "Use of Monitored Natural Attenuation at Superfund, RCRA Corrective Action, and Underground Storage Tank Sites" (April 1999) contains instructions for the use of monitored natural attenuation as a remedial option for petroleum storage tank releases. It is necessary to incorporate this document because it describes protocols and defines sampling procedures that owners and

operators need to use when employing natural attenuation at a petroleum storage tank release.

5. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Kirsten Bowers, Department of Environmental Quality, P.O. Box 200902, Helena, Montana 59620-0902, phone (406) 841-5021, fax (406) 444-5050, or email kbowers@state.mt.us and must be received no later than 5:00 p.m., December 2, 2004. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. Kirsten Bowers, attorney for the Department, has been designated to preside over and conduct the hearing.

7. The Department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list 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: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to Elois Johnson, Paralegal, Legal Unit, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to ejohnson@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.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL QUALITY

James M. Madden
JAMES M. MADDEN
Rule Reviewer

BY: *Jan P. Sensibaugh*
JAN P. SENSIBAUGH, Director

Certified to the Secretary of State, October 25, 2004.

BEFORE THE MONTANA TRANSPORTATION COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through VII pertaining to the Montana scenic-historic byways program	))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On November 29, 2004, at 9:00 a.m., a public hearing will be held in room 123, auditorium of the Montana Department of Transportation building at 2701 Prospect Avenue, Helena, Montana, to consider the proposed adoption 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 November 19, 2004, to advise us of the nature of the accommodation that you need. Please contact Sandra Straehl, Department of Transportation, P.O. Box 201001, Helena, MT 59620-1001; telephone: (406) 444-7692; TDD (406) 444-7696; fax: (406) 444-7671; or e-mail sstraehl@state.mt.us.

3. The proposed new rules provide as follows:

RULE I DEFINITIONS For the purpose of this subchapter, the following definitions apply:

(1) "Advisory council" means the technical oversight council composed of no more than 11 members who must have expertise in one or more of the subjects of tourism, visual assessment, Montana history, resource protection, economic development, transportation, or planning.

(2) "Commission" means the transportation commission provided for in 2-15-2502, MCA.

(3) "Department" means the department of transportation provided for in Title 2, chapter 15, part 25, MCA.

(4) "Local government" means a county, a consolidated government, an incorporated city or town, a school district, or a special district.

(5) "Scenic-historic byway" means a public road or segment of a public road that has been designated as a scenic-historic byway by the commission, as provided in 60-2-601, MCA.

AUTH: 60-2-602, MCA
IMP: 60-2-601 and 60-2-602, MCA

RULE II ADVISORY COUNCIL (1) The commission shall appoint an advisory council for the scenic-historic byways program.

(2) The advisory council shall:

(a) assist the department and the commission in designing the program;

(b) review applications for nominating roads to the scenic-historic byways program; and

(c) recommend to the commission roads that should be included in or deleted from the scenic-historic program.

AUTH: 60-2-602, MCA
IMP: 60-2-601 and 60-2-602, MCA

RULE III MONTANA SCENIC-HISTORIC BYWAYS (1) Montana's scenic-historic byways program will have two tiers of designation:

(a) Improved and paved roads that accommodate two-wheel drive vehicles would be designated as Montana byways.

(b) Less improved roads that may require four-wheel drive or high clearance vehicles would be designated as Montana backways.

AUTH: 60-2-602, MCA
IMP: 60-2-601 and 60-2-602, MCA

RULE IV SCENIC-HISTORIC BYWAY NOMINATION (1) In order for a roadway to be nominated as a scenic-historic byway, local government must prepare an application that follows the rules and procedures provided by the Montana department of transportation by the date specified for submittal each year.

(2) The application must adhere to the requirements for scenic-historic byway designations.

AUTH: 60-2-602, MCA
IMP: 60-2-601 and 60-2-602, MCA

RULE V REQUIREMENTS OF SCENIC-HISTORIC BYWAY DESIGNATION (1) The commission may designate roads to be included as part of the programs and may add or delete roads from the program.

(2) The commission may not designate a road as a scenic-historic byway without the concurrence of the affected local governments and the agencies responsible for maintenance and operation of the road.

(3) All land abutting the scenic-historic byway must be either in public or tribal ownership.

(4) The application shall contain an explanation of the manner in which the byway meets one or more of the intrinsic qualities. In addition, in the application the local government shall set forth, to the extent possible, how the scenic-historic byway designation will:

(a) enhance the experience of the traveling public;

(b) stimulate or allow for economic development and new marketing strategies; and

(c) preserve intrinsic resources for the benefit of future generations.

(5) The proposed scenic-historic byway must possess at least one of the following intrinsic qualities:

(a) scenic;
(b) natural;
(c) historic;
(d) cultural;

(e) archeological; or
(f) recreational.
(6) The proposed scenic-historic byway must be an existing road that can safely accommodate expected traffic volumes.
(7) The proposed designation must have concurrence and approval of the application from local governments and agencies with jurisdiction of the road and adjacent to the road.
(8) The application shall contain a conceptual plan. This conceptual plan for the corridor shall describe the process in which a corridor plan is to be developed. The components to be included in the conceptual plan are how the nominating organization proposes to:
(a) enhance and protect the scenic-historic byway;
(b) develop essential services; and
(c) promote and market the byway on the local and regional level. A corridor management plan may be substituted for the conceptual plan.
(9) A corridor management plan must be developed or in development within two years of a scenic-historic byway designation. A scenic-historic byway will not be signed or indicated on the state tourism map until the corridor management plan is complete. The corridor management plan shall:
(a) serve as a visioning tool to provide direction for enhancing and marketing the corridor, but not as:
(i) a land management document;
(ii) zoning tool or mandate;
(iii) highway improvement scoping or prioritization document; or
(iv) highway management document;
(b) accommodate commerce and commercial vehicles;
(c) maintain a safe and efficient level of highway services;
(d) preclude the locality having adopted the corridor management plan from establishing goals or commitments outside the locality's jurisdiction; and
(e) accommodate all jurisdictions affected or to be affected.
(10) A scenic-historic byway should be as continuous as possible; however, all government entities shall have the right to require that a portion of a proposed scenic-historic byway abutting in their jurisdiction be excluded from designation.
(11) Each scenic-historic byway must have a management group to provide long-term oversight and marketing for the road.
(12) The proposed route must be recommended by the advisory council for final approval by the commission.

AUTH: 60-2-602, MCA
IMP: 60-2-601 and 60-2-602, MCA

RULE VI NOMINATION OF MONTANA STATE BYWAY DESIGNATIONS FOR NATIONAL DESIGNATION (1) Once a road is designated and signed as a Montana scenic-historic byway, local government officials can nominate the road for designation as a national scenic byway or all-American road by completing the requirements for nomination provided by the United States department of

transportation.

(2) National designation applications must be submitted to the Montana scenic-historic byways coordinator to be approved by the Montana transportation commission and forwarded to the federal highway administration.

AUTH: 60-2-602, MCA
IMP: 60-2-601 and 60-2-602, MCA

RULE VII REMOVAL OF MONTANA STATE BYWAY DESIGNATION

(1) The two circumstances that allow for a scenic-historic byway to be removed from designation are:

(a) voluntary removal when local government no longer wants its designation; and

(b) nonconformance removal when the scenic-historic byway loses the intrinsic values specified in original nomination for designation.

(2) Removal of scenic-historic byway designation requires:

(a) local governments and stakeholders to follow steps and procedures provided by the Montana department of transportation; and

(b) a recommendation of removal by the advisory council for final approval by the Montana transportation commission.

AUTH: 60-2-602, MCA
IMP: 60-2-601 and 60-2-602, MCA

4. The proposed new rules are necessary to provide guidance and overall direction concerning the Montana scenic-historic byways program. The rules allow for a quality-oriented program that encourages the development of long-term benefits in planning, management, and commitment to scenic-historic byways. New Rule I contains information and descriptions of the potential parties involved with scenic-historic byways. New Rule II defines the advisory council's role and duties. New Rule III provides for the development of a program that allows for alternative opportunities to explore scenic drives. New Rule IV encourages proactive local government involvement with a proposed scenic-historic byway. New Rules V and VI provide the requirements for designation of scenic-historic routes, locally and nationally, that will aid in promoting and enhancing the experiences of the traveling public in Montana and possibly stimulate economic development. New Rule VII aids in maintenance of the scenic-historic byway integrity by allowing routes to be dropped voluntarily or when the route no longer meets designation requirements. All of the new rules will assist the transportation department with providing a quality transportation system.

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 Sandra Straehl, Department of Transportation, P.O. Box 201001, Helena, MT 59620-1001; telephone: (406) 444-7692; TDD (406) 444-7696; fax: (406) 444-7671; or e-mail sstraehl@state.mt.us and must be received no later than December 3, 2004.

6. Timothy W. Reardon 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, apply and have been fulfilled.

MONTANA TRANSPORTATION COMMISSION

By: /s/ Shiell Anderson
Shiell Anderson, Chairperson

By: /s/ Lyle Manley
Lyle Manley, Rule Reviewer

Certified to the Secretary of State October 25, 2004.

BEFORE THE BOARD OF RADIOLOGIC TECHNOLOGISTS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment of ARM 8.56.602C, permit examinations, and the proposed adoption of NEW RULES I through IV pertaining to radiologist assistants, scope of practice, supervision, and adoption of a code of ethics	)))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On December 7, 2004, at 10:00 a.m., a public hearing will be held in room 471 of the Park Avenue Building, 301 South Park, Helena, Montana to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Radiologic Technologists no later than 5:00 p.m. December 1, 2004, to advise us of the nature of the accommodation that you need. Please contact Helena Lee, Board of Radiologic Technologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2385; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; or e-mail dlibsdrts@state.mt.us.

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

8.56.602C PERMIT EXAMINATIONS (1) The ~~general portion of the permit~~ American registry of radiologic technologists (ARRT) limited scope of practice in radiology core examination contains questions common to all areas of specified x-ray procedures and includes the following topics: basic radiobiology, radiation protection, imaging equipment, x-ray physics, radiographic technique and principles of radiographic exposure, darkroom procedures and ~~inter-relationship~~ interrelationship of the radiographic chain. All limited permit applicants shall pass the ~~general portion of the permit~~ ARRT limited permit core examination.

(a) In addition to the ~~general portion~~ core examination, 40-hour course graduates shall complete ~~an~~ a module examination for each specified x-ray procedure the applicant desires to be permitted to perform. The ~~specified examinations~~ module examinations shall include questions in anatomy, physiology, pathology and x-ray technique common to the ~~specified procedure~~ individual module. Limited permits

are issued in Montana for chest, extremities, skull/sinuses, and spine modules.

~~(2) Applicants for examination may request to take the examination in the board office any day of the working week. This request must be in writing and must be received in the board office at least 10 days prior to the requested examination date.~~

~~(3) Examination results will be mailed out to each examinee by the board office within 10 days after the administration of the examination.~~

~~(4) Applicants may review their examination papers with administrative staff for the board at the board office or at an approved site designated by the board.~~

~~(5) A non-refundable fee will be assessed for the examination. After failing the examination, the applicant will be required to submit another examination fee.~~

~~(6)~~ (2) Applicants for a ~~limited~~ 40-hour course permit ~~(40-hour course)~~ who fail ~~an examination twice must~~ any portion of the limited permit examination (core or individual modules) on two attempts shall ~~retake that~~ be required to successfully complete additional coursework in the failed ~~portion~~ area(s) of the ~~formal x-ray training~~ examination before being allowed admission to retake the failed portion(s) of the examination a third ~~examination~~ time. ~~Upon completion of the additional course work in the failed area, the applicant must file a new application accompanied by the appropriate fees, with the board office.~~

(a) remains the same.

~~(7)~~ (3) Student permit ~~applications~~ applicants (two semesters or its equivalent in an ARRT recognized radiologic technologist program) who ~~have failed the general examination twice must re-take the general examination plus all six category exams.~~ fail the core examination on two attempts shall retake the core examination and all four individual module examinations.

~~(8)~~ (4) Temporary permit applicants (ARRT recognized program graduates) who have failed the ARRT radiologic technologist exam three times ~~must~~ shall take the ~~general exam plus all six category exams.~~ ARRT limited permit core examination and all four individual module examinations.

~~(9)~~ (5) ~~A passing score of 75% is required on each of the general and specified sections of the examination. Retakes of any portion or section of an examination shall require a 75% passing score.~~ A minimum passing score of 70% is required on the limited permit core examination. The passing score for each individual module examination is 50% or greater when the module is combined with the core examination.

(10) remains the same but is renumbered (6).

AUTH: 37-1-131, 37-14-202, MCA
IMP: 37-14-306, MCA

REASON: The Board has determined it is reasonably necessary to amend this rule to clarify the examination requirements for

limited permit applicants. The ARRT limited scope of practice in radiology examination is a nationally recognized entry-level limited permit examination. The Board has determined to discontinue writing its own examination for limited permit applicants and to now require the ARRT examination for limited permit licensure of Montana radiologic technologists. The Board is proposing to clarify the requirements for retaking the limited permit examination upon failure of the core or module examinations. The Board finds that requiring additional study in any failed topic areas prior to retesting is the best way to ensure that qualified applicants are becoming licensed to practice. The Board determined it is reasonable and necessary to reduce the acceptable minimum passing score on the limited permit core examination from 75% to 70%. As provided in the July 2002 update of the ARRT Evaluation of the Passing Score for the Limited Scope Examination, the mean score for the 2002 ARRT limited permit core examination was 66%. The Board determined the ARRT core examination is sufficiently difficult that continuing with the current 75% passing score would result in the needless failure of a majority of limited permit examinees. Subsequently, the Board concluded that requiring a minimum passing score of 70% on the limited permit core examination and 50% on the individual permit module examinations is sufficient to ensure qualified limited permit applicants for licensure. The authority citations are being amended to accurately reflect the statutory sources of the Board's rulemaking authority for this rule.

4. The proposed NEW RULES provide as follows:

NEW RULE I QUALIFICATIONS (1) A radiologist assistant (RA) may also be referred to as a radiology practitioner assistant (RPA) pursuant to 37-14-313, MCA.

(2) To become licensed as a RA/RPA, an applicant shall:

(a) graduate from a radiologist assistant educational program recognized by:

(i) the American college of radiology (ACR);

(ii) the American registry of radiologic technologists (ARRT); or

(iii) the American society of radiologic technologists (ASRT);

(b) be certified as a RA/RPA by ARRT when that certification becomes available. In lieu of or prior to ARRT certification, the board will accept certification from the certification board for radiologist practitioner assistant (CBRPA) or eligibility to sit for the CBRPA certification examination;

(c) maintain an active ARRT registration status in radiography;

(d) submit a copy of current certification in advanced cardiac life support (ACLS) skills;

(e) furnish validation of participation in continuing education activities with a minimum of 24 hours of continuing education credits annually;

(f) have a current Montana radiologic technologist (RT) license; and

(g) submit to the board a letter from the supervising radiologist certifying completion of a clinical preceptorship.

AUTH: 37-1-131, 37-14-202, MCA
IMP: 37-14-313, MCA

REASON: The Board has determined it is reasonably necessary to adopt New Rule I to establish qualifications for licensure as radiologist assistants/radiologist practitioner assistants (RA/RPA) and to further implement Chapter 307, Laws of 2003 (House Bill 501). House Bill 501 required that the Board provide for the qualified licensure of RA/RPAs. Section three of the bill required the Board to establish rules defining the scope of practice and functions of the RA/RPA which are to be consistent with the guidelines adopted by the American College of Radiology (ACR), the American Society of Radiologic Technologists (ASRT) and the American Registry of Radiologic Technologists (ARRT). The Board determined that the qualifications as set forth in New Rule I are necessary to ensure that only qualified applicants are being licensed with the RA/RPA credential and to protect the public from potential harm from unqualified RA/RPAs.

NEW RULE II SCOPE OF PRACTICE - SPECIFIC DUTIES AND FUNCTIONS (1) The RA/RPA shall evaluate the day's schedule of procedures with the supervising radiologist or the radiologist designate and determine where the RA/RPA's skills will be best utilized.

(2) After demonstrating competency, the RA/RPA under the general supervision of the supervising radiologist or the radiologist designate, may perform the following procedures:

(a) fluoroscopic procedures (static and dynamic);

(b) arthrograms, pursuant to 37-14-301, MCA; and

(c) peripheral venograms, pursuant to 37-14-301, MCA.

(3) The RA/RPA may make initial observations of diagnostic images and forward them to the supervising radiologist.

(4) The RA/RPA shall assess and evaluate the psychological and physiological responsiveness of each patient.

(5) The RA/RPA shall participate in patient management, including acquisition of additional imaging for completion of the exam and record documentation in medical records.

(6) The RA/RPA shall administer intravenous contrast media or glucagon under the supervision of a radiologist or the attending physician pursuant to 37-14-301, MCA.

AUTH: 37-1-131, 37-14-202, 37-14-313, MCA
IMP: 37-14-102, 37-14-301, 37-14-313, MCA

REASON: The Board has determined this New Rule II is reasonably necessary to comply with and implement legislative provisions expressed by passage of Section 3, Chapter 307, Laws of 2003 (House Bill 501), that require the Board to specify the duties and functions of licensed RA/RPAs. The proposed duties and functions are consistent with guidelines already established by the American College of Radiology (ACR), the American Society of Radiologic Technologists (ASRT), and the American Registry of Radiologic Technologists (ARRT) as mandated by House Bill 501. Adoption of New Rule II provides the scope of practice for the RA/RPA as an "advanced-level licensed radiologic technologist who works under the general supervision of a radiologist to enhance patient care by assisting the radiologist in the diagnostic imaging environment" per 37-14-102, MCA. The radiologist assistant shall not interpret radiological examinations nor transmit observations to anyone other than to the RA/RPA's supervising radiologist.

NEW RULE III SCOPE OF REQUIRED SUPERVISION (1) A RA/RPA may only perform diagnostic procedures under the general supervision of a licensed radiologist. In order for a RA/RPA to be considered under the general supervision of a radiologist, the RA/RPA must:

(a) meet with the supervising radiologist on a regularly scheduled basis of not less than once every week;

(b) provide the supervising radiologist with copies of records from procedures the RA/RPA has performed;

(c) seek input from the supervising radiologist regarding any issues relating to the RA/RPA’s performance of diagnostic procedures; and

(d) have a means of contacting the radiologist in order to obtain a timely consultation.

(i) Consultations with the supervising radiologist are considered timely if the radiologist replies to the RA/RPA within eight hours of the RA/RPA’s request for consultation.

(2) Consultations with the supervising radiologist shall be conducted:

(a) in person;

(b) by telephone;

(c) by interactive videoconferencing; or

(d) by electronic means of communication, such as e-mail.

(3) The RA/RPA shall not perform any diagnostic procedure for which a consultation is needed or appropriate, until such time as consultation has occurred and the RA/RPA has been advised or directed by the radiologist how to proceed.

AUTH: 37-1-131, 37-14-202, 37-14-313, MCA
IMP: 37-14-102, 37-14-313, MCA

REASON: The Board has determined that New Rule III is reasonably necessary to comply with legislative intent as expressed by passage of Chapter 307, Laws of 2003 (House Bill 501). The Board proposes New Rule III to further delineate and describe the general supervision requirements for the licensed RA/RPA in Montana. The proposed scope of required supervision is consistent with the supervision requirements of the ACR, ASRT, and ARRT, as required in House Bill 501.

NEW RULE IV CODE OF ETHICS (1) The board adopts and incorporates by reference the most recent code of ethics adopted by the ARRT which became effective in July 2003.

(2) Copies of the ARRT code of ethics may be obtained on the ARRT website at www.arrt.org or from the office of the board at 301 S. Park Avenue, Helena, or P.O. Box 200513, Helena, Montana 59620-0513.

(3) The RA/RPA shall adhere to and abide by the ARRT code of ethics.

(4) In addition to the ARRT code of ethics, the conduct of the RA/RPA shall be governed by the following additional ethical and professional principles. The RA/RPA shall:

(a) adhere to all state and federal laws governing informed consent concerning patient health care;

(b) seek consultation with the supervising radiologist, other health providers, or qualified professionals having special skills, knowledge or expertise whenever the welfare of the patient will be safeguarded or advanced by such consultation;

(c) provide only those services for which the RA/RPA is qualified via education, demonstration of clinical competency, and as allowed by rule;

(d) not misrepresent in any manner, either directly or indirectly, the RA/RPA's clinical skills, educational experience, professional credentials, identity, or ability and capability to provide radiology health care services;

(e) place service before material gain; and

(f) carefully guard against conflicts of professional interest.

AUTH: 37-1-131, 37-14-202, MCA
IMP: 37-14-202, 37-14-313, MCA

REASON: The Board has determined that adoption of the ARRT code of ethics in New Rule IV is reasonable and necessary as Section 3, Chapter 307, Laws of 2003 (House Bill 501) requires the Board to adopt rules for the allowable duties and scope of practice for RA/RPAs that are consistent with the guidelines of ARRT, ACR and ASRT. The ARRT code of ethics is uniformly interpreted and enforced by these three entities. Adoption of a code of ethics will provide an ethical framework for the practice of RA/RPAs that will also assist the Board in preserving public health and safety by promoting the quality practice of radiologist assistants.

5. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Radiologic Technologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdrts@state.mt.us, and must be received no later than 5:00 p.m., December 15, 2004.

6. An electronic copy of this Notice of Public Hearing is available through the Department and Board's site on the World Wide Web at http://www.discoveringmontana.com/dli/rts. The Department strives to make the electronic copy of this Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its 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.

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

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

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

BOARD OF RADIOLOGIC TECHNOLOGISTS
JOHN ROSENBAUM, CHAIRPERSON

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

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

Certified to the Secretary of State October 25, 2004

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

In the matter of the adoption of new rules I and II and amendment of ARM 37.85.414 pertaining to medicaid provider requirements	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT

TO: All Interested Persons

1. On December 1, 2004, at 2:00 p.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed adoption and amendment of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on November 22, 2004, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

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

RULE I INTERPRETATION OF RULES (1) The department will interpret its rules by giving meaning to the plain language of the rules. Any department interpretation of a rule to provide clarification of an ambiguity must be provided in writing before the service is provided to the medicaid recipient or the provider may not rely on it.

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

RULE II LIMITATIONS ON CODING ADVICE (1) Employees of the department, or of any contractor or agent of the department, may give a provider general information as to what codes are available for billing under medicaid for a particular service or item being provided. However, the provider retains responsibility for selecting and submitting the proper code to describe the service or item provided. If an employee of the department or of a contractor or agent of the department suggests, recommends, or directs the provider to use a particular code from the choices available or gives other specific coding advice, the provider may not rely on such advice unless the advice is provided in writing before the provider

submits a claim for the service or item.

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

3. The rule as proposed to be amended provides as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.85.414 MAINTENANCE OF RECORDS AND AUDITING (1) All providers of service must maintain records which fully demonstrate the extent, nature and medical necessity of services and items provided to Montana medicaid recipients which support the fee charged or payment sought for the services and items, and which demonstrate compliance with all applicable requirements. All supportive documentation, including but not limited to orders, prescriptions, certificates of medical necessity, referrals and medical records, must be signed and dated by the physician or other licensed practitioner acting within the scope of the practitioner's practice before the claim is submitted to medicaid for reimbursement. When reimbursement is based on the length of time spent in providing the service, the documentation must specify the time treatment began and ended. These records must be retained for a period of at least ~~6~~ six years and ~~3~~ three months from the date on which the service was rendered or until any dispute or litigation concerning the services is resolved, whichever is later.

(a) In maintaining financial records, providers shall employ generally accepted accounting methods. Generally accepted accounting methods are those approved by the national association of certified public accountants.

(b) The department shall have access to all records so maintained and retained regardless of a provider's continued participation in the program.

(c) In the event of a change of ownership, the original owner must retain all required records unless an alternative method of providing for the retention of records has been established in writing and approved by the department.

(d) If a provider cannot provide medical records to prove that a service billed to medicaid was provided and meets all requirements for reimbursement, the service will be deemed not to be provided and reimbursable due to the lack of documentation, and the department will recover all reimbursement paid to the provider. This recovery is permissible regardless of whether the documentation was destroyed or lost due to an event such as, but not limited to, misplaced records, a data processing failure, fire, earthquake, flood, or other natural disaster. The provider must have a backup system in place to allow recovery of documentation destroyed or lost due to such events or any other cause.

(e) These record keeping requirements are the minimum requirements for records to support all medicaid claims. In addition to complying with these minimum requirements, providers must also comply with any specific record keeping requirements

applicable to the type of service the provider furnishes, which may be more restrictive than the minimum requirements of this rule.

(2) In addition to the recipient's medical records, any medicaid information regarding a recipient or applicant is confidential and shall be used solely for purposes related to the administration of the Montana medicaid program. This information shall not be divulged by the provider or his employees, to any person, group, or organization other than those listed below or a department representative without the written consent of the recipient or applicant. In addition, the provider must comply with the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 USC 1320d et seq., and the Uniform Health Care Information Act, 50-16-501 et seq., MCA.

(3) The department, the designated review organization, the legislative auditor, ~~the department of public health and human services,~~ the department of revenue, the medicaid fraud control unit, and their legal representatives shall have the right to inspect or evaluate the quality, appropriateness, and timeliness of services performed by providers, and to inspect and audit all records required by this rule.

(a) Upon the department's request for records, the provider shall submit a true and accurate copy of each record as it existed at the time the provider submitted its claim to medicaid for the service being reviewed.

~~(a)~~ (b) Refusal to permit inspection, evaluation or audit of services shall result in the imposition of provider sanctions in accordance with the rules of the department.

(4) The provisions of this rule specifying the length of time for which records must be retained shall not be construed as a limitation on the period in which the department may recover overpayments or impose sanctions.

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

4. The Montana Medicaid program is a joint federal-state program which pays medical expenses for eligible low income individuals. In order to be reimbursed for services provided to Medicaid recipients, medical providers must comply with requirements set forth in ARM Title 37, chapter 85, subchapter 4. ARM 37.85.414 specifies record keeping requirements for Medicaid providers. Section (1) of the rule currently provides that providers must maintain records which indicate the nature and extent of services provided, show that the services were medically necessary, and document that the payment sought for the service is proper. The rule further states that the provider must keep these records for at least six years and three months after the date on which the service was provided and states that the Department has the right to inspect and audit all records required by the rule. If the Department conducts a postpayment review of a provider's claims and the provider is unable to produce records which support the services

for which the claim was made, the Department is entitled to recover the amount paid for the service pursuant to ARM 37.85.406(9) and (10).

The Department now proposes to amend ARM 37.85.414 to specify that the records required to be maintained to support the provider's claim for a service, such as orders, prescriptions, certificates of medical necessity, and referrals, must be signed and dated by the physician or other medical practitioner before the provider submits a claim to Medicaid for the service. This amendment is necessary because in the past some providers have, in the course of postpayment reviews, produced prescriptions and other documentation signed and dated weeks, months, or even years after the service was provided. The Department has always intended that the provider obtain such documentation before the claim is submitted, in order to ensure that the service is medically necessary before the claim is paid. However, the rule as currently written does not specifically state when the documentation must be obtained. Therefore, this amendment is necessary so that it is clear to providers that they must obtain required documentation before submitting a claim.

ARM 37.85.414(1) is also being amended to specify that supporting documentation must specify the time treatment began and ended in instances where the fee paid for the service is based on the length of time spent in providing the service. The requirement to document a starting and ending time is inherent in the statement that a provider must maintain records which support the payment sought for a service, in cases where the payment is based on the length of time spent. Nevertheless, the Department has found many providers do not document starting and ending time even where the fee is based on time spent. Therefore, the amendment of the rule is necessary to clarify this requirement for providers.

Additionally, the Department proposes to add a provision to ARM 37.85.414 stating that the Department may recover payments for claims not supported by records as required by the rule even if the lack of records is caused by a data processing failure or by a natural disaster such as a fire, earthquake, or flood. In the past some providers have asserted that they were unable to provide records to support their claims because their records were lost due to a data processing failure or a natural disaster. The Department believes that it is the provider's responsibility to have a backup system in place to allow recovery of documentation destroyed or lost due to such events, and in fact the federal Health Insurance Portability and Accountability Act (HIPAA) requires medical providers to have a backup system for their records. Therefore, it is necessary to amend the rule to clarify that lack of required documentation is not excused because the records were destroyed or lost due to such events.

The Department also is adding a provision to state that the

records requirements for all provider types set forth in ARM 37.85.414 are minimum requirements and providers must also comply with specific records requirements for their provider type which may be more restrictive. For example, ARM 37.86.1802(2) governing providers of durable medical equipment and supplies requires that prescriptions for those items be obtained before the item is delivered, rather than before a claim is submitted for the item as ARM 37.85.414 as amended will require. Thus, this provision is necessary to make sure that providers are aware of their obligation to comply with other stricter requirements for their provider type.

ARM 37.85.414(2) currently requires that medical records and information about Medicaid recipients be kept confidential and be used only for purposes directly related to the administration of the Medicaid Program. This provision was adopted in 1980 before Montana's Uniform Health Care Information Act and HIPAA were enacted. It is therefore necessary to amend ARM 37.85.414(2) to specify that providers must comply with the privacy provisions of the Uniform Health Care Information Act and HIPAA in addition to the confidentiality provisions contained in the rule.

ARM 37.85.414(2) lists entities that have the right to inspect and audit records required to be maintained under this rule, such as the Department, the Department's designated review organization, the legislative auditor, and others. Section (2) lists the Department twice, so the second mention of the Department is being deleted because it is redundant. Additionally, the Department now proposes to add a provision to section (2) which states that providers who are asked to furnish records to support claims they have submitted must provide accurate copies of each record as it existed at the time the claim was submitted to Medicaid. In the past providers have sometimes attempted to support claims by providing the Department with orders, prescriptions, or other documents obtained after the claim was submitted. As previously discussed, the Department has always intended that the provider obtain such documents before the claim is submitted, in order to ensure that the service is medically necessary before the claim is paid. Therefore, the Department is adding this provision in addition to the language being added to section (1) stating that all supporting documentation must be signed and dated before the claim is submitted in order to clarify that the only acceptable documentation to support a claim is documentation obtained before the claim was submitted.

The Department also proposes to adopt two new rules applicable to providers. Proposed Rule I provides that the Department interprets its rules according to the plain meaning of the language of the rules, and further provides that a provider may not rely on a departmental interpretation of a rule to clarify an ambiguity unless the interpretation is given in writing before the service is rendered to the Medicaid recipient.

Proposed Rule II addresses the extent to which departmental employees and agents may give providers advice about how to code their claims and the extent to which a provider may rely on coding advice. Rule II specifies that employees and agents of the Department may give general information about codes to providers, but ultimate responsibility for selecting the correct code to describe the service or item provided lies with the provider. Additionally, the proposed rule states that a provider may not rely on any coding advice given by an employee or agent of the Department unless the advice is given in writing before the claim is submitted.

The Department is adopting Rule I and Rule II to address an issue which has arisen in recent years when providers were asked to repay overpayments caused by incorrect billing. It is not uncommon in such cases for providers to assert that they should not be required to repay the overpayment because they were advised by an employee of the Department or of the Department's fiscal agent, Associated Computer Services (ACS), to bill the claim as they did. Often in such cases the provider states that the advice was given orally and the provider is unable to name the person who allegedly gave the provider incorrect advice, making it difficult for the Department or for a hearing officer, if the matter is being litigated, to ascertain what advice the provider was given, if any. The adoption of these rules will protect both providers and the Department by specifying the limits on coding advice by Department employees and agents and by putting providers on notice that they may rely on advice about Departmental requirements or coding only if the advice is given in writing before a claim is filed.

5. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on December 6, 2004. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

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

Russ Cater for
Rule Reviewer

Russ Cater for
Gail Gray, Director, Public Health and Human Services

Certified to the Secretary of State October 25, 2004.

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

In the matter of the proposed adoption of New Rules I through XIX, pertaining to eligible telecommunications carriers	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On December 3, 2004, at 9:00 a.m., a public hearing will be held in the Bollinger Room, Public Service Commission (PSC) offices, 1701 Prospect Avenue, Helena, Montana, to consider the adoption of new Rules I through XIX.

2. The PSC 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 November 24, 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 proposed new rules provide as follows:

NEW RULE I PURPOSE AND SCOPE OF RULES (1) Federal and Montana laws include provisions that apply to commission designation of eligible telecommunications carriers and also to commission review of the status of existing eligible telecommunications carriers. The rules in this sub-chapter are minimum standards additional to, supplemental to, and must be read and applied in conjunction with, federal and Montana law applying to designation of eligible telecommunications carriers and maintenance of eligible telecommunications carrier status.

(2) To properly process, implement, and incorporate changes in applicable federal or Montana laws, commission eligible telecommunications carrier proceedings will be considered on a case-by-case basis. Following proper notice and opportunity to respond, additional standards that are in accordance with federal and Montana laws governing eligible telecommunications carriers and these rules may be considered and applied in any designation and maintenance of status proceeding.

(3) Waiver of a rule in this sub-chapter will not be routinely granted, but may be granted, in the commission's discretion, for clearly demonstrated good cause in fact and law, particularly including upon demonstration that a change in applicable federal or Montana law was not anticipated by these rules and upon demonstration that a particular rule does not

properly reflect important distinguishing features between or among certain types (e.g., incumbent, competitive, rural, nonrural, wireline, fixed wireless, mobile wireless, satellite, voice over internet protocol, cable, power line, and so forth) of applicants or existing eligible telecommunications carriers.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE II BURDEN IN PROCEEDINGS (1) An applicant for designation as an eligible telecommunications carrier has the burden of demonstrating in fact and law that the requirements for designation as an eligible telecommunications carrier have been met. An eligible telecommunications carrier, in any annual or other process involving certification as an eligible telecommunications carrier or maintenance of status as an eligible telecommunications carrier, has the burden of demonstrating in fact and law that the requirements for certification or maintenance of status have been met. The complainant in any complaint pertaining to an eligible telecommunications carrier retaining status as an eligible telecommunications carrier has the burden to demonstrate in fact and law the status should be changed.

AUTH: 69-3-822, MCA
IMP: 69-3-103, 69-3-840, MCA

NEW RULE III DESIGNATION AND MAINTENANCE -- PROCEDURAL RULES (1) Commission procedural rules for contested cases, ARM Title 38, chapter 2, apply in all eligible telecommunications carrier designation and complaint proceedings, unless the procedural order governing the proceeding provides otherwise.

(2) Applicants in designation proceedings shall include, with the application for designation, prefiled testimony establishing a prima facie case for designation.

AUTH: 69-3-822, MCA
IMP: 69-3-103, 69-3-840, MCA

NEW RULE IV DESIGNATION AND MAINTENANCE -- SUPPLEMENTAL PROCEEDINGS (1) For good cause demonstrated, the commission may grant eligible telecommunications status to an applicant or affirm an existing carrier's eligible telecommunications carrier status notwithstanding inability of the applicant or existing carrier to demonstrate that the provisions of federal and Montana laws including these rules or the provisions of assurances given at the time of the application or review of status will be met. In such cases a supplemental proceeding will be commenced at a time designated by the commission, generally not to exceed one year from designation or review of status. The commission may revoke the applicant’s or existing carrier's status if the applicant or existing carrier is then unable to establish that it meets the provisions of federal and Montana laws including these rules or the assurances that have been

provided.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE V DESIGNATION AND MAINTENANCE -- FULFILLING PRINCIPLES OF UNIVERSAL SERVICE (1) In order to fulfill the principles of universal service, an applicant for eligible telecommunications carrier status must demonstrate the following will exist upon designation or within a reasonable time following designation, and on request by the commission, existing eligible telecommunications carriers must demonstrate the following exist or will exist within a reasonable time following a review of status proceeding:

(a) the telecommunications service provided is quality service;

(b) the rate at which service is provided is just, reasonable, and affordable;

(c) advanced telecommunications and information services are available in the areas served;

(d) low-income, low-density, rural, insular, and high-cost customers are served;

(e) services subscribed to by a substantial majority of residential customers and provided by other eligible telecommunications carriers serving the area are provided;

(f) the services supported by universal service funds are provided to all requesting customers within the designated service area; and

(g) eligible telecommunications status is in the public interest.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE VI DESIGNATION AND MAINTENANCE -- PUBLIC INTEREST (1) Consideration of the public interest will apply in all eligible telecommunications carrier designation and maintenance of status proceedings.

(2) In the service areas of rural telephone companies and the rural areas served by nonrural telephone companies, the commission may determine that designation of additional eligible telecommunications carriers is not in the public interest. As a general guideline applying in these areas, less than five access lines per square mile may support one eligible telecommunications carrier, five to 19 access lines per square mile may support two eligible telecommunications carriers, and 20 or more access lines per mile may support more than two eligible telecommunications carriers. All designation and maintenance of status in such areas will be determined on a case-by-case basis.

(3) The value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas.

(4) Mobility and competitive choice are not among the universal service goals enumerated in the federal

Telecommunications Act of 1996.

(5) Until such time as broadband services are added to the federal list of supported services, the commission will not require applicants to provide broadband services as a prerequisite to designation. However, in determining whether an application is in the public interest, the commission may consider whether the applicant's technology platform is compatible with broadband and other advanced service offerings.

(6) As a prerequisite to designation and maintenance of status, an applicant must provide equal access to interexchange carriers.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE VII DESIGNATION AND MAINTENANCE -- MINIMUM SERVICE STANDARDS AND QUALITY OF SERVICE (1) Except as may be otherwise provided in these rules for a specific type of carrier:

(a) an applicant for eligible telecommunications carrier status must establish that it will meet all commission telecommunications service standards in ARM Title 38, chapter 5, sub-chapter 33 [as modified through pending commission MAR Notice No. 38-2-183 published October 21, 2004, at page 2518 of the 2004 Montana Administrative Register, Issue No. 20] and will provide the required quality of service; and

(b) an existing eligible telecommunications carrier must establish, on request by the commission, that it has met and will continue to meet all commission telecommunications service standards in ARM Title 38, chapter 5, sub-chapter 33 [as modified through pending commission MAR Notice No. 38-2-183 published October 21, 2004, at page 2518 of the 2004 Montana Administrative Register, Issue No. 20] and has provided and will continue to provide the required quality of service.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE VIII DESIGNATION AND MAINTENANCE -- MINIMUM SERVICE STANDARDS AND QUALITY OF SERVICE –- EXCEPTIONS (1) If a commission telecommunications standard in ARM Title 38, chapter 5, sub-chapter 33 [as modified through pending commission MAR Notice No. 38-2-183 published October 21, 2004, at page 2518 of the 2004 Montana Administrative Register, Issue No. 20] is less stringent than a standard set forth in these rules, the standard set forth in these rules will govern.

(2) Tariff requirements in the commission telecommunications standards in ARM Title 38, chapter 5, sub-chapter 33 [as modified through pending commission MAR Notice No. 38-2-183 published October 21, 2004, at page 2518 of the 2004 Montana Administrative Register, Issue No. 20] do not apply to eligible telecommunications carriers unless the eligible telecommunications carrier is otherwise required by law to file tariffs with the commission or the commission otherwise orders.

(3) Wireless eligible telecommunications carriers need not file exchange maps in ARM Title 38, chapter 5, sub-chapter 33 [as modified through pending commission MAR Notice No. 38-2-183 published October 21, 2004, at page 2518 of the 2004 Montana Administrative Register, Issue No. 20] , but must file maps and other supporting documentation sufficient to demonstrate coverage, signal strength, tower location, and areas of weak or nonexistent signal strength.

(4) Wireless eligible telecommunications carrier signal strength, at the minimum, must be:

(a) 50% geographic coverage, -85 dBm;

(b) 75% geographic coverage, -92 dBm; and

(c) 95% geographic coverage, -100 dBm.

(5) Wireless eligible telecommunications carrier battery reserve, auxiliary power unit, and mobile power unit requirements in ARM Title 38, chapter 5, sub-chapter 33 [as modified through pending commission MAR Notice No. 38-2-183 published October 21, 2004, at page 2518 of the 2004 Montana Administrative Register, Issue No. 20] shall apply to all tower locations and communications equipment associated with such towers.

(6) Commission telecommunications service standards requiring a network interface device between customer premises and carrier facilities in ARM Title 38, chapter 5, sub-chapter 33 [as modified through pending commission MAR Notice No. 38-2-183 published October 21, 2004, at page 2518 of the 2004 Montana Administrative Register, Issue No. 20] does not apply to wireless eligible telecommunications carriers.

(7) Commission telecommunications service standards pertaining to transmission and noise requirements in ARM Title 38, chapter 5, sub-chapter 33 [as modified through pending commission MAR Notice No. 38-2-183 published October 21, 2004, at page 2518 of the 2004 Montana Administrative Register, Issue No. 20] apply to wireless eligible telecommunications carriers, but are expressed in engineering terms appropriate to wireless technology. Periodic noise test requirements apply to wireless eligible telecommunications carriers.

(8) For wireless eligible telecommunications carriers the commission telecommunications service standards in ARM Title 38, chapter 5, sub-chapter 33 [as modified through pending commission MAR Notice No. 38-2-183 published October 21, 2004, at page 2518 of the 2004 Montana Administrative Register, Issue No. 20] reference to "access lines" means "customers" and to "exchange" means "service area."

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE IX DESIGNATION AND MAINTENANCE -- PROHIBITION ON DEGRADATION OF EXISTING QUALITY OF SERVICE (1) When an incumbent telecommunications carrier or incumbent eligible telecommunications carrier has firmly established a quality of service exceeding the commission minimum telecommunications service standards in ARM Title 38, chapter 5, sub-chapter 33 [as

modified through pending commission MAR Notice No. 38-2-183 published October 21, 2004, at page 2518 of the 2004 Montana Administrative Register, Issue No. 20], an applicant for eligible telecommunications carrier must establish that it will meet the incumbent carrier telecommunications service standards and provide at least the same quality of service. An existing competitive eligible telecommunications carrier must establish, on request of the commission, that it has met and will continue to meet the incumbent carrier telecommunications service standards and has provided and will continue to provide at least the same quality of service.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE X DESIGNATION AND MAINTENANCE -- PROHIBITION ON TARGETING PREFERRED CUSTOMERS (1) Eligible telecommunications carriers must provide service to all qualifying customers making reasonable requests for service within the eligible telecommunications carrier's designated service area. Eligible telecommunications carriers may not act directly or indirectly in a manner demonstrating a preference to serve any particular class or type of customer, such as low-cost, high-revenue customers, or any particular area, such as high-density, low-cost areas.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE XI DESIGNATION AND MAINTENANCE –- COVERAGE

(1) Applications for designation as a competitive eligible telecommunications carrier and, upon request by the commission, existing eligible telecommunications carriers, must provide a plan demonstrating the manner in which the service area for which designation is sought is served or will be served no later than two years from the date of designation or request.

(2) The applicant for designation and the existing eligible telecommunications carrier, if determined by the commission to not be serving the entire area, shall commit to providing the commission with an independent engineering study at the end of each year following the date of designation or determination on review of status. To maintain status as an eligible telecommunications carrier, the applicant or existing carrier must demonstrate voice communications service is accessible by 80% of the residences and businesses within the entire service area of the incumbent within one year of designation or determination, and 98% of the residences and businesses within the entire service area of the incumbent within two years of designation or determination.

(3) For purposes of this rule "accessible" means that the indicated percentage of residences and businesses must be able to utilize the designated carrier’s services from their residence or business locations at a level of service quality commensurate with the level of service quality and standards in

these rules or referenced by these rules. In the case of a wireless eligible telecommunications carrier, "accessible" also means that the customer must not be required to purchase any equipment beyond a typical handheld mobile phone that may be required to enhance the ability to transmit or receive the wireless communications service.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE XII DESIGNATION AND MAINTENANCE -- NETWORK CONGESTION (1) Applicants for designation as an eligible telecommunications carrier and, upon request by the commission, existing eligible telecommunications carriers, must demonstrate, through engineering studies, facilities diagrams, equipment specifications, and expert testimony, that the applicant's or existing carrier's network is capable of providing communications services to customers without blocking or dropping calls due to network congestion or inadequate facilities in excess of one blocked or dropped call per 100 calls during the average busy hour of the 10 highest calling traffic days of the four highest calling traffic weeks of the four highest calling traffic months within the 12 months immediately preceding the application for designation.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE XIII DESIGNATION AND MAINTENANCE -- MINIMUM RATIO OF OWNED TO LEASED FACILITIES (1) To qualify and to maintain status as an eligible telecommunications carrier, the carrier must own at least 50% of the facilities used to provide service.

(2) The extent to which an applicant or existing carrier is able to provide service to customers throughout the service area using the applicant's or existing carrier's own network versus the extent to which the applicant or existing carrier intends to provide service via resale of another carrier's services will be a consideration in eligible telecommunications carrier designation and maintenance of status proceedings.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE XIV DESIGNATION AND MAINTENANCE -- EFFECT ON UNIVERSAL SERVICE FUND AND PRINCIPLES OF UNIVERSAL SERVICE

(1) In applications for designation and in review of status proceedings regarding a particular area served, the commission may consider the effect that designation or continuation of status may have on available funds and the principles of universal service.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE XV DESIGNATION AND MAINTENANCE -- RATE REVIEW PENDING COMPETITION (1) Upon request by the commission any or all eligible telecommunications carriers must provide to the commission rates applicable in specific or all areas served for review by the commission, unless the commission has designated the area served as competitive.

(2) Competitive eligible telecommunications carrier rates must not exceed the incumbent eligible telecommunications carrier rates for supported basic local exchange service. A competitive eligible telecommunications carrier may implement a basic service package to meet this requirement. The basic service package must comply with federal and Montana laws including these rules.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE XVI DESIGNATION AND MAINTENANCE -- LOW INCOME PROGRAMS, RATE REVIEW (1) All eligible telecommunications carriers must establish lifeline and link-up programs. Upon request by the commission, an eligible telecommunications carrier must provide to the commission the rates applicable to these low-income programs.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE XVII DESIGNATION AND MAINTENANCE -- ADHERENCE TO ELIGIBLE TELECOMMUNICATIONS CARRIER LAWS (1) Designation of an applicant for eligible telecommunications carrier status that has demonstrated an inability or unwillingness to comply with laws applicable to eligible telecommunications carriers may be denied or may be granted on strict conditions, depending on the circumstances surrounding the violation. Review of status of an eligible telecommunications carrier that has demonstrated an inability or unwillingness to comply with laws applicable to eligible telecommunications carriers may result in revocation of the status or continuation of status on strict conditions, depending on the circumstances surrounding the violation.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE XVIII MAINTENANCE -- INVESTIGATIONS, AUDITS, REPORTING, NOTICES (1) The commission may conduct investigations and audits of any or all designated eligible telecommunications carriers in Montana.

(2) The commission may require reporting by any or all eligible telecommunications carriers in Montana. The report may be modeled on an existing format (e.g., national exchange carriers association), and may require tracking of the expenditure of universal service funds and ensuring that expenditures are consistent with the purpose of the universal service fund. Upon commission notification, eligible

telecommunications carriers shall submit reports to the commission in a format prescribed by the commission.

(3) Eligible telecommunications carriers receiving or intending to receive federal universal service funding for services provided by means other than customary wireline or mobile wireless service (e.g., satellite, internet, voice over internet protocol, cable, power line, and so forth) must file with the commission notification of receipt or notification of intent to seek funding. During an annual certification procedure or upon commission request, such carriers must demonstrate that their provision of basic exchange service by means other than customary wireline or mobile wireless (e.g., satellite, internet, voice over internet protocol, cable, power line, and so forth) satisfies all of the requirements of federal and Montana law, including the requirements of these rules.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

NEW RULE XIX MAINTENANCE -- ANNUAL CERTIFICATIONS

(1) The process for the annual certifications of eligible telecommunications carriers will be designed to meet federal requirements for annual certification and will be as prescribed by commission letter, with necessary reference to federal and Montana law including these rules, provided to all Montana eligible telecommunications carriers in advance of the annual certification deadline.

AUTH: 69-3-822, MCA
IMP: 69-3-840, MCA

4. Adoption of the proposed new rules, based primarily on a joint Montana Independent Telecommunications Systems and Montana Telecommunications Association petition for rulemaking (2-4-315, MCA) regarding eligible telecommunications carrier public interest standards, is necessary to provide guidance and information, through clarification of existing standards and establishment of new standards, to all prospective and existing Montana eligible telecommunications carriers in obtaining and maintaining eligible telecommunications carrier status in Montana. In addition, as is natural in all rulemaking, the standards will be more readily accessible if codified in rules, rather than expressed in a variety of federal and Montana orders, and the rulemaking process, as opposed to multiple contested case processes, will allow all interested persons, rather than just parties to a particular contested case, to participate in refinement of the standards.

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 December 3, 2004, or may be

submitted to the PSC through the PSC's web-based comment form at http://psc.state.mt.us (go to "consumer assistance," "talk to us," "pending proceeding comments," then complete and submit the form) no later than December 3, 2004. (PLEASE NOTE: When filing comments pursuant to this notice please reference "Docket No. L-04.07.5-RUL.")

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

7. The Montana Consumer Counsel, 616 Helena Avenue, P.O. Box 201703, Helena, Montana 59620-1703, 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.

By: /s/ Bob Rowe
BOB ROWE, Chairman
Public Service Commission

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

Certified To the Secretary Of State October 25, 2004.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the proposed adoption of New Rule I and II relating to qualified research expenses for a qualified corporation, individual, small business corporation, partnership, limited liability partnership, or limited liability company	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On December 6, 2004, at 2:00 p.m., a public hearing will be held in the Director's Office (Fourth Floor) Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the adoption of the above-stated rules relating to qualified research expenses for a qualified corporation, individual, small business corporation, partnership, limited liability partnership, or limited liability company.

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

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Revenue no later than 5:00 p.m., November 19, 2004, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 459-2646; fax (406) 444-3696; or e-mail canderson@state.mt.us.

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

NEW RULE I CREDIT FOR INCREASING RESEARCH ACTIVITIES

(1) A credit for increases in qualified research expenses and basic research payments is allowed to a qualified corporation, an individual, a small business corporation, a partnership, a limited liability partnership, or a limited liability company. Except as specifically limited by Montana law, 15-31-150, MCA, this credit is determined in accordance with 26 USC 41 as that section read on July 1, 1996.

(2) A taxpayer must file form RSCH providing information as prescribed on the form, which includes a copy of the form filed with the IRS to claim the federal credit for increasing research activities. If amounts paid or incurred do not apply

to the federal credit after a termination date provided in 26 USC 41, a taxpayer whose expenses qualify for the Montana credit after the termination date must submit with form RSCH the information required on the federal form for the tax year immediately preceding the tax year in which the termination occurred.

(3) Form RSCH may be obtained from the department upon request or is available on the department's web site under the downloadable forms at www.discoveringmontana.com/revenue.

(4) Form RSCH must be filed with the tax return and mailed to the Department of Revenue, P.O. Box 5805, Helena, Montana 59604-5805 for individual taxpayers and P.O. Box 8021, Helena, Montana 59604-8021 for corporations, small business corporations, partnerships, limited liability partnerships and limited liability companies.

AUTH: Sec. 15-31-150 and 15-31-501, MCA
IMP: Sec. 15-31-150, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule I to conform to the requirements of 15-31-150, MCA. The rule explains the form that must be filed by the taxpayer along with the copy of the form filed with the IRS to claim the federal credit for qualified research activities. The rule also clarifies where the taxpayers may obtain this form and when and where it must be filed.

NEW RULE II INFORMATION REQUIRED OF A MULTISTATE BUSINESS CLAIMING A CREDIT FOR INCREASING RESEARCH ACTIVITIES (1) A taxpayer claiming a credit for increasing research activities who has income from business activity that is taxable both within and outside of this state shall submit a by-state breakdown of:

(a) gross sales less returns and allowances that conform to the requirements of 15-31-311, MCA;

(b) qualified research expenses as defined in 15-31-150, MCA;

(c) supplies as defined in 15-31-150, MCA; and

(d) wages as defined in 15-31-150, MCA.

AUTH: Sec. 15-31-150 and 15-31-501, MCA
IMP: Sec. 15-31-150, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule II to conform to the requirements of 15-31-150, MCA. The rule explains what information is required from the taxpayers.

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

Cleo Anderson
Department of Revenue
Director's Office
P.O. Box 7701
Helena, Montana 59604-7701

and must be received no later than December 10, 2004.

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

6. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://www.discoveringmontana.com/revenue, under "for your reference;" "DOR administrative rules;" and "upcoming events and proposed rule changes." The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

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

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

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Don Hoffman
DON HOFFMAN
Acting Director of Revenue

Certified to Secretary of State October 19, 2004

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 42.20.601, 42.20.620 and 42.20.625 relating to agricultural property taxes	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On November 29, 2004, at 3:00 p.m., a public hearing will be held in the Director's Office (Fourth Floor) Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the amendment of the above-stated rules relating to agricultural property taxes.

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

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Revenue no later than 5:00 p.m., November 19, 2004, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 459-2646; fax (406) 444-3696; or e-mail canderson@state.mt.us.

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

42.20.601 DEFINITIONS The following definitions apply to this sub-chapter:

(1) and (2) remain the same.

(3) "Animal unit" means a ~~two-year-old steer or range~~ mature cow~~, a bull, or four to five adult sheep that would weigh, either individually or collectively,~~ of approximately 1,000 pounds and a calf as old as six months, or their equivalent.

(4) through (9) remain the same.

(10) "Domestic grazing land" means all lands devoted to the production of forage from introduced plants that are not part of the original flora of an area that are harvested directly by grazing animals.

(10) through (14) remain the same but are renumbered (11) through (15).

(16) "Native grazing land" means all lands devoted to the production of forage from native plants that are part of the original flora of an area that are harvested directly by grazing animals.

(15) through (21) remain the same but are renumbered (17) through (23).

AUTH: Sec. 15-7-111, MCA

IMP: Sec. 15-1-101, 15-6-133, 15-7-201, and 15-7-202, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.20.601 to change the definition of a livestock animal unit to match the definition used by the United States Natural Resource Conservation Service (NRCS). The NRCS uses this definition of an animal unit to calculate how much dry herbage an animal unit will consume in one day and one month. The department has chosen to adopt the NRCS methodology to calculate carrying capacity based on the NRCS definition of an animal unit. The department believes it is important that the DOR and the NRCS use the same definitions and procedures when addressing this issue.

42.20.620 CRITERIA FOR AGRICULTURAL LAND VALUATION FOR LAND TOTALING LESS THAN 20 ACRES (1) through (8) remain the same.

(9) If the land is used primarily to raise and market livestock, the land must currently support 30 or more animal unit (AU) months of grazing carrying capacity, with cattle as the base. A nine-month grazing season shall be the basis for calculating the number of animal units based on current carrying capacity. One AU is assumed to consume ~~760~~ 915 pounds of dry herbage production per month from native grazing land. The carrying capacity may be based on information obtained from the United States natural resource and conservation service (NRCS) soil survey. If a soil survey does not exist, the carrying capacity may be based on an estimate by the NRCS, the local county agricultural extension agent or the department. Based on the manner in which the NRCS measures dry herbage production and the lost forage consumption due to grazing livestock and other causes, the per-acre per-year dry herbage production ~~estimate~~ consumed is ~~reduced by 75%~~ 25% of the NRCS estimate for an unfavorable precipitation year on non-irrigated grazing land. On nonirrigated domestic grazing land, the department shall increase the estimated nonirrigated native grazing land carrying capacity by 50% (1.5). The department shall use the following formula, based on NRCS soil survey information, to calculate the carrying capacity for non-irrigated native grazing land, which does not exhibit significant over-grazing or weed infestation:

(a) per-acre per-year dry herbage production multiplied by 0.25 equals the per-acre per-year dry herbage production consumed by livestock;

(b) per-acre per-year dry herbage production consumed by livestock divided by ~~790~~ 915 pounds of dry herbage production consumed per-month per-animal unit equals the animal unit months per acre (AUMs/acre); and

(c) livestock acres grazed multiplied by AUMs/acre equals the total AUMs ~~for the non-irrigated pasture~~.

(10) remains the same.

(11) If the land is primarily used to grow crops that are not marketed but consumed by humans, livestock, poultry, or other animals in the agricultural operation, the applicant must prove that the land on the application produced the equivalent of $1,500 in gross agricultural income each year from crops that were consumed. The applicant must make a written estimate of the weight or quantity of food or animal fiber produced. The written estimate must include all proof set forth in this rule. The weight or quantity estimate will be multiplied by the current commodity price to determine whether the $1,500 annual gross income test has been met.

(12) remains the same.

(13) Acceptable proof of production shall include:

(a) a statement from the United States farm services agency (FSA) indicating estimated yield if crops are the basis for income;

(b) if livestock is the basis for income, information the taxpayer or their agent obtains from the NRCS website, or a statement from the NRCS or the county agricultural extension agent indicating that the parcel(s) is/are capable of producing in its current state a minimum of 30 ~~animal unit~~ AU months of grazing capacity; ~~or~~ and

(c) a confirmation by the department.

(14) through (18) remain the same.

AUTH: Sec. 15-1-201, MCA

IMP: Sec. 15-7-201, 15-7-202, 15-7-203, 15-7-206, 15-7-207, 15-7-208, 15-7-209, 15-7-210, and 15-7-212, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.20.620 to adopt the identical procedures currently used by the United States Natural Resource Conservation Service (NRCS) to calculate the livestock carrying capacity. The department has chosen to adopt the NRCS methodology to calculate carrying capacity based on the NRCS estimate of dry herbage production. The department believes it is important that the DOR and the NRCS use the same procedures when addressing this issue.

42.20.625 CRITERIA FOR AGRICULTURAL LAND VALUATION FOR LAND TOTALING 20 TO 160 ACRES IN SIZE (1) through (8) remain the same.

(9) If the land is used primarily to raise and market livestock, the land must currently support 30 or more animal unit (AU) months of grazing carrying capacity, with cattle as the base. A nine-month grazing season shall be the basis for calculating the number of animal units based on current carrying capacity. One AU is assumed to consume ~~760~~ 915 pounds of dry herbage production per month from native grazing land. The carrying capacity may be based on the information obtained from the NRCS soil survey. If a soil survey does not exist, the carrying capacity may be based on an estimate by the NRCS, the county agricultural extension agent or the department. Based on the manner in which the NRCS measures dry herbage production and the lost forage consumption due to grazing livestock and other causes, the per-acre per-year dry

herbage production ~~estimate~~ consumed is ~~reduced by 75%~~ 25% of the NRCS estimate for an unfavorable precipitation year on non-irrigated grazing land. On nonirrigated domestic grazing land, the department shall increase the estimated nonirrigated native grazing land carrying capacity by 50% (1.5). The department shall use the following formula, based on NRCS soil survey information, to calculate the carrying capacity for non-irrigated native grazing land, which does not exhibit significant over-grazing or weed infestation:

(a) per-acre per-year dry herbage production multiplied by 0.25 equals the per-acre per-year dry herbage production consumed by livestock;

(b) per-acre per-year dry herbage production consumed by livestock divided by ~~790~~ 915 pounds of dry herbage production consumed per-month per-animal unit equals the animal unit months per acre (AUMs/acre); and

(c) livestock acres grazed multiplied by AUMs/acre equals the total AUMs ~~for the non-irrigated pasture~~.

(10) remains the same.

(11) If the land is primarily used to grow crops that are not marketed but consumed by humans, livestock, poultry, or other animals in the agricultural operation, the applicant must prove that the land on the application produced the equivalent of $1,500 in gross agricultural income each year from the crops that were consumed. The applicant must make a written estimate of the weight or quantity of food or animal fiber produced. The written estimate must include all proof set forth in this rule. The weight or quantity estimate will be multiplied by the current commodity price to determine whether the $1,500 annual gross income test has been met.

(12) If the consumption was from livestock, the land must support 30 or more ~~animal unit~~ AU months of grazing carrying capacity, with cattle as the base.

(13) Acceptable proof of production shall include:

(a) a statement from the United States farm services agency (FSA) indicating estimated yield if crops are the basis for production; or

(b) if livestock is the basis for income, information the taxpayer or their agent obtains from the NRCS website, or a statement from the NRCS or the county agricultural extension agent indicating that the parcel(s) is/are capable of producing in its current state, a minimum of 30 ~~animal unit~~ AU months of grazing capacity if livestock is the basis for production; and

(c) a confirmation by the department.

(13) through (18) remain the same but are renumbered (14) through (19).

AUTH: Sec. 15-1-201, MCA

IMP: Sec. 15-6-133, 15-6-134, 15-7-201, and 15-7-202, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.20.625 for the same reasons it is amending ARM 42.20.620.

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

Cleo Anderson
Department of Revenue
Director's Office
P.O. Box 7701
Helena, Montana 59604-7701

and must be received no later than December 2, 2004.

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

6. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://www.discoveringmontana.com/revenue, under "for your reference;" "DOR administrative rules;" and "upcoming events and proposed rule changes." The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

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

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

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Don Hoffman
DON HOFFMAN
Acting Director of Revenue

Certified to Secretary of State October 25, 2004

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 44.6.105 Fees for Filing Documents -- Uniform Commercial Code, 44.5.114 Corporations - Profit and Nonprofit Fees, 44.5.115 Limited Liability Company Fees, and 44.5.121 Miscellaneous Fees, relating to On-line Filing Fees	)))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On November 29, 2004, a public hearing will be held at 10:00 a.m. in the Secretary of State's Office Conference Room of the State Capitol, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Secretary of State 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 Secretary of State no later than 5:00 p.m. on November 19, 2004, to advise us of the nature of the accommodation that you need. Please contact Janice Doggett, Secretary of State's Office, P.O. Box 202801, Helena, MT 59620-2801; telephone (406) 444-5375; FAX (406) 444-4196; or e-mail jdoggett@state.mt.us.

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

44.6.105 FEES FOR FILING DOCUMENTS -- UNIFORM COMMERCIAL CODE (1) through (1)(m) remain the same.

(2) The fees for conducting business via electronic means are the same as for hard copy transactions.

(3) Uniform Commercial Code bulk data are only available through electronic means, $1,000 per month.

AUTH: 2-15-405, 30-9A-526, MCA
IMP: 30-9A-501, 30-9A-502, MCA

REASON: The Secretary of State proposes this amendment to clarify the fee amount for conducting business via electronic means. The cumulative amount that will be collected is approximately $34,000, and will affect approximately 4,000 customers.

44.5.114 CORPORATIONS - PROFIT AND NONPROFIT FEES
(1) through (3)(e) remain the same.

(f) annual report filed on-line prior to April 15th 10.00

(f) remains the same but is renumbered (g).

(h) annual report filed on-line after April 15th 25.00

(g) remains the same but is renumbered (i).

~~(h)~~(j) certificate of ~~authorization~~ authority (foreign) 5.00

(i) and (j) remain the same but are renumbered (k) and (l).

AUTH: 2-15-405, 35-1-1307, 35-2-1107, MCA
IMP: 35-1-216, 35-1-217, 35-2-119, 35-1-1026, 35-1-1028, MCA

REASON: The Secretary of State proposes this amendment in order to clarify the fees for filing annual report via electronic filing. The cumulative amount of fees collected at the reduced amount will be approximately $25,000, saving approximately 2,200 customers approximately $11,000 per year. The Secretary of State proposes this amendment in order to conform with the language used in statute.

44.5.115 LIMITED LIABILITY COMPANY FEES (1) through (3)(d) remain the same.

(e) annual report filed on-line before April 15th 10.00

(e) remains the same but is renumbered (f).

(g) annual report filed on-line after April 15th 25.00

(f) remains the same but is renumbered (h).

(i) certificate of existence (domestic) 5.00

(j) certificate of authority (foreign) 5.00

AUTH: 2-15-405, 35-1-1307, MCA
IMP: 35-8-208, MCA

REASON: The Secretary of State proposes this amendment in order to clarify the fees for filing annual report via electronic filing. The cumulative amount of fees collected at the reduced amount will be approximately $47,500, saving 4,300 customers approximately $21,500 per year. The Secretary of State proposes the amendments to clarify the limited liability company certificate services available online.

44.5.121 MISCELLANEOUS FEES (1) remains the same.

(a) on-line certificate of fact 15.00

(2) Certified c~~C~~opy of any document 10.00

(3) through (3)(d) remain the same.

(4) Bulk data for corporation records varies according to data type and number of documents. Please see the secretary of state's web site.

AUTH: 2-15-405, 35-1-1307, 35-2-1107, MCA
IMP: 35-1-1206, 35-2-119, 35-2-1003, 35-8-211, MCA

REASON: The Secretary of State proposes this amendment to clarify that copies obtained from the Secretary of State's office are certified, and to clarify the fee for conducting business via electronic means. The cumulative amount of fees collected from on-line certificates of fact will be approximately $7,500, and will affect 500 customers. The cumulative amount of fees collected from certified copies will be approximately $20,000, and will affect 2,000 customers.

4. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Janice Doggett, Secretary of State's Office, P.O. Box 202801, Helena, MT 59620-2801, or by e-mailing jdoggett@state.mt.us, and must be received no later than December 2, 2004.

5. Janice Doggett, at the address above, has been designated to preside over and conduct the hearing.

6. The Secretary of State 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 administrative rules, corporations, elections, notaries, records, Uniform Commercial Code or a combination thereof. Such written request may be mailed or delivered to the Secretary of State's Office, Administrative Rules Bureau, 1236 Sixth Avenue, P.O. Box 202801, Helena, MT 59620-2801, faxed to the office at (406) 444-5833, e-mailed to klubke@state.mt.us, or may be made by completing a request form at any rules hearing held by the Secretary of State's Office.

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

/s/ Bob Brown
BOB BROWN
Secretary of State

/s/ Janice Doggett
JANICE DOGGETT
Rule Reviewer

Dated this 25th day of October 2004.

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

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

TO: All Concerned Persons

1. On July 1, 2004, the Fish, Wildlife and Parks Commission (commission) published MAR Notice No. 12-307 regarding the public hearings on the proposed adoption of new rules I through XII pertaining to river recreation at page 1436 of the 2004 Montana Administrative Register, Issue Number 13.

2. The commission has adopted the following new rules exactly as proposed:

Rule I (ARM 12.11.401)
Rule V (ARM 12.11.420)
Rule VII (ARM 12.11.430)
Rule VIII (ARM 12.11.435)
Rule X (ARM 12.11.445)

3. The commission has adopted the following new rules with the following changes, stricken matter interlined, new matter underlined:

Rule II (ARM 12.11.405)
Rule III (ARM 12.11.410)
Rule IV (ARM 12.11.415)
Rule VI (ARM 12.11.425)
Rule IX (ARM 12.11.440)
Rule XI (ARM 12.11.450)
Rule XII (ARM 12.11.455)

NEW RULE II (ARM 12.11.405) POLICY STATEMENT CONCERNING RIVER RECREATION RULES (1) through (5) remain as proposed.

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

(7) through (10) remain as proposed.

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

NEW RULE III (ARM 12.11.410) RIVER RECREATION MANAGEMENT PLANS AND RULES GENERALLY (1) through (5) remain as proposed.

(6) When possible, the development of management plans must be coordinated with the planning processes of state,

tribal, and federal agencies having jurisdiction over a river or the reach of a river.

(7) and (8) remain as proposed.

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

NEW RULE IV (ARM 12.11.415) RIVER RECREATION MANAGEMENT PLANS AND RULES: DEPARTMENT RESPONSIBILITIES (1) through (4)(g) remain as proposed.

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

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

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

NEW RULE VI (ARM 12.11.425) CREATION OF CITIZEN ADVISORY COMMITTEES (1) The department shall establish a citizen advisory committee when developing a river recreation management plan or when recommending river recreation rules to the commission. The department shall also establish a citizen advisory committee to consider changes to river recreation management plans or to consider amendments to river recreation rules if the proposed changes or amendments are anticipated to be of significant enough interest to the public to benefit from the participation of a citizen advisory committee.

(2) Members of the citizen advisory committee serve by appointment of the director. In considering appointments the director, through a public process, shall:

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

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

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

NEW RULE IX (ARM 12.11.440) FIXED ALLOCATION (1) through (2)(b) remain as proposed.

(3) If a fixed allocation system is adopted for a river, the commission may change the amount of use allocated to a service provider and no property right attaches to that use.

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

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

NEW RULE XI (ARM 12.11.450) TRANSFERRABILITY OF RIVER USE DAYS (1) The sale or transfer of a licensed or nonlicensed river service provider business and the transfer of river use days shall comply with 37-47-310(4), MCA, and shall not be prohibited as long as all legal requirements are fulfilled.

(2) and (3) remain as proposed.

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

NEW RULE XII (ARM 12.11.455) RIVER RECREATION MANAGEMENT PLANNING MANUAL (1) through (2)(e) remain as proposed.

(3) The department and its citizen advisory committees must consider the river recreation planning manual when developing a river recreation management plan or recommending river recreation rules to the commission.

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

4. The following comments were received and appear with the commission's responses:

Topic: Positive Features of the Rules

COMMENT 1: In addition to public comments that offered overall support for the proposed rules, some people identified specific features of the rules that they particularly liked. Some people supported the ability of the commission to empower local citizen advisory committees on an as needed basis in particular watersheds. One person commented that it is important to recognize that as it stands today the commission has all the authority it needs to regulate the social conditions on rivers and that these rules set up a procedure that the commission has to follow, and this procedure eliminates some of the discretion that the commission currently has when making decisions. One person commented that the rules advocate for a partnership approach with other agencies and this should help to address concerns about water quantity and impacts to recreation and agriculture. Some people commented that new rules III (ARM 12.11.410), IV (ARM 12.11.415), V (ARM 12.11.420), and VI (ARM 12.11.425) all mention that decision makers have to have good data and that this is very important. Some people commented that they appreciate that the proposed rules allow for flexibility in order to recognize the differences between rivers. One person commented that requiring the commission to conduct rulemaking according to the Montana Administrative Procedure Act (MAPA), and requiring the department to conduct an analysis according to the Montana Environmental Policy Act (MEPA), is the right way to go because it ensures public input and this leads to good decisions. Some people commented that they are in favor of the nonresident section of the new rules.

One person recommended that the commission adopt all aspects of new rule II (ARM 12.11.405), as written without changes. One person commented that they agree wholeheartedly with new rule II(3) (ARM 12.11.405(3)) that reads, "The general premise of these rules is that the public prefers to recreate on rivers without controls on their recreational experience, other than regulations that are necessary for managing aquatic resources, such as fishing regulations." One person commented that the process outlined in these rules is the "mirror image" of the process that was used in the development of the Big Hole River Recreation Management Plan. This person thought this process worked well in the Big Hole and should work well in other river basins. Some people commented that they agreed that resource protection is the single highest consideration in development of recreation plans, and they supported the contention that management plans or rules must not allow unlimited recreation to compromise long-term conservation.

RESPONSE: The commission appreciates hearing comments on features of the rules that people believe will help to maintain or improve river recreation management on rivers in Montana.

Topic: Definitions

COMMENT 2: One person recommended that the definition of a "river service provider" be amended so there are two categories: (1) angling service providers, and (2) non-angling service providers. This would aid in identifying and tracking those river service providers that are presently licensed and those that are not.

RESPONSE: The proposed rules apply to all types of river service providers, and therefore the commission thinks it is unnecessary to create two categories of providers. This type of distinction could be considered as a part of a river recreation management plan where it might be beneficial to distinguish between angling and non-angling service providers.

Topic: Restrictions, Rationing, Allocation

COMMENT 3: One person commented that if there are a lot of rules and/or restrictions it would be hard for people to spontaneously recreate on a river.

RESPONSE: The commission recognizes that the presence of rules and/or restrictions could affect some people’s opportunity to spontaneously recreate on a river. For this reason, new rule II(3) (ARM 12.11.405(3)) states, "The general premise of these rules is that the public prefers to recreate on rivers without controls on their recreational experience, other than regulations that are necessary for managing aquatic resources, such as fishing regulations."

COMMENT 4: The commission received numerous comments on residency, outfitting, and whether or not Montana residents should have preference over nonresidents and river service providers if it becomes necessary to restrict or ration use. Some people recommended that the commission, if it becomes necessary to restrict or ration use on a river, establish a hierarchy where the citizens of Montana would be restricted or rationed only after the river service providers and nonresidents have been restricted or rationed. They reasoned that residents of Montana should be given priority over nonresidents because residents pay taxes here and endure lower wages than people living in other areas of the country. They also reasoned that river service providers are profiting from a public resource, and therefore that sector of use should be restricted before the noncommercial sector of use is restricted. Some people recommended that the commission adopt a rule that states, "A person's or persons' decision to operate a commercial venture on publicly held waters should not interfere, limit, or affect in any way the private public's right to access or legally recreate on those waters."

Of those opposed to a hierarchy approach and/or restrictions based on residency, some people recommended that the department and the commission not differentiate between a resident and a nonresident, or between guided and nonguided users. These individuals believed that restrictions on use should apply to everyone, not just outfitters and nonresidents. One person commented that if it is crowded, it is crowded for everyone. Some people commented that nonresidents contribute a significant amount of money to the department's budget and the department should be concerned about placing restrictions on them. One person recommended that the department consider the court cases in Arizona and the 9th Circuit Court, Conservation Force, Inc. v. Manning, having to do with nonresidents because it could have implications for Montana.

RESPONSE: The commission points out that the River Recreation Advisory Council deliberated for considerable time on the topics of residency and commercial use. The commission believes that the rules reflect the council's carefully crafted words on these issues. The council agreed that planning and management of Montana's river systems should provide for and conserve a full variety of recreation experiences and assure that river recreation historically enjoyed by people in Montana is recognized (new rule II(7) (ARM 12.11.405(7)). The council also agreed that nonresidents are an important part of the state's tourism economy and rivers are an attraction to visitors. They agreed that nonresidents should have reasonable and equitable opportunities compared to other recreational users to enjoy Montana's resources. They agreed that "reasonable and equitable" as applied to nonresidents means recreational use that fairly considers the interests of all types of recreational users. Reasonable and equitable is not intended to mean that each type of recreational user must have the exact same share of use in terms of the timing, amount, and location of use (new

rule II(8) (ARM 12.11.405(8)). The council agreed that river service providers are an important industry in Montana and should be regulated. They agreed that there are differences in management considerations between river service providers and private (nonguided) users. They agreed that management plans need to provide opportunities for river service providers to compete for the business of paying customers and that management plans should encourage viable and diverse types of commercial services (new rule II(9) (ARM 12.11.405(9)). The commission carefully considered the council's recommendations and the public's comments on these issues. The commission points out that the council did not recommend a hierarchy approach where Montana citizens would automatically be given priority over commercial and nonresident use of rivers should it become necessary to restrict or ration use. Rather, the council recommended the use of an analysis and decision-making process and the involvement of a citizen advisory committee, which together would yield river recreation management decisions that are based on the conditions present on a river and the interests of the public. The commission points out that the rules would allow for differentiation based on residency if the best available data indicate that the amount of use by residents or nonresidents is a primary contributor to an identified problem. The rules would also allow restrictions on river service providers in order to meet the objectives of a management plan. The commission believes that the rules, when viewed as a whole, make it clear that arbitrary discrimination against residents, nonresidents and river service providers is not acceptable. Rather, the decision to restrict or ration users, including residents, nonresidents, and river service providers, should be an informed decision that is based on the conditions on a river and the interests of the public. The commission trusts that the council's recommendations, which are reflected in these rules, are a reasonable approach that will result in fair opportunities for all users of rivers in Montana. The commission will consider any rule restricting nonresident uses in light of Conservation Force, Inc. v. Manning and other cases to determine whether the rule is allowed or prohibited.

COMMENT 5: One person commented on new II(8) (ARM 12.11.405(8)) which states that nonresidents should have reasonable and equitable opportunities compared to other recreational users to enjoy Montana's resources. This individual recommended that the word "equitable" be stricken from the rules because it implies the same, or 50%/50%. This person also thought that residents should have priority over nonresidents.

RESPONSE: New rule II(8) (ARM 12.11.405(8)) states that "reasonable and equitable" as applied to nonresidents means recreational use that fairly considers the interests of all types of recreational users, and is not intended to mean that each type of recreational user must have the exact same share of use in terms of the timing, amount, and location of use. The commission believes that the rule provides an adequate

definition of "reasonable and equitable" and makes it clear that the use of the word "equitable" should not be interpreted to mean that nonresidents must be provided "equal" opportunities to enjoy Montana's resources. The commission believes that "Equitable opportunities" as applied to nonresidents implies "fair opportunities."

COMMENT 6: One person recommended that the rules include additional language that states "river service providers are not necessary or even desirable in all places." One person expressed serious concern with "crowding" rules because of their inherent subjectivity; but, if rules regarding numbers are thought necessary, all guiding should be banned.

RESPONSE: The commission points out that the River Recreation Advisory Council did not recommend that river service providers are not necessary or even desirable in all places. Nor did the council recommend that river service providers are necessary or desirable in all places. These two statements reflect the fact that people have different sets of values and interests when it comes to river recreation and the role of river service providers. The commission believes that the analysis and decision-making process identified in the rules and recommended by the council would provide an opportunity for the public to express their values and interests. The commission points out that the rules state that management plans need to provide opportunities for river service providers to compete for the business of paying customers. The commission interprets this to mean that a management plan and its associated rules could not eliminate the river service provider industry on an entire river. The commission does believe that the rules would allow for the identification of river reaches where restrictions prohibit river service providers from operating, as long as there are other reaches of the river where river service providers have opportunities to compete for the business of paying customers. The commission emphasizes that rules that restrict or ration river service providers would be the result of an analysis and decision-making process that considers the conditions on a river and the interests of the public.

COMMENT 7: The commission received comments from people concerned about the impact restrictions could have on river service providers. Some people commented that they are concerned because the easiest person to restrict is the outfitter, and restrictions on outfitters in this state have increased over the years and inhibit their ability to operate. Some people commented that the rules will have a greater impact on guides and outfitters, that further restrictions will be placed on commercial operations while no restrictions will be placed on the general public's use of the river. They recommended that if the commission continues to place restrictions on commercial river recreation activities, it must also address the over-crowding from nonguided people.

RESPONSE: The commission believes that the rules in general and the analysis and decision-making process mandated by the rules would result in river recreation management decisions that are reasonable for all users of rivers in Montana, including river service providers. New rule II(9) (ARM 12.11.405(9)) makes it clear that river service providers are an important industry and that management process should encourage viable and diverse types of commercial services. The commission also points out that the analysis and decision-making process and the involvement of a citizen advisory committee is intended to yield river recreation management decisions that are based on the conditions present on a river and the interests of the public. The commission trusts that the analysis and decision-making process in the proposed rules will result in fair opportunities for all users of rivers in Montana.

COMMENT 8: One person commented that new rule II(9) (ARM 12.11.405(9)) where it states, "River service providers are an important industry and should be regulated," reflects the River Recreation Advisory Council's desire that all commercial activities on rivers are licensed or regulated to encourage quality industry standards that will promote public safety and professional conduct. This person believed that the phrase is not intended to suggest that river service providers "should be regulated" automatically within any river recreation scenario or management plan.

RESPONSE: The commission agrees that the use of the words, "should be regulated," in new rule II(9) (ARM 12.11.405(9)) does not imply that river service providers should automatically be restricted or rationed on rivers in Montana. The commission does not agree that the use of the words, "should be regulated" only refers to the licensing of river service providers in order to establish quality industry standards. The commission agrees that establishing quality industry standards that promote public safety and professional conduct is something that should be pursued. Establishing these standards could help to prevent or alleviate social conflicts on rivers. The commission believes that the use of the words, "should be regulated," also implies that the department and a citizen advisory committee, when developing a river recreation management plan or recommending rules as a part of the analysis and decision-making process, should examine the characteristics of commercial use of a river within the context of overall use of the river. The conditions present on the river and the interests of the broad spectrum of users, including those of the river service providers, would collectively determine the extent that regulations are needed to ensure that commercial use occurs in a manner that is compatible with other types of noncommercial use, to provide opportunities for river service providers to compete for the business of paying customers, and to ensure that there are viable and diverse types of commercial services present. The "regulating of river service providers" would mean different things under different river recreation conditions and management scenarios.

COMMENT 9: One person commented on new rule II(9) (ARM 12.11.405(9)) which states "Management plans need to provide opportunities for river service providers to compete for the business of paying customers. Management processes should encourage viable and diverse types of commercial services." This person commented that, while being all for free enterprise and competition, this individual hopes that the department doesn't try to artificially create a balance of "diverse types" of services. This person stated that most guided rivers have already gravitated to a competitive situation where those river service providers who work the hardest, longest, and best reap the rewards of more business.

RESPONSE: Management plans would reflect the conditions on a river and the interests of the public, including the river service providers. With this in mind, the commission anticipates that planning processes under the new rules, when addressing the commercial component of use on a river, would lead to a management scenario where the types of services present reflect the public's demand for services. This would not preclude scenarios where there are multiple types of commercial services available on a river. It would also not preclude a scenario where there are one or just a few types of commercial services available on a river.

COMMENT 10: One person commented that outfitters believe that if the number of commercial users authorized to operate on a river is regulated, there may not be a need to ration river use days.

RESPONSE: The commission will ask the department to take this into consideration when developing a river recreation management plan or recommending rules to the commission.

COMMENT 11: The rules state that restrictions and/or a rationing and allocation system would be designed for an individual river based on the conditions on that river. The rules do not identify one set of restrictions and one type of rationing and allocation system that would be used on all rivers where restrictions and/or rationing is necessary. Some people commented that they agreed that restrictions and rationing and allocation systems should be tailored to each river and user group. Other people commented that these rules were supposed to give guidance for river planning and bring uniformity to all river plans. These individuals stated that citizen advisory committees would struggle with this decision in the future because the rules do not identify one approach or method for rationing and allocating use.

RESPONSE: When drafting the recommendations from which these rules were formed, the River Recreation Advisory Council considered the merits of establishing one set of restrictions and one rationing and allocation system for all rivers where it

is necessary to restrict or ration use. The council recommended that, because conditions vary from river to river, it would be better for the rules to allow flexibility when designing restrictions or a rationing and allocation system for a river. The commission, like the council, realizes that the development of restrictions and the selection of a rationing and allocation system for a river could be challenging for a citizen advisory committee, the department, and the commission. The commission is hopeful that the outcome of this type of approach will result in decisions being made that accurately reflect the interests of the public and the characteristics of use on a river.

COMMENT 12: Some people recommended specific tools or actions to manage use on a river, such as restrictions on the number of launches allowed at a river access site or limitations on group size.

RESPONSE: The commission points out that the proposed rules are broad in nature and purposely do not specify the types of management tools that must be used on a river. Rather, the rules propose an analysis and decision-making process be used to identify the tools or actions that are appropriate for a set of river conditions. The commission agrees that there are a number of ways to manage use, and believes that it is important that the department and citizen advisory committees have flexibility when formulating management plans and tools. A river management plan that makes sense on the Beaverhead River may not be at all appropriate for a portion of Clark Fork River. The decision-making process outlined in the new rules will encourage the department and its citizen advisory committees to consider a number of aspects when formulating river management plans, including the ideas mentioned in the public comments.

COMMENT 13: The commission received a number of comments on the rules pertaining to the use of a nonfixed allocation system. Of those people opposed to the use of a nonfixed allocation system, some people commented that this type of system ignores the historical use of outfitters who have spent a lifetime building their business in Montana. Some people commented that a nonfixed allocation system would take away a recreation opportunity for a whole segment of the public that would have a difficult time entering a permit system. Some people commented that this type of allocation system might have merit for management on rivers that have overnight use where river users plan months in advance or on rivers where there are no river service providers, but they believe it would be devastating to service providers that book the majority of their trips within 48 hours of when the use occurs. The commission also received comments from people who support the use of a nonfixed allocation system. Some people commented that a nonfixed allocation system should be used for any rationed river because rivers and streams in Montana are a public resource, and it is not appropriate for the permits to be given to the river service provider. Some people commented that they disliked the fixed

allocation system, such as the one used on the Smith River, because landowners along the river and those with the money to hire an outfitter can float the river most any time they want. They are concerned that the average Montanan has to apply for several years before they get a permit.

RESPONSE: The commission points out that new rule VIII(5) ARM 12.11.435(5)) states that if rationing is proposed, and it becomes necessary to allocate opportunities to use or conduct business on a river, the department, working with the citizen advisory committee, shall recommend an allocation system to the commission. The rule states that the department may consider all types of allocation systems including fixed systems, nonfixed systems, and variations of these two types. The commission believes that this rule, when combined with the rest of the rules, will enable the department and the citizen advisory committee to design an allocation system that is based on the recreational characteristics of a river, and a system that works for the various types of river service providers that operate there.

COMMENT 14: The commission received comments on new rule VIII(2) (ARM 12.11.435(2)) that state that when determining how a river should be managed, the commission shall consider management methods in sequential order, from least restrictive methods to most restrictive methods. Section (3) of this rule also states that the commission may deviate from this order under conditions or circumstances identified by the commission. This provision allowing the commission to deviate from the sequential order was viewed both negatively and positively. Some people commented that they support the sequential ordering identified in section (2) but are concerned that section (3) leaves a broad power to the commission and is contrary to the public's recommendation that an ordering process must be used, not just considered. Other people commented that they do not support requiring the use of nonrestrictive, restrictive and rationing sequentially to address a problem. These individuals recommended that all options should be available to the department simultaneously to resolve the problem rather than allowing problems to linger while ineffective methods are exhausted. For this reason they recommended that the provisional language in section (3) is important and should remain a part of the rules.

RESPONSE: The commission points out that new rule II(3) (ARM 12.11.405(3)) reflects the River Recreation Advisory Council's recommendation that the public prefers to recreate on rivers without controls on their recreation experience. New rule VIII(2) (ARM 12.11.435(2)) two ensures that the commission shall seriously consider the use of less-restrictive management methods first in order to avoid placing unnecessary restrictions on the public. The provisional language in section (3) also ensures that the commission is not bound to the sequential

ordering if it is clear that the use of less-restrictive methods would be ineffective and could result in conditions worsening.

COMMENT 15: One person recommended that the rules state that river recreation management rules should be adopted without termination dates. This person commented that continual re-adoption of rules leads to animosity among the competing parties, as shown on the Beaverhead and Big Hole rivers and that forcing plans to expire only leads to needless tinkering and animosity between competing interests.

RESPONSE: The commission will take this into consideration in the future when adopting river recreation management rules for individual rivers.

COMMENT 16: One person recommended that restrictions on use of a river should only apply to a very short period of time when use is at its highest level. Their explanation was that there is only about a six-week period of time when use is high, and restrictions are not needed beyond that time period.

RESPONSE: The commission will take this into consideration in the future when adopting river recreation management rules for individual rivers.

Topic: Transfer/Sale of River Use Days

COMMENT 17: Some people commented that they support the transferability of river use days to qualified buyers. They explained that without transferability there is no business to sell and therefore no incentive to invest in their business.

RESPONSE: New rule XI (ARM 12.11.450) proposes that the sale or transfer of a licensed or nonlicensed river service provider and the transfer of river use days shall comply with 37-47-310(4), MCA, and shall not be prohibited as long as all legal requirements are fulfilled. According to 37-47-310(4), MCA, when a fishing outfitter's business is sold or transferred in its entirety, any river-use days that have been allocated to that fishing outfitter through the fishing outfitter's historic use of or activities on restricted-use streams are transferable to the new owner of the fishing outfitter's business. New rule XI (ARM 12.11.450) proposes that this requirement should also apply to nonlicensed river service providers. The commission believes the proposed rule should not interfere with a river service provider's ability to sell or transfer their business. The sale of river-use days separate from the sale of a business may be affected by recreational use rules on a river, e.g., the Big Hole and Beaverhead Rivers where there are no river service providers eligible to use separated river use days.

COMMENT 18: Some people commented on section (3) in new rule XI (ARM 12.11.450) that states that no property right attaches to the transferred use days. Some people commented that they are

concerned about the commercialization of public resources and recommended that there be an additional rule that explicitly prohibits a river service provider from selling river use days. One person commented that a property right has attached if the commission limits the number of river use days available to a river service provider and allows that river service provider to sell them. This person recommended that if the goal is to make sure that no property right attaches to the use days, the state should make it so that only the river service provider who received the use days can use those days, and that they can't transfer them to someone else.

RESPONSE: New rule XI (ARM 12.11.450) is based on 37-47-310(4), MCA, and provides for the transfer of river use days when a river service provider is transferring or selling their business in its entirety. New rule XI (ARM 12.11.450) is consistent with the law in stating that the use of any transferred river use days is subject to change pursuant to rules adopted by the commission, and no property right attaches to the transferred river use days. It is the commission's interpretation that the statement, "No property right attaches to the transferred river use days," is for the purpose of clarifying that the use of river use days or the transfer of river use days from one river service provider to another does not establish a property right. The availability and use of those river use days is subject to change pursuant to rules adopted by the commission. The commission does not intend for new rule XI (ARM 12.11.450) to explicitly prohibit or allow the sale or transfer of river use days.

COMMENT 19: Some people commented that the State of Montana's Board of Outfitters should license all types of river service providers, not just those who provide angling services. They explained that having licensure requirements similar to the hunting and fishing industry would help ensure that all of the river service providers are properly licensed, insured and regulated. They commented that the health and safety of the public is probably even more of a concern in a whitewater rafting operation than in a fishing operation. Some people requested that there be more rigorous licensing criteria established. They also commented that the data gathered during the licensing process would be useful. Some people recommended that the department be given the authority to license outfitters. Some people recommended that Montana not allow outfitters and guides from out of state to operate here.

RESPONSE: The commission points out that the proposed rules are for the purpose of addressing or preventing social conflicts on rivers and the issue of licensing river service providers is not within the scope of these proposed rules. Furthermore, the department does not have the statutory authority or responsibility for licensing outfitters and guides in Montana. The commission asks that comments of this nature be made to the

Montana Board of Outfitters within the Department of Labor and Industry or to the Montana State Legislature.

COMMENT 20: Some people expressed concerns about the number of outfitters and guides licensed in Montana.

RESPONSE: The commission points out that the department does not have the authority or responsibility for licensing outfitters and guides in Montana. This authority and responsibility lies with the Montana Board of Outfitters within the Department of Labor and Industry. The department does have the authority to regulate use on rivers and streams that are legally accessible to the public. This includes the authority to regulate the number of outfitters and guides authorized to operate on a river or stream should this type of action become necessary.

Topic: Identifying Rivers Needing a Management Plan

COMMENT 21: One person commented on the methods the department would use to identify rivers in need of further analysis and planning. This individual recommended that "dissatisfaction triggers" be identified that would trigger the appointment of a citizen advisory committee and/or the development of a management plan.

RESPONSE: Currently, new rule IV (ARM 12.11.415) proposes that the department, using existing information, shall evaluate the social and biological conditions on rivers and identify those rivers where further analysis and planning may be needed in order to prevent or resolve social conflicts. In preparation for future river recreation management needs, the department developed a River Evaluation Form. The form asks regional supervisors and their staff members to evaluate and score the rivers in their region based on the frequency and significance of social or biologically driven recreation issues, problems and/or conflicts. The form then asks for information that describes why the evaluator assigned a river a particular score. Evaluators are then asked to identify what they think the department needs to do in the next two years to address the social or biologically driven recreation issues, problems, and/or conflicts they listed and described for a particular river. They are asked to select one or more of the following responses:

A = Nothing (no action needed)
B = Conduct public meetings to begin identifying issues, problems and/or conflicts
C = Gather more data in an effort to better understand issues, problems, and/or conflicts
D = Establish a citizen advisory committee to begin a river management planning process

The evaluation form and process will be used to identify rivers where conditions might warrant further actions, such as the collection of data or the appointment of a citizen advisory committee to begin a river management planning process. The score assigned to a particular river would be similar to the "dissatisfaction triggers" mentioned in the comment above.

Topic: Stream Access, Stream Access Law

COMMENT 22: Some people recommended that the department use stream access as a management tool. They believed that maintaining and acquiring public access is a tool that can be used to disperse users.

RESPONSE: The commission agrees that maintaining and acquiring public access can be used to disperse users and that this tool might be appropriate for some rivers in the state. A citizen's Advisory Committee could consider this tool as a part of its analysis and decision-making process for a particular river.

COMMENT 23: Some people recommended that a statement be added to the rules to make it clear that the rules do not affect stream access rights.

RESPONSE: The commission recognizes that streams, rivers and lakes are public resources and that the public has a right to recreate on public water. This stream access right is part of Montana’s Constitution. The right is subject to reasonable regulation to reduce conflicts, to protect the safety and health of the public, and to protect and preserve the natural resources and the public use and enjoyment of the public resource. The commission is committed to using its authority to regulate recreational use to enhance the public’s use and to protect the resource without infringing upon or denying the public’s right to use the resource. This is required by the constitutionally based stream access rights. A statement in these procedural rules is not necessary to recognize what cannot be ignored or denied.

COMMENT 24: One person commented that simple public access to our public resources must remain a top priority for the department, and perhaps there has been too much emphasis on "making them pretty" with fancy campgrounds, launch ramps, picnic tables and fee stations.

RESPONSE: This recommendation will be directed to the department Fishing Access Site Program Coordinator.

Topic: Citizen Advisory Committees

COMMENT 25: In regard to the selection of citizen advisory committee members, one person recommended that the department work with Commissioner Mike Murphy on language to ensure there is equitable representation among the local citizens.

RESPONSE: New rule VI (ARM 12.11.425) provides that the director shall appoint members to citizen advisory committees that represent identified interests, both locally and statewide. Commissioner Murphy has expressed an interest in the methods that would be used to appoint people to a citizen advisory committee. His goals are to ensure that there is equitable representation of the affected interests and to ensure that the public views the appointed citizen advisory committee as credible. The commission will ask the department to include in the planning manual (see, new rule XII (ARM 12.11.455)) more detailed criteria for appointing people to a citizen advisory committee and ensuring equitable representation of the interest categories and committee credibility.

COMMENT 26: In regard to the composition of the citizen advisory committees, one person recommended that guides should have a place at the table because they have different viewpoints and different interests than those of outfitters.

RESPONSE: New rule VI (ARM 12.11.425) states that in considering appointments (to the citizen advisory committee) the director shall: (a) identify interests and stakeholders that will be affected by the proposed management plan or regulation; and (b) appoint members to the committee that represent the identified interests, stakeholders, and perspectives, both locally and statewide. The rule stops short of listing all the interests, stakeholders, and perspectives that might be affected by the proposed management plan or regulation. The decision to not include a list of affected parties is based on the premise that (a) not all of the parties would be affected and/or be present on each and every river; and (b) the department does not possess an exhaustive list of all the parties that might potentially be affected by a river recreation management plan or regulation. To attempt to include such a list in the rules could inadvertently result in the failure to include a potentially affected party. However, the rules make it clear that the director shall appoint members to the committee that represent the identified interests, stakeholders, and perspectives, both locally and statewide. The director could determine, for example, that guides represent an identified interest and provide a unique perspective and therefore should be appointed to a citizen advisory committee.

COMMENT 27: One person recommended that new rule II(6) (ARM 12.11.405(6)) be amended to include the following sentence: Membership on the citizen advisory committees will be made up of Montana residents.

RESPONSE: New rule II(6) (ARM 12.11.405(6)) is based on the recommendations of the River Recreation Advisory Council and states "Participation of all interested parties is vital when developing management plans." Experience has shown that failure to include all the interested parties when developing a

management plan or making key decisions can result in inequitable decisions being made that are unsustainable over time or decisions that do not resolve the conflict. Rather, experience has shown that inclusion of the various interest categories, including resident and nonresident interests, is an important ingredient to success. It can be challenging for a nonresident to participate on a citizen advisory committee and therefore it is sometimes necessary to select a representative for this interest category that resides in the state and can attend the meetings.

COMMENT 28: Some people recommended that there be term limits in place so that people don't serve on a citizen advisory committee for too long. They said the rules include language stating how committee members would be replaced if they are not doing a good job.

RESPONSE: More specific information regarding the citizen advisory committees would be included in the planning manual (see, new rule XII (ARM 12.11.455)). The commission believes that it would not be necessary for the planning manual to identify term limits for the citizen advisory committee members. The citizen advisory committees would be ad hoc committees appointed for the purpose of assisting the department and the commission in the development of a river recreation management plan and/or rules necessary to implement the plan. The committees would disband upon completing their work, which should address concerns about individuals serving too long on a committee. As for the recommendation that the rules include language stating how committee members would be replaced if they are not doing a good job, the department proposes that if this situation arises the committee members themselves should decide on how to address the problem. This would give the committee ownership in making what could be a critical decision.

COMMENT 29: Some people commented that having the department director appoint the members of the citizen advisory committee could be detrimental to the credibility of the process.

RESPONSE: The department was concerned about this issue when it appointed the members of the River Recreation Advisory Council, and thus it made a decision to solicit nominations from the public. The director then appointed members from the nominations that were received. This type of nomination and appointment process gave the public an opportunity to influence the composition of the committee and it ensured that the director would be able to appoint a committee that was representative of the interest categories. The proposed rules currently do not mention any public participation in the selection of committee members. In order to address this concern and ensure that the public has an opportunity to participate in the appointment of a citizen advisory committee, the commission has amended new rule VI(2) (ARM 12.11.425(2)) to include the words "through a public process."

COMMENT 30: One person commented that local concerns are important, but in the case of some of our more popular fishing rivers it is clear that the user group is predominantly not local, and thus the largest and most directly affected river use constituent group might be underrepresented if participation is limited to local interests. This individual recommended revising the citizen advisory committee selection and representation process.

RESPONSE: New rule VI(2)(b) (ARM 12.11.425(2)(b)) states that "In considering appointments...the director shall: (b) appoint members to the committee that represent the identified interest, stakeholders, and perspective, both locally and statewide." The words "both locally and statewide" make it clear that the citizen advisory committees would not be limited to local interests.

COMMENT 31: Some people recommended that the number of people representing a particular interest category on a citizen advisory committee should correlate to the number of people overall in that interest category. They commented that there are more nonguided river users than there are outfitters in the state, and therefore there should be a greater number of committee members representing the nonguided interests.

RESPONSE: The proposed rules do not provide details on the composition of a citizen advisory committee or the number of people who would represent various interest categories. The commission will notify the department that the planning manual (see, new rule XII (ARM 12.11.455)) needs to provide general guidelines on the composition of citizen advisory committees but that the exact composition of a committee would be determined on a case-by-case basis. Proportional representation is one method that could be used. Having a greater number of representatives could be an advantage to an interest category if decisions are made through a vote. The number of representatives from each category becomes less of a factor if the committee is using interest-based problem solving and consensus-based decision-making, which is the approach recommended by the River Recreation Advisory Council.

COMMENT 32: Some people commented on whether or not a citizen advisory committee should be required to use a consensus-based process when developing its recommendations and making decisions. Some people recommended that the citizen advisory committees not be required to use consensus in their deliberations. One person thought that the River Recreation Advisory Council seemed tied by the consensus process. Other people recommended that the citizen advisory committees should use a consensus-based process. One person recommended that the rules should state "Citizen advisory committees shall strive for consensus. If consensus cannot be reached, differing viewpoints will be forwarded to the Commission for their consideration in

their decision-making process and recorded in the record of decision."

RESPONSE: The proposed rules do not identify a method that must be used by the citizen advisory committees to develop recommendations and make decisions. The River Recreation Advisory Council recommended that the citizen advisory committees use interest-based problem solving and consensus-based decision-making. The commission will ask the department to include in the planning manual (see, new rule XII (ARM 12.11.455)) the Council's recommendation and information and guidelines on interest-based problem solving and consensus-based decision-making.

COMMENT 33: People offered differing opinions on whether or not a citizen advisory committee should be involved in reviewing, re-adopting or amending a management plan or rule. Some people commented that the proposed rules only refer to the citizen advisory committee's involvement on the front end of the process when the management plan is first developed. They recommended that the words "or amending" be added after the word "adopting" in new rule VI(1), and after the word "developing" in section (2). Other people commented that advisory committees are time consuming, often contentious, and expensive. For this reason, they recommended that when an existing plan is being renewed, the commission should consider public comment and not require an advisory committee to renew an existing plan. They recommended that the commission should only convene a citizen advisory committee after public comment indicates a need and conditions on the river have changed substantially from initial plan adoption.

RESPONSE: There can be very different circumstances when the commission and department are considering changing a management plan or the commission is considering amending the river recreation use rules on a river. Sometimes the changes will be minor, sometimes the changes or amendments can be sufficiently informed by the product of the original citizen advisory committee, and sometimes the changes to be considered will be significant and not adequately covered by the committee's work. The commission has decided to address the issue of changes or amendments by amending section (2) of new rule VI (ARM 12.11.425) to require the establishment of a citizen's advisory committee whenever the "proposed amendments or changes are anticipated to be of significant enough interest to the public to benefit from the participation of a citizen advisory committee."

COMMENT 34: One person recommended that new rule II(6) (ARM 12.11.405(6)) be amended to say that "Individuals appointed to serve on a citizen advisory committee, river users, and those affected by river recreation shall be full and integral partners in the development of management plans or rules." The current version of the rule uses the word should instead of shall.

RESPONSE: The commission has decided to amend the rule to say "shall be full and integral partners in the development of proposed management plans or rules." These wording changes emphasize that citizen advisory committees will have a role in the development of proposed management plans or rules. The use of the word "proposed" recognizes that the department and commission are the final decision-makers for management plans, and the commission adopts river recreational use rules.

COMMENT 35: One person commented that one of the challenges would be initiating a planning process in places like the Beaverhead and the Big Hole rivers where there are already rules in place and people are entrenched on the issues. This person predicted that in these types of situations it would be difficult to recruit people to citizen advisory committees who are open minded and willing to take a fresh look at the issues.

RESPONSE: The commission recognizes that there might be additional challenges when initiating a planning process on rivers where there are management plans and/or rules already in place. The commission will ask the department to strive to appoint citizen advisory committee members who are committed to resolving the conflicts and identifying solutions that meet the interests of a diverse public.

COMMENT 36: One person recommended that the rules include a mechanism to ensure that public input is not restricted to the citizen advisory committee (see, new rule V (ARM 12.11.420)). New rule V simply says, "public input" without adequately explaining the mechanics of giving that input. A citizen should be able to directly contact the department with suggestions. This person suggested that the rule say, "...public input with the department accepting comments in both written or electronic form."

RESPONSE: The commission thinks the recommended language is not necessary because the MAPA process already requires that the commission accept public comments in both written and electronic form. Section (3), new rule V (ARM 12.11.420), states that "[t]he commission shall adopt river recreation rules according to MAPA." MAPA requires agencies to give public notice of intended rulemaking actions, to conduct public hearings, receive public oral, written and electronic comment, and consider public comment as a part of the rulemaking process. MAPA also provides for an interested persons list (see, rule proposal notice, MAR Notice Number 12-307, paragraph seven) for people who are interested in a given topic to receive notice whenever rulemaking occurs on that topic. Additionally, new rule V(1)(b) (ARM 12.11.420(1)(b)) states, "When concurring in a management plan or when adopting, amending, or repealing rules for a river, the commission shall consider...public input."

COMMENT 37: One person stated that it is important that when rules are adopted they are adopted in a consistent manner. This person thought that the department shouldn't appoint a citizen advisory committee for one river and not appoint one for another river.

RESPONSE: New rule VI(1) (ARM 12.11.425(1)) states "The department shall establish a citizen advisory committee when developing a river recreation management plan or when recommending river recreation rules to the commission." Therefore, a citizen's advisory committee will be appointed when river management plans are developed or when the department recommends river recreation rules to the commission.

Topic: Data/Information

COMMENT 38: Some people commented on the importance of having good data when developing a management plan and/or rules for a river. Some people commented that there are a lot of inaccurate perceptions about conditions on rivers, what the problem is, who is using the river, etc., which is why it is so important to have good data. Some people expressed concern over new rule V(2) (ARM 12.11.420(2)) that reads "There is not a requisite amount of information that the commission shall consider before it is able to make a river recreation management decision." Some people recommended the rules include a minimum threshold for data backed by a concerted effort to develop funding sources for this vital aspect of management planning. Another person recommended that the rules be reworded to make it clearer that regardless of the amount or types of data considered, the commission would still need to consider MEPA, MAPA, the citizen advisory committee process, etc. before making a decision.

RESPONSE: The commission agrees that river recreation information can be beneficial when developing a river recreation management plan and/or rules. New rule V (ARM 12.11.420) requires the commission to consider the best available biological, social, and economic data before the department when concurring in a management plan or when adopting, amending, or repealing rules for a river. This rule also states that there is not a requisite amount of information the commission shall consider before it is able to make a river recreation management decision. Recreation conditions vary from river to river, and therefore it would be difficult to establish a minimum threshold for data that would suffice for all rivers. Furthermore, experience has shown that some people who are dissatisfied with a river recreation management decision will find fault with the data regardless of how much data is available. The commission believes that the proposed rules, in numerous places, make it clear that the department and the commission would be collecting and assessing river recreation information when developing management plans and adopting rules.

COMMENT 39: One person commented that the term "best available information" in new rule IV(4)(b)-(d) (ARM 12.11.415(4)(b)-(d)) is vague unless a strict legal definition is intended or spelled out. This person wondered if the term "best available data" means whatever is available at the point of decision-making, however scant or insignificant the data. Some people commented that this term could enable the commission to make decisions based on very little data. One person recommended that if the department doesn't have information it should not make any decisions about use of a river.

RESPONSE: The use of the term "best available information" is intended to mean that the department and the commission will consider the best information available at the time a decision is made. The department and the commission must make a concerted effort to obtain and consider the best data available. The term "best available data" is commonly used in environmental policy and law and enables the decision-maker to make the best decision at the time, rather than making no decision at all. If the default, when a specified "quantity" of data is not available, is to a de facto prohibition on making any decision, the public and resource could be denied the benefits and protections of needed regulation.

COMMENT 40: One person recommended that the department develop a standard, state-approved "river use survey," and the department should be required to gather recent and sound data when, or even before, social conflicts come to a head.

RESPONSE: The commission will ask the department to examine its data collection methods and consider ideas such as a standardized, state-approved river use survey.

COMMENT 41: Some people recommended that river service providers be required to keep accurate records on the number of clients they serve and information on the timing and location of the use.

RESPONSE: The department already requires river service providers to keep records on the Alberton Gorge and the Smith River. Since the use of rivers varies so widely throughout the state, the commission thinks that the decision to require river service providers to keep records should be made on a river-by-river basis, depending on the conditions present and the information that is needed. The department can also rely upon river use data submitted to the Board of Outfitters.

COMMENT 42: One person recommended that the rules be specific regarding what data are used. This person recommended that the department angling pressure data be used as the baseline data, and additional data could be considered based on validity.

RESPONSE: Because rivers vary in terms of the types of recreation that are present, it would be difficult for the rules

to be more specific on the data that should be considered. On some rivers, for example, angling is one of several types of use that occurs, and therefore it would be difficult to establish the angling pressure data as the baseline data.

COMMENT 43: Another person recommended that the department use volunteers to accomplish survey work, collection of fees, etc.

RESPONSE: While defining the duties of volunteers is beyond the scope of this rulemaking, the commission will direct this comment to the department's Responsive Management Unit.

COMMENT 44: One person cautioned that it is one thing to set up a permit system, but another thing to set up a monitoring system. In this individual's view, the challenge is in first acquiring baseline data and then setting up a monitoring system that is consistent over time so that comparisons can be made and trends identified.

RESPONSE: The commission agrees that acquiring baseline data and developing a monitoring system for the purpose of examining trends can sometimes be challenging. The commission shall ask the department to take this into account when working on individual rivers.

Topic: Tourism Economy

COMMENT 45: Some people commented on the relationship between river recreation management and the state's tourism-based economy. They advised the commission to think about the state's economy as it moves forward and consider the potential impact river recreation decisions might have on the economy. Some people commented that river recreation decisions that affect nonresidents could result in potential visitors choosing not to recreate in Montana. Some people commented that river recreation decisions that restrict the ability of outfitters to conduct business could have negative impacts on local economies.

RESPONSE: The commission is sensitive to the important role rivers play in the state's tourism economy. It is for this reason that the proposed rules require the department and the commission to consider economic data when developing a river recreation management plan and/or rules. The prevention or resolution of social conflicts on rivers should benefit residents, nonresidents, and outfitters. Just as unreasonable or capricious restrictions on nonresidents and outfitters could negatively impact the tourism economy, failure to address social conflicts could result in a dissatisfactory experience for visitors and have a negative impact on the tourism economy. The inclusion of tourism, nonresident, and outfitting interests on the citizen advisory committees will help to ensure that river recreation management decisions reflect the many interests and perspectives that are involved, including those related to tourism.

Topic: Displacement Issues

COMMENT 46: Several people recommended that the department and the commission consider the displacement factor when developing a river recreation management plan and/or rules. Some people commented that if the commission restricts use on a river, people might choose to recreate on a different river to avoid the restrictions and that this could lead to crowding on the unrestricted river. Inadvertently the commission would have caused the crowding problem to shift from one river to another. Conversely, some people commented that if the commission doesn't restrict use on some of the high use rivers, people will become disgusted with the conditions and choose to go to a different river, potentially creating crowding problems there. Another person recommended that the commission purposefully leave some high-use rivers unregulated. This person believes that there are some popular rivers where people are accustomed to seeing lots of people, but they continue to go there because the fishing is good. This person believes that if the commission restricts use on these popular, high use rivers, the public would go to other rivers instead, which could lead to crowding problems on rivers where there currently is no problem. One person commented that social conflicts are self-regulating and that people will find places to recreate that meet their needs and will avoid places where conditions do not meet their needs.

RESPONSE: The commission recognizes that its decision to restrict use on a river, or its failure to address conflicts, could influence river use and lead to displacement. The commission agrees that a river recreation planning process must consider how management decisions, or lack thereof, might influence use of other rivers in the state. The commission will ask the department to include this issue in its river recreation planning manual (see, new rule XII (ARM 12.11.455)). The commission will also ask the department to identify methods for surveying displaced anglers in order to gain a better understanding of their decisions.

Topic: Commission/Department Authority

COMMENT 47: Several people commented that they are concerned about new rule III(8) (ARM 12.11.410(8)) that states, "Nothing in this subchapter shall prevent the department, with the concurrence of the commission, from amending or repealing a management plan and the commission from amending or repealing rules as needed." Some people commented that this rule gives the department and the commission too much power to do "basically whatever they please." One person commented that this would allow the commission/department to avoid going through a MAPA process when amending a management plan and/or rules for a river. This person recommended that the rules be changed to make it clear that the MAPA requirements also apply

when amending a plan and/or rules, which would require that the commission provide rationale and justification for its rules.

RESPONSE: The intent of section (8) of new rule III (ARM 12.11.410) is to make it clear that the initial management plan and recreational use rules on a river are not permanent. They may be amended or repealed as circumstances change and new data or information are available. Public input, including satisfaction or dissatisfaction with how the initial plans and rules are working or not working, may also lead to adoption, amendment or repeal of rules. Section (3) of new rule V (ARM 12.11.420) requires that river recreation rules be adopted under MAPA. Adopting rules means both the adoption of initial rules and the adoption of subsequent rules, such as amendments or "addition" rules. All versions of river recreation rules must be adopted under MAPA. The commission is revising section (1) of new rule VI (ARM 12.11.425) to provide the full application of these rules, including the use of a citizen advisory committee, to any proposed amendments or changes to plans or rules that are of significant interest to the public. (See, Comment 33 and Response.)

Topic: Planning Manual

COMMENT 48: One person commented that if it is important that the planning manual referred to in new rule XII (ARM 12.11.455) provide direction to the department, it is also important that the department be forced or mandated to give consideration to these directions. This person commented that it is important that the elemental details of the River Recreation Advisory Committee recommendations to disappear into a planning manual on a forgotten shelf.

RESPONSE: The commission agrees that the recommendations of the River Recreation Advisory Council should be considered when developing a river recreation management plan and/or rules for a river. The commission added language to new rule XII (ARM 12.11.455) to clarify that citizen advisory committees must consider the river recreation planning manual as they do their work.

COMMENT 49: One person recommended that the department develop a playbook of proven methodologies that work when it comes to addressing social conflicts on rivers. This individual said that the department should include this information in the planning manual so that the citizen advisory committees know what has worked on other rivers.

RESPONSE: The commission agrees and shall ask the department to include information on river recreation management tools that have been used on other rivers for the purpose of preventing or resolving social conflicts. The commission does not believe it is necessary to include this request in the rules.

Topic: Natural Resource Protection

COMMENT 50: One person recommended that new rule II (ARM 12.11.405) include a statement saying that the highest priority is to provide protection for natural resources, similar to new rule III(1) (ARM 12.11.410(1)).

RESPONSE: New rule II(4) (ARM 12.11.405(4)) already includes a statement that says, "The quality of the river resource should be protected as the first and foremost priority."

COMMENT 51: One person commented that it is of great importance that the department's fisheries division has full authority to regulate all aspects of fisheries management. This person recommended that the commission add a rule stating that river recreation management plans shall be crafted to comply with fisheries management plans and not vice-versa.

RESPONSE: The commission agrees that river recreation management plans should comply with fisheries management plans and believes that the new rules ensure that this takes place. New rule IV(4) (ARM 12.11.415(4)) states that the department shall develop management plans and recommend rules to the commission based on the best available information, including biological information. Biological information includes fisheries plans and the information that these plans are based on. Furthermore, the rules require the department to conduct an environmental analysis according to MEPA when developing management plans, which would include examining fisheries issues. In addition, new rule III (12.11.410) states that the highest priority of a management plan is providing protection for resources, including fisheries.

COMMENT 52: One person commented that the rules fail to mention the importance of water quantity in a river. This person stated that quantity of water has a big influence on river recreation because if you don't have enough water, you end up with a lot of social impacts.

RESPONSE: The proposed rules are for the purpose of addressing or preventing social conflicts on rivers. The commission agrees that water quantity can influence recreational opportunities and that undesirable stream flows, such as drought, can lead to or compound social conflicts. The rules would require the department to conduct an environmental analysis according to MEPA and water quantity issues, where relevant, would be considered.

COMMENT 53: One person commented that the rules propose to restrict users but do nothing to protect resources. This person thought that if the commission is going to restrict people on rivers, it should protect the resources.

RESPONSE: The commission agrees that providing protection to resources is very important and believes the rules make it clear that providing protection to the resources is the highest priority. The commission also points out that the department has a competent fisheries and wildlife division that provides protection to the resources in and along rivers.

COMMENT 54: One person recommended that the department work with other states to improve their fisheries so that people won't be so inclined to come to Montana.

RESPONSE: The commission will forward this comment to the department's fisheries division staff that communicates with fisheries managers in other states.

COMMENT 55: Some people commented that restoration of some of the more marginal rivers in the state (Clark Fork, Jefferson, etc.) could alleviate some of the pressure on the more heavily used rivers. One person commented that the solution does not lie in allocating or rationing recreational use, but in enhancing and increasing angling opportunities across the state.

RESPONSE: The commission agrees that restoration of fisheries habitat in rivers where habitat is marginal could lead to more angling opportunities and alleviate angling pressure on existing streams where use is high. The fisheries department has staff working on habitat restoration, and the commission supports these efforts.

Topic: Landowner Issues

COMMENT 56: One person commented that there are a lot of landowners in the state who don't want to see anyone recreating on the rivers and that they are going to use these rules as a tool to try to keep people off the river.

RESPONSE: The analysis and decision-making process and the citizen advisory committee are for the purpose of ensuring that everyone's interests are considered when making river recreation management decisions. The commission believes that this is a fair and reasonable process that will not lead to people taking unfair advantage of others.

Topic: Wild and Scenic River Program

COMMENT 57: One person recommended that the Wild and Scenic River Program is the appropriate program for addressing social conflicts and resource concerns on rivers. This person stated that the commission and department's efforts are duplicative and unnecessary.

RESPONSE: The commission recognizes that the federal government can use the Wild and Scenic Rivers Program to manage recreation on designated rivers. The commission points out that there are

two rivers in Montana designated as "wild and scenic." However, the commission has received hundreds of comments regarding problems on some rivers in the state. Citizens want these problems resolved. The congressional designation process can take considerable time, and the department already has the authority to address social conflicts on rivers. Through experience, the commission has found that the people experiencing the problems and the interest groups affected are often the best people to design solutions to solve the problems. The commission thinks that the department can complement the federal government's efforts on Wild and Scenic Rivers.

Topic: Education

COMMENT 58: One person recommended that an education program be incorporated into the licensing program and that the program should educate people about river etiquette.

RESPONSE: New rule II(3) (ARM 12.11.405(3)) states that educating the public about river recreation issues can lead to modified behavior on rivers and the department can use education as a nonregulatory method to address social problems on rivers. Incorporating an education program into a licensing program is beyond the scope of these rules, but the commission will forward this idea to the department's management staff.

Topic: Aviation

COMMENT 59: One person commented that aviators are interested in recreational opportunities that would involve the placement of an airstrip on state lands adjoining a river.

RESPONSE: When implementing these rules, the director would appoint members to the citizen advisory committee that represent the identified interests, stakeholders, and perspectives, both locally and statewide. The commission encourages aviators and other river recreation enthusiasts to get involved in river recreation management processes.

Topic: Coordination with other agencies

COMMENT 60: One person recommended that the department and commission work with other state and federal agencies when developing river management plans. One person commented that the commission's decision to restrict or ration river use could be in conflict at times with a federal agency's permit that already restricts or rations use on some Montana rivers and recommended that the commission take into consideration any applicable tribal, state and federal permits. One person commented that enforcement and compliance issues could get unduly complicated. One person who is an outfitter commented that outfitters do not wish for redundant regulation and that currently they are regulated by the Forest Service and the

National Parks Service. This person said that to have another agency implementing recreation rules would be very confusing.

RESPONSE: The commission agrees that it is important to work with other state and federal agencies when developing river recreation management plans and believes that these rules provide for that cooperation. New rule II(10) (ARM 12.11.405(10)) states that partnerships with other agencies that lead to improved management of the river resources and better services to the public are encouraged. New rule III(6) (ARM 12.11.410(6)) states that when possible, the development of management plans must be coordinated with the planning processes of both state and federal agencies having jurisdiction over a river or reach of river. The commission intends that these rules also encourage partnerships with tribes having jurisdiction over a river or reach of river and has added language to new rule II (ARM 12.11.405) and new rule III (ARM 12.11.410) to reflect this fact.

Topic: River Recreation Advisory Council Guiding Principles

COMMENT 61: One person recommended that the River Recreation Advisory Committee (RRAC) Guiding Principles be made a requirement for any and all individual river plans that address social conflicts for the reason that within the RRAC process, the Guiding Principles emerged as the most comprehensive expression of the will of the council.

RESPONSE: The commission agrees with the importance of the Guiding Principles and points out that the principles are reflected throughout the rules. The commission also points out that new rule XII(1) (ARM 12.11.455(1)) states that the river recreation management planning manual will incorporate the recommendations of the River Recreation Advisory Council as expressed in their final report of July 10, 2003, including the guiding principles.

Topic: Pilot Project

COMMENT 62: One person expressed concern that the commission has not selected a river to try this process before going forward.

RESPONSE: The commission points out that it will monitor the implementation of these rules on rivers. The commission can make changes if necessary.

Topic: Fees, Program Cost

COMMENT 63: Some people provided ideas for generating revenue to help pay for river recreation management efforts. One person recommended that the commission consider charging a launch fee at access sites in order to generate money for the river recreation management program. One person recommended that the

commission consider requiring nonresidents to put in for a permit to fish and use the money to pay for river recreation management. One person recommended that the cost of nonresident licenses be increased substantially to help pay for Montana infrastructure. One person recommended that there be a substantial tax on fishing boats and that professional guides and private citizens pay the revenue to the department. One person recommended a head tax on any person who floats in a raft controlled by a guide. One person commented that so far it has been anglers' dollars that have paid for river recreation management efforts and that in the future the commission should examine ways for non-angling interests to help pay for the program. Some people recommended that non-angling recreational floaters, such as rafters and kayakers, pay a use rate similar to what the angler pays for a fishing license. These individuals thought that monies collected go to river and stream improvement. One person recommended there be a tag for all watercraft that use a waterway in the state of Montana and that the monies collected be earmarked for waterway upkeep and improvement and water safety. One person commented that the basic need is for access, and expenditures to ensure simple access (not overly-developed) should supercede all other expenditures. For this reason, this person expressed opposition to fees to access "their own land." One person commented that it is wrong that people who use the Smith River pay more in fees than it costs to regulate the river. This person does not want to see the river recreation management program become a way to raise fees for the department in the future. One person recommended that the department, the commission, and the Citizen Advisory Council should make every reasonable effort to determine how much it will cost the department to implement and enforce a new management plan.

RESPONSE: The commission appreciates the suggestions for ways to generate revenue for river recreation management and will ask the department to consider these ideas in future strategic planning efforts. The commission also recognizes that taxation is a sensitive topic in the state of Montana, and any effort to generate money from new fees should be thoroughly evaluated for its merits. Most of the ideas proposed would require legislation to implement.

Topic: River-Specific Comments

COMMENT 64: A number of people provided specific comments on individual rivers.

Some people commented that they disagreed with the rule proposal notice's description of use on the Beaverhead and Big Hole rivers from about 1995 to 1997. One person commented that the rule proposal notice fails to tell readers why people showed up on these two rivers during this time period and what has happened since 1997. These people recommended that the public should have current information. Some people commented that

there are already rules for the Beaverhead and Big Hole rivers and thought that it is not necessary to start over again once the statewide rules are adopted.

One person expressed support for the proposed rules but was concerned about the slowness of the process. This person commented that the need in the Bitterroot Valley is more than evident and requested that the commission please do what it must do and get on with it. This person also stated that it may already be too little too late. A Hamilton resident expressed opposition to implementing management rules for the Bitterroot or other rivers in Western Montana because this individual believes they are not needed.

One person commented that within the last four or five years there has been a dramatic and disturbing change in the amount of motorized use on the Clearwater River. This individual expressed concern about the high-speed ski boats using the river and the danger to public safety and recommended that there be no wake zones on small rivers like the Clearwater.

One person recommended that, because of the way the Madison and Yellowstone are divided up with access sites, parts of the rivers could be closed to float fishing during the week and open for wade fishermen only. One person commented that Three Rivers Park is a new concept and vision for river access for river recreation. One person commented that on the lower Madison River this summer there has been an incredible increase in floating and fishing use. This person said that parking situations on the highway are creating a hazard and recommended that if it ever comes down to permitting, fishermen and floaters need to be treated equally because both sectors of use are contributing to the problem. One person who has lived in the Madison Valley for 18 years said something needs to be done about the fishing pressure on the Madison River. This person said that the river looks like an interstate highway with bumper-to-bumper drift boats. Because of this overcrowding, this individual has not floated the river this year. One person commented that there is too much fishing pressure on the Madison River around Ennis from the salmon fly hatch (late June) until mid-September. This person stated that this fishing pressure is excessive from both a recreation experience point of view and from the impacts on the fish resource. This person thought that the angling public would accept restrictions on float access to the river. One person recommended that the commission extend the fishing season on the Madison in order to spread use out over the entire year. One person recommended that the commission adopt regulations to control overcrowding on the upper Madison because there are too many boats and people there. Because of these conditions, this person has stopped floating or wading there. The same person also commented that conditions on the Yellowstone are approaching those on the Madison. One person commented that the biggest concern continually expressed by fellow anglers is that the number of anglers (primarily

nonresident and guided anglers) has increased to a level that the resident anglers find the solitude of fishing (primarily wade fishing) has been compromised, and the competition from float anglers is unacceptable. This person specifically mentioned rivers such as the Madison and the Yellowstone, and in more recent years, the Big Horn and the Missouri.

One person commented that there is quite a bit of animosity between outfitters/guides and the local citizenry on the Missouri River, from Holter Dam to the Dearborn River and that it is a known fact that the river is too crowded in this area. Some people commented that they are concerned about the use of motorboats and personal watercraft on the Missouri River in Great Falls. They commented that these types of use have increased significantly, and there are public safety and noise issues. They recommended more enforcement of the rules.

One person commented that Rock Creek is not doing well. This person said both the numbers of fish and the size and quality have gone down noticeably while the fishing pressure and number of boaters has gone up. This person recommended that the department, the Forest Service and Five Valleys Land Trust need to do something soon or Rock Creek would be lost.

One person commented that even the though the statewide rules propose that the department would use the least restrictive method possible to get the job done, on the Smith River the department restricts use before the river flows start to rise and continues these restrictions almost three months after flows rise. This individual said that if the commission is going to apply these rules to the Smith River, it is going to have to cut down on the regulations there. One person commented that the Smith River is a good program, that Joe O'Neill does a good job there, and there seems to be a low level of conflict. This person recommended that this type of program could be implemented on other rivers, e.g., limit the number of launches per day. One person who used to float the Smith River before permitting said the experience was gross. It is a much finer experience now.

One person who has lived on the Stillwater River for 30 years and observed lots of changes said that use is getting out of hand, and the fish population is suffering. This individual recommended that now is the time to stop commercial rafting trips and slow down private rafters.

RESPONSE: The commission appreciates the public's interests and concerns and points out that these comments will be useful for future river recreation planning efforts. The commission will refer these comments to the department and future advisory committees designing management plans on these rivers.

By: Dan Walker
Dan Walker,
Chairman, Fish, Wildlife and Parks Commission

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

Certified to the Secretary of State October 25, 2004

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I (42.9.105) and II (42.9.106) and amendment of ARM 42.9.101, 42.9.104, 42.9.202, and 42.9.203 relating to pass-through entities	))))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On August 19, 2004, the department published MAR Notice No. 42-2-736 regarding the proposed adoption and amendment of the above-stated rules relating to pass-through entities at page 1919 of the 2004 Montana Administrative Register, issue no. 16.

2. A public hearing was held on September 23, 2004, to consider the proposed adoption and amendment. No oral testimony was provided and no written comments were received. However, since the proposal notice was filed the final design, layout, and payment method for these rules has been completed and the form names have been changed. The original rules were written with the idea that the department would have two consent agreements and one pass-through entity statement and that payment of withholding would be separate. The following reflects those necessary changes:

NEW RULE I (42.9.105) CONSENT, COMPOSITE RETURN, OR WITHHOLDING FOR PARTNERS, SHAREHOLDERS, AND SINGLE MEMBER LLC MEMBERS THAT ARE FOREIGN C CORPORATIONS (1) and (1)(a) remain as proposed.

(b) obtain from the foreign C corporation and file with its information return the ~~foreign C corporation's~~ PASS-THROUGH ENTITY OWNER TAX agreement to timely file a Montana corporate license tax or corporate income tax return, to timely pay tax due, and to be subject to the state's tax collection jurisdiction on the Montana ~~Foreign C Corporation Income~~ PASS-THROUGH ENTITY OWNER Tax Agreement, Form ~~PT-FCA~~ PT-AGR (MONTANA Pass-through Entity ~~Foreign C Corporation~~ OWNER TAX Agreement); or

(c) remit an amount on the foreign C corporation's account, determined as provided in (3), with~~:~~

~~(i) a Statement of Montana Income Tax Withheld, Form PT-WH; and~~

~~(ii) a~~ THE Pass-through Entity'S ~~Withholding Payment Transmittal Document,~~ INFORMATION RETURN, FormS ~~PT-HWHREM.~~ CLT-4S, PR-1, OR DER-1; AND

(d) PROVIDE FORM PT-WH TO THE FOREIGN C CORPORATION SETTING FORTH THE AMOUNT OF WITHHOLDING REMITTED TO THE DEPARTMENT OF REVENUE WHICH CAN BE USED AS AN ESTIMATED PAYMENT AGAINST THE TAX LIABILITY OF THE FOREIGN C CORPORATION

UPON FILING A MONTANA CORPORATION LICENSE TAX RETURN OR INCOME TAX RETURN.

(2) and (3) remain as proposed.

(4) The due date for the remittance ~~and transmittal documents~~ described in (1)(c) is the due date of the entity's information return.

AUTH: 15-30-305 and 15-30-1112, MCA
IMP: 15-30-1113, MCA

NEW RULE II (42.9.106) ~~CONSENT~~ STATEMENT, COMPOSITE RETURN, OR WITHHOLDING FOR PARTNERS, SHAREHOLDERS, AND SINGLE MEMBER LLC MEMBERS THAT ARE SECOND-TIER PASS-THROUGH ENTITIES

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

(b) obtain from the second-tier pass-through entity and file with its information return the second-tier pass-through entity~~'s~~ OWNER statement on Form PT-~~PTS~~STM (MONTANA SECOND-TIER Pass-through Entity ~~Second-Tier Pass-through Entity~~ OWNER Statement) establishing that its Montana source income will be fully accounted for in individual income or corporate license or income tax returns filed with the state; or

(c) remit an amount on the second-tier pass-through entity's account, determined as provided in (3), with~~:~~

~~(i) a Statement of Montana Income Tax Withheld, Form PT-WH; and~~

~~(ii) a~~ THE Pass-through Entity'S ~~Withholding Payment Transmittal Document,~~ INFORMATION RETURN, FormS ~~PT-HWHREM.~~ CLT-4S, PR-1, OR DER-1; AND

(d) PROVIDE FORM PT-WH TO THE SECOND-TIER PASS-THROUGH ENTITY SETTING FORTH THE AMOUNT OF WITHHOLDING REMITTED TO THE DEPARTMENT OF REVENUE WHICH CAN BE PASSED THROUGH TO ITS OWNERS AND USED AS AN ESTIMATED PAYMENT AGAINST THE TAX LIABILITY OF THE OWNERS OF A SECOND-TIER PASS-THROUGH ENTITY UPON FILING A MONTANA INDIVIDUAL INCOME, CORPORATION LICENSE TAX, OR CORPORATE INCOME TAX RETURN.

(2) The pass-through entity is ~~not~~ required to attach new statements each year~~, but must attach a currently effective agreement for each new second-tier pass-through entity owner~~.

(3) remains as proposed.

(4) The due date for the remittance ~~and transmittal documents~~ described in (1)(c) is the due date of the first-tier pass-through entity's information return.

AUTH: 15-30-305 and 15-30-1112, MCA
IMP: 15-30-1113, MCA

42.9.104 CONSENT, COMPOSITE RETURN, OR WITHHOLDING FOR PARTNERS, SHAREHOLDERS, AND SINGLE-MEMBER LLC MEMBERS WHO ARE NONRESIDENT INDIVIDUALS (1) and (1)(a) remain as proposed.

(b) obtain from the nonresident individual and file with its information return the ~~individual's~~ PASS-THROUGH ENTITY OWNER TAX agreement to timely file a Montana individual income tax return, to timely pay tax due, and to be subject to the state's tax collection jurisdiction on Form ~~PT-NRA~~ PT-AGR (MONTANA Pass-through Entity ~~Nonresident Individual~~ OWNER

Agreement); or

(c) remit an amount on the individual's account, determined as provided in (3), with~~:~~

~~(i) a Statement of Montana Income Tax Withheld, Form PT-WH; and~~

~~(ii)~~ ~~a~~ THE Pass-through Entity'S ~~Withholding Estimated Payment Transmittal Document,~~ INFORMATION RETURN, FormS ~~PT-HWHREM.~~ CLT-4S, PR-1, OR DER-1; AND

(d) PROVIDE FORM PT-WH TO THE NONRESIDENT INDIVIDUAL SETTING FORTH THE AMOUNT OF WITHHOLDING REMITTED TO THE DEPARTMENT OF REVENUE WHICH CAN BE USED AS AN ESTIMATED PAYMENT AGAINST THE TAX LIABILITY OF THE NONRESIDENT INDIVIDUAL UPON FILING A MONTANA INDIVIDUAL INCOME TAX RETURN FORM 2.

(2) and (3) remain as proposed.

(4) The due date for the remittance ~~and transmittal documents~~ described in (1)(c) is different for tax years beginning before January 1, 2003, than it is for later tax years.

(a) and (b) remain as proposed.

AUTH: 15-30-305 and 15-30-1112, MCA
IMP: 15-30-1113, MCA

3. Therefore, the department adopts New Rule I (ARM 42.9.105) and New Rule II (ARM 42.9.106), amends ARM 42.9.104 with the amendments listed above, and amends ARM 42.9.101, 42.9.202 and 42.9.203 as proposed.

4. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.discoveringmontana.com/revenue, under "for your reference;" "DOR administrative rules;" and "upcoming events and proposed rule changes." The Department strives to make the electronic copy of this Adoption Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Don Hoffman
DON HOFFMAN
Acting Director of Revenue

Certified to Secretary of State October 19, 2004

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.17.101, 42.17.103, 42.17.105, 42.17.111, 42.17.113, 42.17.114, 42.17.120, 42.17.131, 42.17.134, 42.17.203, 42.17.204, 42.17.206, 42.17.207, 42.17.208, 42.17.209, 42.17.210, 42.17.218, 42.17.219, 42.17.221, 42.17.222, 42.17.223, 42.17.304, 42.17.305, 42.17.306, 42.17.308, 42.17.309, 42.17.310, 42.17.311, 42.17.312, 42.17.313, 42.17.314, 42.17.315, and 42.17.316; and repeal of ARM 42.17.205, 42.17.220, 42.17.224, 42.17.307, 42.17.506, 42.17.508, 42.17.538, and 42.17.539 relating to business and estimated payment taxes	)	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On September 2, 2004, the department published MAR Notice No. 42-2-738 regarding the proposed amendment and repeal of the above-stated rules relating to business and estimated payment taxes at page 2054 of the 2004 Montana Administrative Register, issue no. 17.

2. A public hearing was held on September 23, 2004, to consider the proposed amendment and repeal. Oral testimony received at the hearing is summarized as follows along with the response of the department:

COMMENT NO. 1: Mary Whittinghill, Montana Taxpayer's Association inquired whether the department was going to require existing businesses to file the new form that was identified in ARM 42.17.218.

RESPONSE NO. 1: No, existing businesses are already registered with the state. This is for new businesses that are not currently registered.

COMMENT NO. 2: Ms. Whittinghill suggested the department amend ARM 42.17.218 to clarify that it only applies to "new employers" so that there won't be any confusion about who would be required to file this form. The amendment would be to insert "new" as an amendment in ARM 42.17.218(1) in front of "employer".

RESPONSE NO. 2: The department agrees and the rule is amended below to reflect this request.

COMMENT NO. 3: Ms. Whittinghill inquired about the Montana tax identification number that is referenced in the rule and how that would differ from the current employer identification numbers being used by the department. She mentioned that she had been present for the GenTax presentation earlier and as she understood that explanation of this process, people will be able to use the current tax identification number but there will be a new number that is assigned to employers and is generated off of GenTax (the new computer system for the department). She questioned if that was correct?

RESPONSE NO. 3: GenTax will have a new number but the old numbers are still valid. The Montana identification number will be used instead of a customer number but the two numbers are interchangeable.

COMMENT NO. 4: Ms. Whittinghill asked about ARM 42.17.304, determination of tax liability and why the elderly homeowner credit would be considered a part of the total taxes paid? She questioned why that couldn't be used if they make estimated payments as being part of the liability? She said she thought it was confusing as shown in the example.

RESPONSE NO. 4: The department will further amend the example to make it clearer to the taxpayers. The elderly homeowner credit is the only refundable credit and is considered a payment used in determining if an individual is subject to the underpayment interest. The underpayment interest is assessed if an individual has a liability after all payments of $500 or more and the taxpayer has not paid in through withholding and estimated payments 90% of the current year or 100% of the previous tax year's tax liability. It is determined a payment when determining the final liability of $500.

There are two steps that must be considered; first make the determination which is lower, 90% of current year's liability, or 100% of last year's liability. Once that determination has been made, then look at how many estimated payments were made during the year and apply that against the lower of the two to determine if an underpayment penalty would be appropriate.

COMMENT NO. 5: Ms. Whittinghill stated for clarification purposes, as she understands the process, the taxpayer cannot assume that because they are getting $1,000 they don't have to make an estimated payment. If their tax liability the following year was $800 and they know that they are going to qualify for the $1,000 as an elderly taxpayer, and they decide at the end of the year their tax liability will be $0 because they are going to get approximately $200 back, would the department require them to withhold or make estimated payments on the $800?

RESPONSE NO. 5: No. The department would not require payments on that amount.

COMMENT NO. 6: Ms. Whittinghill asked if ARM 42.17.304(2), which addresses "estimated payments" could be clarified better by adding "prior year" to the second sentence.

RESPONSE NO. 6: The department agrees that this could be clarified. See the amendment below in new (3).

COMMENT NO. 7: Ms. Whittinghill commented on ARM 42.17.305 regarding the underpayment penalty. She stated that the rule indicates that the department does not provide any extensions. The underpayment portion is the 100% of the prior year or 90% of this year's liability. For example, if her last year's liability was $1,000 and she made $800 in payments then her underpayment would be $200. Then she would get charged interest on the $200 under 15-30-241, MCA, of 12% a month based on what? Does the department require payment on the current part first or how would the department figure when that interest begins? In other words, at what point does the interest start to calculate?

RESPONSE NO. 7: Interest is assessed separately on each missed payment. For example, if the payments were made in April and June and missed in September but made again in December, the September payment accrues interest from the date due until the underpayment is made. The department follows federal regulations in this regard and provides a Montana worksheet to calculate the amount of the underpayment. If four equal payments were made and were underpaid, interest is calculated on each underpayment separately until payment is made. A taxpayer is required to make equal installment payments unless they qualify for the annualization method.

COMMENT NO. 8: Ms. Whittinghill stated that as she understands ARM 42.17.305, if a taxpayer files electronically they don't have to file the form that is required in the rule - is that correct?

RESPONSE NO. 8: That is correct. Any electronically filed returns do not require the worksheets to be filed but the taxpayer must retain those worksheets as a record and provide them to the department upon request. The new forms being developed by the department will have this same requirement noted on them so that the taxpayer will be advised of the requirement to retain these documents.

3. As a result of the comments received the department amends ARM 42.17.218 and 42.17.304 with the following changes:

42.17.218 EMPLOYER REGISTRATION (1) Every NEW employer required to withhold state individual income tax must register

for a Montana tax identification number on form GenReg, which is provided by the department. A new employer who has acquired the business of another employer must not use the predecessor's identification number. Application for a Montana tax identification number ~~is to~~ SHALL be sent to the Department of Revenue, P.O. Box 5805, Helena, Montana 59604-5805.

(2) and (3) remain as proposed.

AUTH: Sec. 15-30-305, MCA
IMP: Sec. 15-30-209, MCA

42.17.304 DETERMINATION OF TAX LIABILITY FOR PRECEDING TAX YEAR; DETERMINATION OF TAX PAID FOR CURRENT TAX YEAR

(1) A taxpayer's tax liability for the preceding tax year is the total tax imposed by Title 15, chapter 30, MCA, less any NONREFUNDABLE tax credits allowed under Montana law ~~other than the elderly homeowner/renter credit~~, as shown on the taxpayer's return. ~~The elderly homeowner/renter credit is treated as a payment of tax and is added to the taxpayer's withholding and estimated tax payments in determining the amount of tax paid for the current year.~~

(2) THE AMOUNT OF TAX PAID FOR THE CURRENT YEAR IS THE SUM OF THE WITHHOLDING AND ESTIMATED TAX PAYMENTS PLUS ANY REFUNDABLE ELDERLY HOMEOWNER/RENTER CREDIT CLAIMED, AS SHOWN ON THE TAXPAYER'S RETURN.

Example: A taxpayer has a tax, before APPLYING NONREFUNDABLE credits, of $5,000. ~~The taxpayer has an elderly homeowner/renter credit of $400, other tax credits of $1,000 and employer withholding of $800.~~ THE TAXPAYER HAS A NONREFUNDABLE ENERGY CONSERVATION INSTALLATION CREDIT OF $500. The taxpayer's tax liability for the prior year for estimated tax purposes is ~~$4,000~~ $3,500 computed as follows:

~~Tax before credits~~	~~$5,000~~
~~Credits~~	~~(1,000)~~
~~Tax liability~~	~~$4,000~~
TAX BEFORE NONREFUNDABLE CREDIT	$5,000
NONREFUNDABLE CREDITS	(500)
TAX LIABILITY	$4,500

The amount of tax the taxpayer has paid ~~through a combination of employer withholding and estimated payments~~ for the current year for estimated tax purposes is $1,200 computed as follows:

~~Tax paid (elderly homeowner/renter credit)~~	~~$ 400~~
~~Withholding~~ MONTANA TAX WITHHELD	$ 800
REFUNDABLE ELDERLY HOMEOWNER/RENTER CREDIT	400
Total taxes paid	$1,200

~~(2)~~(3) TO DETERMINE THE PRECEDING TAX YEAR LIABILITY OF AN INDIVIDUAL WHO PARTICIPATES IN A COMPOSITE RETURN, THE FOLLOWING REQUIREMENTS APPLY:

(a) ~~The tax liability for the preceding tax year of~~ FOR a taxpayer who was a participant in a composite return for the preceding year, THE TAX LIABILTY FOR THE PRECEDING YEAR is the participant's PRECEDING YEAR composite tax liability.

(b) ~~If an individual was required to~~ FOR A TAXPAYER WHO fileD a Montana individual income tax return FOR the ~~year~~ preceding ~~a~~ TAX year ~~they~~ AND FOR THE CURRENT YEAR, AND participateD in a composite return filing, their tax liability for the preceding tax year is their individual liability as determined in (1).

(4) Estimated payments made by a partnership or S corporation with respect to a participant's composite tax liability are not taxes paid by the participant for the current tax year. The rules for filing composite returns are located in ARM Title 42, chapter 9, subchapter 2.

AUTH: Sec. 15-30-305, MCA
IMP: Sec. 15-30-241, MCA

4. Therefore, the department amends ARM 42.17.218 and 42.17.304 with the amendments listed above and amends ARM 42.17.101, 42.17.103, 42.17.105, 42.17.111, 42.17.113, 42.17.114, 42.17.120, 42.17.131, 42.17.134, 42.17.203, 42.17.204, 42.17.206, 42.17.207, 42.17.208, 42.17.209, 42.17.210, 42.17.219, 42.17.221, 42.17.222, 42.17.223, 42.17.305, 42.17.306, 42.17.308, 42.17.309, 42.17.310, 42.17.311, 42.17.312, 42.17.313, 42.17.314, 42.17.315, and 42.17.316 and repeals ARM 42.17.205, 42.17.220, 42.17.224, 42.17.307, 42.17.506, 42.17.508, 42.17.538, and 42.17.539 as proposed.

5. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.discoveringmontana.com/revenue, under "for your reference;" "DOR administrative rules;" and "upcoming events and proposed rule changes." The Department strives to make the electronic copy of this Adoption Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Don Hoffman
DON HOFFMAN
Acting Director of Revenue

Certified to Secretary of State October 19, 2004

VOLUME NO. 50 OPINION NO. 10

CITIES AND TOWNS - Establishment of preferential water and sewer rate for senior citizens by self-governing municipality;
HUMAN RIGHTS - Application of Human Rights Act to self-governing local governments;
LOCAL GOVERNMENT - Application of Human Rights Act to self-governing local governments;
LOCAL GOVERNMENT - Establishment of preferential water and sewer rate for senior citizens by self-governing municipality;
MUNICIPAL GOVERNMENT - Application of Human Rights Act to self-governing local governments;
MUNICIPAL GOVERNMENT - Establishment of preferential water and sewer rate for senior citizens by self-governing municipality;
STATUTORY CONSTRUCTION - Application of specific provision of Human Rights Act over general provision of Governmental Code of Fair Practices;
MONTANA CODE ANNOTATED - Sections 1-2-102, 7-1-103, -113(3), -114(1)(g), 7-13-4301, -4304, -4304(2), -4304(4), 49-1-102, -205, 49-2-205, -308, -402, 49-3-205, 69-7-101 to -113, -201.

HELD:

1. A local government with self-government powers may set rates for water and sewer service without regard to the requirements of Mont. Code Ann. § 7-13-4304.

2. Protection against unlawful governmental discrimination is an area affirmatively subject to state control. Consequently, the provisions of Mont. Code Ann. § 49-2-308 of the Montana Human Rights Act apply to a self-governing municipality in the setting of water and sewer service rates.

October 12, 2004

Mr. Paul J. Luwe
Bozeman City Attorney
P.O. Box 1230
Bozeman, MT 59771-1230

Dear Mr. Luwe:

You have requested my opinion on the following questions:

1. Does providing discounts or preferential rates to senior citizens violate the uniformity for like services requirement of Mont. Code Ann. § 7-13-4304(2)?

2. Does providing discounts or preferential rates to senior citizens violate Mont. Code Ann. § 7-13-4304(4)?

3. Does providing discounts or preferential rates to senior citizens violate Mont. Code Ann. §§ 49-1-102 and 49-1-205?

Your letter informs me that the City Commission of the City of Bozeman, a city with self-government powers, is interested in providing discounts or preferential rates to senior citizens on their wastewater or water charges. The cost of the discounts or preferential rate would be spread among the remaining wastewater and water rate payers. Thus, the non-senior citizen ratepayers would subsidize senior citizen ratepayers. The Bozeman City Commission is interested in providing preferential rates on the basis that seniors are often on fixed incomes and have a lesser ability to pay.

I.

Mont. Code Ann. § 7-13-4301 authorizes a municipality to create and operate a water and sewer system. Mont. Code Ann. § 7-13-4304 provides:

> Authority to charge for services. (1) The governing body of a municipality operating a municipal water or sewer system shall fix and establish, by ordinance or resolution, and collect rates, rentals, and charges for the services, facilities, and benefits directly or indirectly afforded by the system, taking into account services provided and benefits received.
>
> (2) Sewer charges may take into consideration the quantity of sewage produced and its concentration and water pollution qualities in general and the cost of disposal of sewage and storm waters. The charges may be fixed on the basis of water consumption or any other equitable basis the governing body considers appropriate. The rates for charges may be fixed in advance or otherwise and shall be uniform for like services in all parts of the municipality. If the governing body determines that the sewage treatment or storm water disposal prevents pollution of sources of water supply, the sewer charges may be established as a surcharge on the water bills of water consumers or on any other equitable basis of measuring the use and benefits of the facilities and services.
>
> (3) An original charge for the connecting sewerline between the lot line and the sewer main may be assessed when the connecting sewerline is installed.
>
> (4) The water and sewer rates, charges, or rentals shall be as nearly as possible equitable in proportion to the services and benefits rendered.

(Emphasis added.) While the Montana Supreme Court has not ruled on this issue under this statute, courts in other jurisdictions have held that under similar legal provisions requiring "uniform" or "equitable" rates, preferences for groups thought to be of limited means are sometimes illegal. See, e.g., Mountain States Legal Found. v. New Mexico State Corp. Comm'n, 687 P.2d 92 (1984) (preferential telephone rate for senior citizens violates constitutional requirement that utility rates be "just and reasonable.") Before addressing the difficult issue that might otherwise be presented under these statutes, it is prudent first to decide whether these provisions apply to a self-governing city such as Bozeman.

In Lechner v. City of Billings, 244 Mont. 195, 797 P.2d 191 (1990), the Montana Supreme Court considered a challenge to provisions enacted by the City of Billings, a self-governing city, providing charges for new water and sewer connections that would be paid by the owners of newly developed properties but not by those owning property with existing hook-ups. Developers challenged the charges on the ground, among others, that municipal water and sewer charges were affirmatively subject to state control and that the statutes governing such charges were binding on self-governing cities. The Montana Supreme Court rejected this argument, holding that the legislature had removed the Public Service Commission's authority over municipal utility rates and that under Mont. Code Ann. § 7-1-113(3) the matter is not subject to rulemaking by any state agency and no state agency has enforcement authority. 244 Mont. at 200-03.

If the Court had stopped there, the answer to your question regarding the application of the rate equity provisions of Mont. Code Ann. § 7-13-4304 would be clear--since water and sewer ratemaking is not an area affirmatively subject to state control, and no provision of law makes the rate equity provisions specifically applicable, they should not apply at all. However, the next section of the Court's opinion creates some confusion by discussing the extent to which statutes governing municipal water and sewer ratemaking affected the validity of the Billings ordinance. The Court analyzed the ordinance and held that it did not violate the requirements of Mont. Code Ann. § 7-13-4304 requiring that charges be commensurate with "services provided and benefits received" and that the charges be "as nearly as possible equitable in proportion to the services and benefits rendered." 244 Mont. at 203-08 (concluding after statutory analysis that "the system development fee is a reasonable exercise of the City's self-governing powers.").

Accepting the Court's first holding that setting of rates is not an area "affirmatively subject to state control" under Mont. Code Ann. § 7-1-113(3), the second holding appears to be dicta in which the Court assumed, without necessarily deciding, that the rate-setting statutes applied. In my

opinion, based on Lechner's holding that setting of municipal water and sewer rates is not "affirmatively subject to state control," the proposed Bozeman ordinance would not be subject to challenge under Mont. Code Ann. § 7-13-4304 as being in violation of the statutory requirement that rates be "commensurate with services provided and benefits received" or that they be "as nearly as possible equitable in proportion to the services and benefits rendered." Rather, as a self-governing municipality, Bozeman would be free to design its own rate system without having to comply with the provisions of Mont. Code Ann. § 7-13-4304 under the broad authority of Mont. Code Ann. § 7-1-103 ("A local government unit which elects to provide a service or perform a function that may also be provided by a general power government unit is not subject to any limitation in the provision of that service or performance of that function except such limitations as are contained in its charter or in state law specifically applicable to self-government units."). State ex rel. Swart v. Molitor, 190 Mont. 515, 521, 621 P.2d 1100, 1104 (1981).

Several additional matters are beyond the scope of this opinion. First, your letter provides no information and seeks no opinion as to whether the proposed ordinance might bring the city into conflict with its obligations to comply with laws "regulating budget, finance, or borrowing procedures." Mont. Code Ann. § 7-1-114(1)(g). The holding above should therefore not be read to determine that the rate system will be adequate to meet requirements for retirement of bonded indebtedness and any other applicable financial requirements. Second, you also have not submitted a copy of the city charter or asked my opinion as to whether the proposed ordinance is consistent with the City's authority under that instrument. Third, you have not sought my opinion as to the extent to which the City must, in its ratemaking decisions, comply with the provisions of Mont. Code Ann. § 69-7-101 to 69-7-113 and 69-7-201. Fourth, since Bozeman is a self-governing municipality, I have no occasion here to opine as to the application of these statutes to general government municipalities. Accordingly, I express no opinion on any of these questions.

II.

Your remaining question inquires as to whether the proposed ordinance would constitute age discrimination in violation of the Montana Human Rights Act and the Montana Governmental Code of Fair Practices. The Human Rights Act provides, in pertinent part:

> Discrimination by the state. (1) It is an unlawful discriminatory practice for the state or any of its political subdivisions:

> (a) to refuse, withhold from, or deny to a person any local . . . services, . . . advantages, or privileges because of . . . age, . . . unless based on reasonable grounds . . . .

Mont. Code Ann. § 49-2-308. Under Mont. Code Ann. § 49-2-402, "[a]ny grounds urged as a 'reasonable' basis for an exemption . . . shall be strictly construed." In addition, the Montana Governmental Code of Fair Practices contains a general prohibition against the performance of governmental services in a manner that discriminates based on age, without any recognition of a defense based on "reasonable grounds." Mont. Code Ann. § 49-3-205. In applying these two statutes to your questions, in my opinion the provision of the Human Rights Act is the more specific, since it recognizes a defense not provided in the Governmental Code of Fair Practices, that of "reasonable grounds." Accordingly, my analysis concentrates on the Human Rights Act. Mont. Code Ann. § 1-2-102.

The City is subject to the Act despite its status as a self-governing municipality. Discrimination in government services is affirmatively subject to state control. The Human Rights Commission has both substantive rulemaking authority and enforcement jurisdiction, satisfying the requirements of Mont. Code Ann. § 7-1-113(3). It is therefore my opinion that the Human Rights Act may be applied in determining the validity of the proposed ordinance.

No Montana cases are helpful in determining whether the City's proffered justification provides "reasonable grounds" for its ordinance. However, in at least one case, a court has held that the presumption that senior citizens are of limited financial means does not provide a rational justification for preferential rates for senior citizens. Mountain States Legal Found. v. Utah Pub. Serv. Comm'n, 636 P.2d 1047, 1057-58 (Utah 1981).

I find it would be inappropriate for me to give an opinion as to whether the proposed ordinance would meet the strictly construed standard of "reasonable grounds" for discrimination based on age. The reasonableness of the distinction would require fact-finding as to the economic circumstances of seniors and the effect of the proposed rates that I cannot perform in the context of my power to render opinions. See, e.g., Utah Pub. Serv. Comm'n, 636 P.2d at 1057-58 (considering rationality of senior citizen power rates based on the existence of "substantial record evidence"). Moreover, the Human Rights Act gives primary jurisdiction to the Human Rights Commission in making such factual determinations. Mont. Code Ann. § 49-2-205.

THEREFORE, IT IS MY OPINION:

1. A local government with self-government powers may set rates for water and sewer service without regard to the requirements of Mont. Code Ann. § 7-13-4304.

2. Protection against unlawful governmental discrimination is an area affirmatively subject to state control. Consequently, the provisions of Mont. Code Ann. § 49-2-308 of the Montana Human Rights Act, apply to a self-governing municipality in the setting of water and sewer service rates.

Very truly yours,

/s/ Mike McGrath
MIKE McGRATH
Attorney General

mm/cdt/jym

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 June 30, 2004. This table includes those rules adopted during the period July 1, 2004 through September 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 June 30, 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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