ISSUE NO. 2

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 The Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

Page Number

TABLE OF CONTENTS

NOTICE SECTION

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 4.17.102 relating to the organic certification program	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On February 24, 2007, the Montana Department of Agriculture proposes to amend the above-stated rule.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Agriculture no later than 5:00 p.m. on February 8, 2007, to advise us of the nature of the accommodation that you need. Please contact Gregory H. Ames at the Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-3144; Fax: (406) 444-5409; or e-mail: agr@mt.gov.

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

4.17.102 ADOPTION OF NATIONAL ORGANIC PROGRAM REGULATIONS

(1) The department ~~hereby~~ adopts and incorporates by reference the following parts of the United States Department of Agriculture (USDA) National Organic Program (NOP) final rule, Title 7, Part 205, Code of Federal Regulations (CFR) adopted December 21, 2000, as amended at 68 FR 61987-61993, October 31, 2003; 68 FR 62215-62218, November 3, 2003; 70 FR 29579, May 24, 2005; 70 FR 61217-61219, October 21, 2005; 71 FR 32803-32807, June 7, 2006; and 71 FR 53299-53303, September 11, 2006 ~~National Organic Program (NOP)~~:

(a) through (f)(i) remain the same.

(ii) Sections 205.640 through 205.642;

(ii) through (iv) remain the same, but are renumbered (iii) through (v).

(2) and (3) remain the same.

AUTH: 80-11-601, MCA
IMP: 80-11-601, MCA

REASON: The changes will correct a two-part finding from a recent internal audit. First, our current administrative rule does not adopt the current National Organic Program (NOP) standards. The NOP standards have been amended on six separate occasions since December 2000. In order to remain compliant with the terms of our USDA accreditation, the department must revise our administrative rule whenever the federal rule is amended. In addition, our current administrative rule

does not adopt all applicable sections of the NOP standards. Sections 205.640-641 specify the fees that the department will be charged by the USDA for accreditation. Section 205.642 specifies that the department will charge fees for certification that are "reasonable" and only charge those fees that are "filed with the USDA administrator." The omission of these sections in the original rule appears to be a simple oversight. Adoption of these sections will not change any fees that the department charges for certification.

The six amendments, which this proposed rule adopts, to the National Organic Program regulation have the following impacts:

Amendment 1, 68 FR No. 211, 61987 - 61993, October 31, 2003: This rule amends the U.S. Department of Agriculture's (USDA) National List of Allowed and Prohibited Substances (National List), adding ten substances, revising two annotations and making eight technical corrections.

Amendment 2, 68 FR No. 212, 62215 - 62218, November 3, 2003: This rule amends the U.S. Department of Agriculture's (USDA) National List of Allowed and Prohibited Substances (National List), adding four substances, and revising the annotation of one substance.

Amendment 3, 70 FR No. 99, 29579, May 24, 2005: In accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, this rule adjusts civil monetary penalties imposed by agencies within USDA to incorporate an inflation adjustment.

Amendment 4, 70 FR No. 203, 61217 - 61219, October 21, 2005: This rule amends the U.S. Department of Agriculture's (USDA) National List of Allowed and Prohibited Substances (National List), revising the annotation of one substance on the National List, methionine, to extend its use in organic poultry production until October 21, 2008.

Amendment 5, 71 FR No. 109, 32803 - 32807, June 7, 2006: The rule revises the National Organic Program (NOP) regulations to clarify that nonorganically produced products listed in section 205.606 of the regulations may be used as ingredients in or on processed products labeled as "organic" only when organic ingredients are not commercially available. The rule also revises section 205.236 of the NOP regulation, involving types of feed permitted for dairy animals being converted to organic production.

Amendment 6, 71 FR No. 175, 53299-53303, September 11, 2006: This rule amends the U.S. Department of Agriculture's (USDA) National List of Allowed and Prohibited Substances (National List). Specifically, the rule revises the annotation of one substance on the National List, Glycerine oleate, to eliminate its use after December 31, 2006. The rule adds "Hydrogen chloride ─ for delinting cotton seed for planting" to the National List. The rule amends section, 205.605 Nonagricultural (Nonorganic) Substances Allowed as Ingredients in or on Processed Products Labeled as "Organic" or "Made with Organic (Specified Ingredients or Food Group(s)" by adding nine substances, seven with specific use restrictions. Finally, this rule amends Sec. 205.681 by updating the mailing address for where to file a certification or accreditation appeal.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Gregory H. Ames at the Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; Fax: (406) 444-5409; or e-mail: agr@mt.gov. Any comments must be received no later than February 22, 2007.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Gregory H. Ames at the Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; Fax: (406) 444-5409; or e-mail: agr@mt.gov. A written request for hearing must be received no later than February 22, 2007.

6. If the department receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 12 persons based on approximately 120 organic operations certified by the department.

7. The Department of Agriculture maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person and specifies for which program the person wishes to receive notices. Such written request may be mailed or delivered to Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; Fax: (406) 444-5409; or e-mail: agr@mt.gov or may be made by completing a request form at any rules hearing held by the Department of Agriculture.

8. An electronic copy of this Notice of Proposed Amendment is available through the department's web site at www.agr.mt.gov, under the Administrative Rules section. The department strives to make the electronic copy of the Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

DEPARTMENT OF AGRICULTURE

/s/ Nancy K. Peterson
Nancy K. Peterson, Director

/s/ Gregory H. Ames
Gregory H. Ames
Rule Reviewer

Certified to the Secretary of State, January 16, 2007.

BEFORE THE BOARD OF REAL ESTATE APPRAISERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment of ARM 24.207.506 qualifying education requirements for residential certification, 24.207.509 qualifying experience, 24.207.517 trainee requirements, and 24.207.2101 continuing education, and the proposed adoption of NEW RULE I scope of practice	))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On February 15, 2007, at 9:00 a.m., a public hearing will be held in room 489, 301 South Park Avenue, Helena, Montana to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Real Estate Appraisers (board) no later than 5:00 p.m., on February 9, 2007, to advise us of the nature of the accommodation that you need. Please contact Barb McAlmond, Board of Real Estate Appraisers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2325; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2323; e-mail realestateappraiser@mt.gov.

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

24.207.506 QUALIFYING EDUCATION REQUIREMENTS FOR RESIDENTIAL CERTIFICATION (1) remains the same.

(2) In addition to the topics listed in ARM 24.207.505, applicants for certification as a certified residential real estate appraiser shall demonstrate that their education involved coverage of narrative report writing and direct capitalization within the income approach. The education for this class shall place particular emphasis on the appraisal of ~~one~~ two- to four-unit residential properties.

(3) through (5) remain the same.

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-105, 37-54-303, MCA

REASON: It is reasonably necessary to amend this rule to match the current requirements of the Appraiser Qualifications Board (AQB) of The Appraisal Foundation. The AQB establishes the minimum education, experience, and

examination requirements for certification as a certified residential real estate appraiser. States are required to implement appraiser certification requirements that are no less stringent than those of the AQB. The board's rule committee discovered the inconsistency at its last biennial meeting.

24.207.509 QUALIFYING EXPERIENCE (1) Acceptable appraisal experience includes~~,~~ but is not limited to~~,~~ the following:

(a) through (2) remain the same.

(3) All applicants claiming appraisal experience shall have made a substantial contribution in arriving at a value conclusion as evidenced by the applicant's signature on the report or the applicant's name listed in the report ~~as someone who provided significant professional assistance in the appraisal process~~. Each appraisal shall show progressive participation in the appraisal process as documented in the experience log approved by the board.

(4) All evidence of appraisal activity must be supported by written file memoranda or written report and made available to the board for review.

(5) ~~If requested, experience documentation in the form of reports or file memoranda should be available to support the experience claimed.~~ The ~~verification for experience credit~~ experience log claimed by an applicant shall be on forms prescribed by the board which shall include:

(a) through (e) remain the same.

(6) All experience submitted to the board must be done in conformance with ~~the~~ Uniform Standards of Professional Appraisal Practice as promulgated by The Appraisal Foundation that is current at the time the appraisal is completed.

(7) and (8) remain the same.

(9) The board will use the following maximum hourly credit as a guide toward the crediting of experience hours:

(a) single family residential (one unit dwelling)	
(i) ~~complete assignment~~	~~12~~
self-contained report	40
(ii) ~~limited assignment~~	~~8~~
summary report	12
(iii) restricted use report	12
(b) multifamily residential (two-to-four units)	20
(i) ~~complete assignment~~	~~20~~
self-contained report	40
(ii) ~~limited assignment~~	~~10~~
summary report	20
(iii) restricted use report	20
(c) residential vacant land less than ten acres	8
(i) self-contained report	16
(ii) summary report	8
(iii) restricted use report	8
(d) individual residential subdivision sites (per site) (not to exceed ~~50~~ 20 hours - two sites per subdivision)	5
(i) self-contained report	10
(ii) summary report	5

(iii) restricted use report	5
(e) land (undeveloped nonresidential tracts, residential multifamily sites, commercial sites, industrial sites, land in transition, etc.)	20
(i) self-contained report	60
(ii) summary report	20
(iii) restricted use report	20
(f) rural~~/~~ , agricultural~~/~~ , or residential	
~~(i)~~ ten to 160 acres	20
(i) self-contained report	60
(ii) summary report	20
(iii) restricted use report	20
~~(ii) 160 to 1000 acres with improvements~~	~~50~~
~~(iii) over 1000 acres with improvements~~	~~60~~
(g) rural, agricultural, or residential 160 to 1000 acres with improvements	
(i) self-contained report	100
(ii) summary report	50
(iii) restricted use report	50
(h) rural, agricultural, or residential over 1000 acres with improvements	
(i) self-contained report	120
(ii) summary report	60
(iii) restricted use report	60
~~(g)~~ (i) residential multifamily (5-12 units) (apartments, condominiums, townhouses, mobile home parks, etc.)	35
(i) self-contained report	70
(ii) summary report	35
(iii) restricted use report	35
~~(h)~~ (j) residential multifamily (13+ units) (apartments, condominiums, townhouses, mobile home parks, etc.)	40
(i) self-contained report	120
(ii) summary report	60
(iii) restricted use report	60
~~(i)~~ (k) commercial single tenant (office building, retail store, restaurant, service station, bank, day care center, etc.)	35
(i) self-contained report	70
(ii) summary report	35
(iii) restricted use report	35
~~(j)~~ (l) commercial multitenant (office building, shopping center, hotel, etc.)	60
(i) self-contained report	120
(ii) summary report	60
(iii) restricted use report	60
~~(k)~~ (m) industrial (warehouse, manufacturing plant, etc.)	60
(i) self-contained report	180
(ii) summary report	60

(iii) restricted use report 60

~~(l)~~ (n) institutional (nursing home, hospital, school, church, government building, etc.) 60

(i) self-contained report 180

(ii) summary report 60

(iii) restricted use report 60

(10) Review appraisals will be allowed a maximum 1/3 the allotted time found in (9).

(11) remains the same.

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-1-131, 37-54-105, 37-54-202, 37-54-303, MCA

REASON: The board determined there is reasonable necessity to amend (3) to clarify that the board requires evidence of an applicant's progressive participation in the appraisal process as shown throughout the applicant's experience log. Deficiencies in showing the progress have been identified in review of applications. It is necessary to amend (4) and (5) for better organization and to simplify terminology used in the rule.

The board is amending (9) to adjust the acceptable categories and associated hours of qualifying appraisal experience to meet the current 2006 Uniform Standards of Professional Appraisal Practice (USPAP) development and reporting requirements. The board is also reorganizing (9) to enable applicants to more readily recognize where their work product falls within the categories in the rule. Section (10) is being amended to address applicant confusion by clarifying that the board limits the experience from review appraisals to a maximum of 1/3 the time allotted from the categories in (9).

24.207.517 TRAINEE REQUIREMENTS (1) through (1)(b) remain the same.

(c) have completed ~~40~~ 45 hours of approved qualifying education including 15 hours of Universal Standards of Professional Appraisal Practice (USPAP) in the principles of real estate appraisal prior to making application; and

(d) complete an additional ~~50~~ 45 hours of approved qualifying education within the next 12 months or the next renewal, whichever is greater. ~~Fifteen hours must be in the area of the Uniform Standards of Professional Appraisal Practice (USPAP).~~

(2) through (12) remain the same.

AUTH: 37-1-131, 37-1-141, 37-54-105, MCA
IMP: 37-1-131, 37-1-141, 37-54-105, 37-54-201, 37-54-202, 37-54-303, 37-54-403, MCA

REASON: The board determined it is reasonably necessary to amend both pre-application and post-application trainee education requirements in this rule. Following the 1/1/2008 changes to the required core curriculum set by the AQB, acceptable educational courses will be offered in 30 hour increments instead of 40

hour increments. The board is amending the rule to comply with the new structure of offered courses. The board further concluded that it is more reasonable to require a trainee applicant to obtain the instruction offered in the 15 hour USPAP course prior to applying for licensure rather than requiring the USPAP course after application.

24.207.2101 CONTINUING EDUCATION (1) through (3) remain the same.

(4) Application may be made for continuing education credit for participation other than as a student in appraisal education processes and programs. Examples of activities for which credit may be granted are teaching, program development, authorship of textbooks, or similar activities which are determined by the board to be equivalent to obtaining continuing education.

(5) Every other renewal year, licensees shall provide evidence to the board of having completed at least ~~31~~ 28 hours of instruction in courses or seminars approved by the board, at least seven hours of which must be the national Uniform Standards of Professional Appraisal Practice (USPAP) course.

(6) through (10) remain the same.

AUTH: 37-1-131, 37-1-319, 37-54-105, 37-54-303, MCA
IMP: 37-1-131, 37-1-306, 37-54-105, 37-54-303, 37-54-310, MCA

REASON: The board determined it is necessary to amend this rule to match the current biennial hour continuing education requirement set by the AQB. In addition, the change to 28 required hours is more consistent with national education courses which are offered in 7 hour increments.

4. The proposed new rule provides as follows:

NEW RULE I SCOPE OF PRACTICE (1) Real property appraisers must adhere to a specific scope of practice and must comply with the competency provision of Uniform Standards of Professional Practice (USPAP).

(a) The licensed real property classification applies to the appraisal of noncomplex one to four residential units having a market value less than $1,000,000 and complex one to four residential units having a market value less than $250,000,000.

(i) The licensed real property classification appraisal of vacant or unimproved land that is utilized for one to four family purposes or for which the highest and best use is for one to four family purposes.

(ii) The licensed real property classification appraisal does not include the appraisal of subdivisions for which a development analysis or appraisal is necessary.

(b) The certified residential real property classification applies to the appraisal of one to four residential units without regard to market value or complexity.

(i) The certified residential real property classification includes the appraisal of vacant or unimproved land that is utilized for one to four family purposes or for which the highest and best use is for one to four family purposes.

(ii) The certified residential real property classification does not include the appraisal of subdivisions for which a development analysis or appraisal is necessary.

(c) The certified general real property classification applies to the appraisal of all types of real property.

(i) The certified general real property classification includes all types of real property without regard to value.

AUTH: 37-1-131, 37-54-105, MCA
IMP: 37-54-105, 37-54-201, MCA

REASON: The board determined that reasonable necessity exists to adopt this new rule to specify the allowable scope of practice for real property appraisers. Although the AQB has identified the nationally recognized parameters for the scope of real property appraisal practice and the board currently follows the parameters, the scope had not been previously delineated in administrative rule. Adoption of this new rule will make it easier for licensees and applicants to access this information.

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 Real Estate Appraisers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2323, or by e-mail to realestateappraiser@mt.gov, and must be received no later than 5:00 p.m., February 23, 2007.

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 www.realestateappraiser.mt.gov. The department strives to make the electronic copy of this Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

7. The board 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 administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Real Estate Appraisers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2323, e-

mailed to realestateappraiser@mt.gov, or made by completing a request form at any rules hearing held by the agency.

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

9. Don Harris, attorney, has been designated to preside over and conduct this hearing.

BOARD OF REAL ESTATE APPRAISERS
KRAIG KOSENA, CHAIRPERSON

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

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

Certified to the Secretary of State January 16, 2007

BEFORE THE BOARD OF OIL AND GAS CONSERVATION
THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 36.22.1308, plugging and restoration bond, and ARM 36.22.1408, financial responsibility	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

To: All Concerned Persons

1. On February 15, 2007, the Board of Oil and Gas Conservation will hold a public hearing at 8:00 a.m. at the Petroleum Club Conference Room, Crowne Plaza Hotel, 22nd Floor, 27 North 27th Street, Billings, Montana, to consider the proposed amendment of the above-stated rules.

2. The board 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 January 31, 2007, to advise us of the nature of the accommodation that you need. Please contact Terri Perrigo, Board of Oil and Gas Conservation, 1625 11th Ave., Helena, MT 59620; telephone (406) 444-6675; fax (406) 444-2453; or e-mail to tperrigo@mt.gov.

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

<u>36.22.1308 PLUGGING AND RESTORATION BOND</u> (1) Except as otherwise provided in these rules, the following bonds are required for wells within the board's jurisdiction:

(a) The owner or operator of a single well to be drilled or of a single existing oil, gas, or class II injection well to be acquired, must provide a one well bond:

(i) in the sum of $1500, where the permitted total depth of a drilling well, or the actual, or plugged-back, total depth of an existing well, is 2000 feet or less; or

(ii) in the sum of $5000, where the permitted total depth of drilling well, or the actual, or plugged-back, total depth of an existing well, is greater than 2000 feet and less than 3501 feet; or

(iii) in the sum of $10,000 where the permitted total depth of a drilling well, or the actual, or plugged-back, total depth of an existing well, is 3501 feet or more.

(b) The owner or operator of multiple wells to be drilled, of existing wells to be acquired, or any combination thereof, must provide a multiple well bond in the sum of $50,000. A one-time consolidation of companies will not be considered an acquisition requiring a $50,000 bond if the consolidation does not change the party or parties responsible for the ultimate plugging of the wells and the aggregate amount of the existing bonds covering wells prior to consolidation.

(c) The owner or operator of existing wells covered by a multiple well bond in an amount less than $25,000 must provide a new bond or rider to an existing bond

to increase coverage to $25,000. ~~An operator may request a payment schedule of equal annual bond increases over a period not exceeding five years from the effective date of these rules. Such payment schedules may be approved administratively.~~

(2) All bonds must be executed on board Form No. 3 or board Form No. 14, must be payable to the state of Montana, and must be conditioned for the performance of the duty to properly plug each dry or abandoned well, and to restore the surface of the location as required by board rules.

(3) The board may require an increase by appropriate rider of any bond from $1500 to $3000, $5000 to $10,000, or from $10,000 to $20,000 for a single well bond, when in the opinion of the board the factual situation warrants such an increase in order for any owner or operator to be in compliance with this rule. In addition to, or in lieu of, an increase in the bond amount as provided above, the board may limit the number of wells that may be covered by any multiple well bond.

(4) No new or additional wells shall be added or substituted to any bond existing prior to the effective date of this rule.

(5) The staff may refer approval of any proposed bond to the board for consideration at its next regularly scheduled business meeting. The staff will promptly notify the applicant of the reason(s) approval has been deferred to the board and will advise the applicant of the time and place for the business meeting. The board may approve, require modification, or reject a proposed bond.

~~(5)~~ (6) The bond referred to in this rule must be in one of the following forms:

(a) a good and sufficient surety bond secured from a bonding company licensed to do business in the state of Montana;

(b) a federally insured certificate of deposit issued and held by a Montana bank ~~or any national bank in the United States that is federally insured and has total assets greater than $200 million~~; or

(c) a letter of credit issued by~~:~~ an FDIC-insured, Montana commercial bank.

~~(i) an FDIC-insured, Montana commercial bank; or~~

~~(ii) an out-of-state FDIC-insured, commercial bank having assets in excess of $200 million.~~

(7) Out-of-state bank bonds previously approved by the board remain in effect.

~~(6)~~ (8) A well must remain covered by a bond, and such bond must remain in full force and effect until:

(a) the plugging and restoration of the surface of the well is approved by the board; or

(b) a new bond is filed by a successor in interest and such bond is approved by the board.

~~(7)~~ (9) A notice of intent to change operator must be filed on Form No. 20 by a proposed new owner or operator of a well within 30 days of the acquisition of the well. Said notice shall include all information required thereon and must contain the endorsement of both the transferor and the transferee. The board administrator may delay or deny any change of operator request if he determines that either the transferor or the transferee is not in substantial compliance with the board's statutes, rules, or orders. The board may require an increase in any bond up to the maximum amount specified in (3) ~~of this rule~~ as a condition of approval for any change of

operator request. The transferor of a well is released from the responsibility of plugging and restoring the surface of the well under board rules after the transfer is approved by the board.

~~(8)~~ (10) Where the owner of the surface of the land upon which one or more noncommercial wells have been drilled wishes to acquire a well for domestic purposes, the bond provided by the person who drilled or operated the well will be released if the surface of the location is restored as required by board rules, and if said surface owner furnishes:

(a) proof of ownership of the surface of the land on which the well is located; and

(b) for actual beneficial water uses of 35 gallons or less per minute, not to exceed ten acre-feet per year, a copy of the notice of completion of groundwater development (Water Rights Form 602) filed with the Department of Natural Resources and Conservation (DNRC); or

(c) for actual beneficial water uses of more than 35 gallons per minute, or in excess of ten acre-feet per year, a copy of the beneficial water use permit (Water Rights Bureau 600) received from the DNRC; or

(d) for a domestic gas well, a written signed inspection report from one of the board's field inspectors stating that the well is presently being beneficially used as a source of domestic natural gas; and

(e) for a domestic gas well:

(i) a federally insured certificate of deposit in the amount of $5000 for a single well or in the amount of $10,000 for more than one well; or

(ii) a real property bond in the amount of two times the amount of the required federally insured certificate of deposit.

~~(9)~~ (11) The real property bond required in ~~(8)~~ (10)(e)(ii) ~~above~~ must be:

(a) provided on board-approved form; and

(b) accompanied by a certified real property appraisal and abstract of title which evidence unencumbered owner equity in an amount equal to or greater than the amount of the bond required.

~~(10)~~ (12) A domestic well must be plugged, abandoned, and restored in accordance with ARM 36.22.1301 through 36.22.1304, 36.22.1306, 36.22.1307, and 36.22.1309, or transferred to a bonded operator in accordance with ~~(7)~~ (9) ~~of this rule~~, after the well ceases to be used for domestic purposes.

AUTH: 82-11-111, MCA
IMP: 82-11-123, MCA

REASONABLE NECESSITY: The amendment of these rules by the board is reasonably necessary so as to: eliminate expired provisions; provide the board with greater oversight of bonding; and to provide greater security and efficiency in the revocation of such bonds. The language proposed to be stricken within ARM 36.22.1308(1)(c) regarding payment schedules is no longer applicable because the time period for such payment schedules has expired. The language proposed to be added in ARM 36.22.1308(5) is necessary to provide for direct board review of certain bonds which in the judgment of the staff merit such review. The language proposed to be stricken in ARM 36.22.1308(6)(b) would restrict future certificates of deposit or

letters of credit for bonding purposes to those issued by Montana banks. This provision is reasonably necessary to ensure that forfeited bond proceeds can be economically and efficiently collected by the board. Certificates of deposit and letters of credit issued by out-of-state jurisdictions increase the legal and collection costs for the board to the point that they may, as a practical matter, impair the ability of the board to utilize the proceeds from those bonds where legal disputes arise with out-of-state banks. The board has no such concerns with certificates of deposit and letters of credit issued by banks within the state of Montana.

36.22.1408 FINANCIAL RESPONSIBILITY (1) The owner or operator of any injection well outside the exterior boundaries of Indian reservations must comply with the applicable bonding requirements of ARM 36.22.1308 and this subchapter.

~~(2) Owners or operators of injection wells in compliance with the U.S. environmental protection agency (EPA) financial assurance requirements on the date primary enforcement authority is delegated to the board of oil and gas conservation must provide a bond on board Form No. 3 or Form No. 14 in an amount equal to that provided to the EPA, unless an alternative multi-well bond is approved as provided in this rule. This bond is limited to wells covered under the EPA bond. The bond may be reduced to reflect the plugging or re-completion of wells to other approved used. The reduction will be in the proportion each plugged or re-completed well represents to the total bond amount at the time the bond was initially accepted.~~

~~(3)~~ (2) Owners or operators proposing to drill or acquire additional injection wells must provide the individual well bonds described in ARM 36.22.1308(1) as appropriate for the depth of the well unless such additional well(s) are covered under a multiple well UIC bond as provided in this rule. The multiple well bond described in ARM 36.22.1308(1)(b) is not available for injection wells.

~~(4)~~ (3) Injection well operators may propose an alternative multiple well UIC bond to the board's staff. The staff will review the proposed bond and provide a recommendation for its approval, modification, or rejection by the board at its next available scheduled meeting. In support of its request for a multi-well bond the operator may provide cost estimates for plugging and restoring the surface of wells of the type and in the area to be covered by the bond, the operator's estimate of any residual or salvage value that may reduce the costs of plugging, and any other information the operator wishes to provide. In reviewing a proposed bond, the staff must consider the reasonableness of the cost estimates provided, the compliance history of the operator, the operator's history of promptly plugging unneeded wells, and the financial condition of the operator. Multiple well bonds will be in a minimum amount of $50,000.

~~(5)~~ (4) The board may accept a letter of credit in lieu of a surety bond or certificate of deposit. A letter of credit must meet the following conditions:

(a) it must be issued by an FDIC-insured, Montana commercial bank; ~~or an out-of-state FDIC-insured commercial bank having assets in excess of $200,000,000;~~

(b) it must be in an amount equal to the bond otherwise required;

(c) it must be for a term of not less than one year, automatically renewable for additional one year period(s), and irrevocable during its term. The bank issuing

the letter of credit must notify the board, by registered or certified mail, not less than 120 days prior to the expiration date of the letter of credit if it does not intend to renew the letter;

(d) the letter of credit will remain in the custody of the board; and

(e) the letter of credit must provide that it is immediately payable in full upon demand by the board if the person on whose behalf the letter is issued fails to properly plug each dry or abandoned well and restore the surface of the location as provided by board rules.

~~(6)~~ (5) The board may reject a letter of credit and demand other security if it has reason to doubt the solvency of the bank or to believe the obligation of the letter of credit has become impaired. The board may require a financial statement from the principal and proof of solvency of the bank at any time before or after acceptance of the letter of credit.

AUTH: 82-11-111, MCA
IMP: 82-11-111, 82-11-121, 82-11-123, 82-11-124, 82-11-127, 82-11-137, MCA

REASONABLE NECESSITY: The amendment of ARM 36.22.1408(2) is reasonably necessary so as to eliminate any reference to obsolete language related to UIC primacy issues. Similarly, the amendment of ARM 36.22.1408(4)(a), which would eliminate an owner or operator's future ability to use certificates of deposit or letters of credit from out of state banks for bonding purposes, is reasonably necessary to ensure that forfeited bond proceeds can be economically and efficiently collected by the board. Certificates of deposit and letters of credit issued by out-of-state jurisdictions increase the legal and collection costs for the board to the point that they may, as a practical matter, impair the ability of the board to utilize the proceeds from those bonds where legal disputes arise with out-of-state banks. The board has no such concerns with certificates of deposit and letters of credit issued by banks within the state of Montana.

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 Terri Perrigo, Board of Oil and Gas Conservation, 1625 11th Ave., Helena, Montana 59620; telephone (406) 444-6675; fax (406) 444-2453; or e-mailed to tperrigo@mt.gov, and must be received no later than 5:00 p.m. on February 22, 2007.

5. Ed Hayes, Agency Legal Services, 2535 St. John's Avenue, Billings, MT 59102 has been designated to preside over and conduct the hearing.

6. An electronic copy of this Notice of Public Hearing on Proposed Amendment is available through the department's site on the World Wide Web at http://www.dnrc.mt.gov. The department strives to make the electronic copy of this Notice of Public Hearing on Proposed Amendment 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.

7. The agency 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 conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources, or a combination thereof. Such written request may be mailed or delivered to Legal Unit, Department of Natural Resources and Conservation, P.O. Box 201601, 1625 11th Ave., Helena, MT 59620-1601, faxed to the office at (406) 444-2684, or may be made by completing a request form at any rules hearing held by the agency.

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

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

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

/s/ Terri Perrigo
TERRI PERRIGO
Executive Secretary
Board of Oil and Gas

/s/ Tommy H. Butler
TOMMY H. BUTLER
Rule Reviewer

Certified to the Secretary of State January 16, 2007.

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

In the matter of the adoption of new rules I through XV and the repeal of ARM 12.8.211 pertaining to commercial use of lands under the control of the department	)))))	NOTICE OF ADOPTION AND REPEAL

TO: All Concerned Persons

1. On July 27, 2006, the Fish, Wildlife and Parks Commission (commission) published MAR Notice No. 12-322 regarding the public hearings on the adoption and repeal of the above-stated rules at page 1779 of the 2006 Montana Administrative Register, Issue No. 14.

2. The commission has adopted New Rule II (ARM 12.14.105), New Rule XII (ARM 12.14.155), and New Rule XV (ARM 12.14.170) of Alternative A exactly as proposed.

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

NEW RULE I (ARM 12.14.101) DEFINITIONS (1) "Allocation" means distributing limited use opportunities when a rationing system is in place.

(2) "Authorization" means written permission granted to a person or entity by the department to conduct commercial use.

(3) "Commercial use" means any person or entity that utilizes lands under the control, administration, and jurisdiction of the Montana Department of Fish, Wildlife and Parks for consideration. Commercial use includes any person, group, or organization, including nonprofit organizations and academic institutions, that makes or attempts to make a profit, vend a service or product, receive money, amortize equipment, or obtain goods or services as compensation from participants in activities occurring on lands that are is under the control, administration, and jurisdiction of the department. This includes nonprofit organizations and educational groups that receive money from participants in activities occurring on department land. This includes a person whose business operates on department land, regardless of that person's physical presence at the site, but does not include a person who rents, sells, or otherwise provides equipment or merchandise that is used on department land unless the renting, selling, or providing of equipment or merchandise takes place on department land. Examples of commercial use that are governed by these rules include but are not limited to: trail rides, guided walks or tours, float trips, guided angling or hunting, game retrieval, professional dog training, equipment rentals, retail sales, food concessions, filming, firewood cutting, construction-related activities, research when accompanied by paying clients, or any combination thereof. This does not include persons or entities that transfer vehicles or people to or from a department owned or controlled site.

(4) "Commission" means the Department of Fish, Wildlife and Parks Commission of the state of Montana.

(5) "Concession service" means a commercial business that provides multiple services or products on department land. Examples include but are not limited to marinas, lodging, equipment rental or sales, retail sales, and food services.

(6) "Consideration" means something of value given or done in exchange for something of value given or done by another.

(7) "Department" means the Department of Fish, Wildlife and Parks of the state of Montana.

(8) "Educational group" means an organized group that is officially recognized as an educational or scientific institution by a federal, state, or local government entity. Documentation of this recognition must be on institutional letterhead and include a signature by the head of the institution/department and documentation of official educational or scientific tax exemption as granted by the Internal Revenue Service.

~~(8)~~(9) "Fishing access site" means a site or area designated by the department as a fishing access site.

(10) "Mitigation" means an enforceable measure, within the authority of the agency or mutually agreed to by the permit holder that is designed to reduce or prevent undesirable effects or impacts of the proposed use.

~~(9)~~(11) "Ration" means to regulate use intensity by limiting the amount of use on a site.

~~(10)~~(12) "Restricted water body" means a body of water regulated by special department rules governing commercial ~~or public~~ use, such as rules that restrict the timing, location, amount, or type of commercial use that occurs. "Restricted water body" may also mean~~s~~ a body of water that is ~~cooperatively managed with another agency~~ under a cooperative management agreement with another agency concerning commercial use.

~~(11)~~(13) "Site" means an individual unit of land, or portion thereof, owned or managed by the department.

~~(12)~~(14) "State park" means a site or area designated by the department as a state park.

~~(13)~~(15) "Water-based outfitter or guide" means any person who for consideration provides ~~nonhunting,~~ water-related recreation services or supervises someone providing these services. This includes ~~fishing~~ outfitters and guides that are licensed by the state of Montana, and ~~nonfishing~~ water-based ~~outfitters and guides~~ service providers that are not licensed by the state of Montana.

~~(14)~~ (16) "Wildlife management area" means a site or area designated by the department as a wildlife management area or a wildlife habitat protection area.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

NEW RULE III (ARM 12.14.110) EXCEPTIONS TO APPLICABILITY OF COMMERCIAL USE RULES (1) These commercial use rules do not apply to commercial activities or uses that are initiated or invited by the department for the purpose of manipulating, enhancing, or otherwise improving the habitat of a site.

Such uses shall continue to be governed by the department's land lease-out policy. Examples include but are not limited to livestock grazing, farming, haying, fencing, and timber harvest.

(2) These commercial use rules do not apply to the leasing of department land~~s~~ for communication towers, utility easements, and granting of right-of-way. These types of commercial use shall continue to be governed by the department's land lease-out policy.

(3) These commercial use rules do not apply to the leasing of department oil and gas reserves. These uses shall continue to be governed by the department's oil and gas reserves leasing policy.

(4) These commercial use rules do not apply to the transferring of vehicles or people to or from a department site.

(5) These commercial use rules do not apply to the collection of antlers.

(6) These commercial use rules do not apply to trapping or commercial activities under Title 87, chapter 4, parts 2 through 10, MCA ~~(87-4-201, MCA; etc.).~~ (~~T~~taxidermists, fur dealers, alternative livestock, shooting preserves, fish ponds, sale of game, menageries and zoos, game bird farms, and fur farms), except commercial dog training and field trials conducted for commercial purposes.

(7) These commercial use rules do not apply to the press or the news media when photographing, filming, or reporting on activities that occur on department land.

(8) These commercial use rules do not apply to consignment sales when the department sells merchandise on behalf of a business and a portion of the revenue is allocated to the department.

(9) These commercial use rules do not apply to commercial activities or uses that are initiated or invited by the department for the purpose of addressing public safety concerns. Examples include but are not limited to hazardous tree removal and fuel reduction efforts to reduce fire danger.

(10) These commercial use rules do not apply to fishing tournaments conducted by nonprofit organizations.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

NEW RULE IV (ARM 12.14.115) GENERAL POLICY (1) Department land~~s~~ belongs to the people of Montana and the department manages these sites and associated resources in trust for the benefit of current and future generations of the people. The department's primary ~~responsibility~~ responsibilities ~~is~~ are ~~to provide benefits to the public from these sites and~~ to maintain or enhance the resources of these sites and to provide benefits to the public from these sites~~, now and in the future~~.

(2) Some types of commercial use can help the department to achieve its resource management goals and/or provide desired services to the public when properly managed. Commercial use must be managed to ~~ensure that the commercial use does not conflict with, or detract from, public use~~ prevent or minimize conflicts with the public and the intended purposes of a site.

(3) Commercial use on department land~~s~~ is a privilege, not a right. Authorization to conduct commercial use may be denied, amended, or revoked at any time for cause. Historical commercial use of a site does not convey a right to conduct commercial use in the future ~~and does not guarantee that the department shall allocate opportunities for commercial use if rationing becomes necessary~~. If it becomes necessary to ration and allocate commercial use, the department is not required to allocate opportunities based on historical use of a site.

(4) The department may prohibit, restrict, condition, or otherwise manage commercial use, including placing stipulations on the type, timing, location, duration, and quantity of commercial use~~, for the purposes of:~~. Reasons for prohibiting, restricting, conditioning, or otherwise managing commercial use include but are not limited to:

(a) protecting resources or mitigating impacts to resources;

(b) preventing or minimizing conflicts with the intended purpose for which the department acquired, maintains, or manages a site;

(c) preserving the public's ability to recreate on or otherwise use a site;

(d) providing for the public's safety and welfare; or

(e) other purposes identified by the department.

(5) Restrictions, including prohibitions, rationing, and allocation on water-based outfitters and guides on rivers and fishing access sites shall be governed by the department's statewide river recreation rules.

(6) The purpose and management objectives can vary from one type of department land to another and from one site to another. The public's use and expectations can vary from one type of department land to another and from one site to another. The opportunities to conduct commercial use may be different depending upon where the use would occur, and the department may develop policies that provide additional guidance for managing commercial use at fishing access sites, state parks, wildlife management areas, and other department land~~s~~.

(7) The department may establish special criteria for a particular site or prohibit commercial use altogether based on the management objectives and conditions of that site.

~~(8) If a management plan has been written for a site and the management plan is more restrictive than these commercial use rules, the management plan takes precedence.~~

~~(9)~~ (8) The department may prohibit or condition commercial use that would displace the general public. The department may temporarily alter public use opportunities at fishing access sites and state parks to accommodate commercial use on a case-by-case basis in the interest of public safety and security or when there is the potential for short-term conflicts.

~~(10)~~ (9) The department must comply with federal aid requirements when authorizing commercial use on department land~~s~~ purchased or managed with federal aid.

~~(11)~~ (10) Commercial hunting outfitting is prohibited on all department land~~s~~ and on water bodies that are located entirely within the boundaries of department land~~s~~. Commercial fishing outfitting is prohibited on all wildlife management areas. ~~This does not apply to~~ The department may authorize commercial use that is solely

for the purpose of assisting the public in the retrieval of legally harvested game animals. The department may authorize a commercial hunting outfitter to:

(a) travel on a designated trail across department land solely for the purpose of gaining access to federal land~~s~~ where the commercial hunting outfitter is authorized to conduct use; and

(b) use a fishing access site solely for the purpose of gaining access to water bodies where the commercial hunting outfitter is authorized to conduct use.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

NEW RULE V (ARM 12.14.120) COMMERCIAL USE PERMITS (1) A permit is required in advance to conduct commercial use on land~~s~~ under the control, administration, and jurisdiction of the department. ~~The department may waive the commercial use permit requirement if the person is authorized under some other form of permit or contract issued by the department or other government agency.~~

(2) The department administers two types of commercial use permits:

(a) fishing access site permit; and

(b) restricted use permit.

(3) The department may issue a commercial use permit to a person as an individual, or as a representative of an entity~~,~~ or business. When authorizing water-based fishing outfitting or guiding, the department may only issue the permit to a licensed outfitter or guide. The applicant must obtain all other licenses or permits required by state or federal law in order to receive a commercial use permit.

(4) A commercial use permit is not a property right and may be revoked, amended, or suspended at any time for cause. ~~The recipient of a commercial use permit is not guaranteed future use of the permit.~~ Causes for revoking, amending, or suspending a permit include but are not limited to the following:

(a) failure to comply with the commercial use rules;

(b) failure to pay required permit fees;

(c) falsifying records of use;

(d) failure to comply with the terms of the permit;

(e) failure to comply with state or federal rules or laws pertaining to resource and land management;

(f) failure to obtain other required state or federal permits;

(g) impacts on resources or the public; or

(h) changing conditions or management objectives at a site.

(5) The availability, terms, and conditions of a commercial use permit may vary based on the regulations and management plan in place at the site where the use would occur. The department may refuse applications for a permit if the use would occur at a site where commercial use is rationed and there are no additional opportunities to conduct such use.

(6) The department may require commercial users to report their use of department land~~s~~. The department may require commercial users to maintain and have on their person for department inspection a logbook for recording commercial use. The department shall include specific reporting requirements as permit or contract stipulations.

(7) A commercial use permit ~~and any associated units of use~~ may only be used by the holder of the permit. The permit holder may not sell, lease, or rent the permit, or otherwise receive compensation from another person for the opportunity to use the permit. The permit holder may hire or contract persons to provide authorized services provided that said persons do not recruit clients, make agreements with clients concerning monetary consideration or services provided, collect fees from clients, or advertise any business other than the permitted business when conducting the permitted use. The permit holder is responsible for ensuring that the persons hired or contracted comply with the terms of the permit.

(8) The permit holder may pay an agent to recruit clients, make arrangements with clients concerning monetary consideration or services provided, and collect fees from clients provided that the agent does not conduct the authorized services.

~~(8)~~ (9) A commercial use permit is not transferable and is void when a business is sold or transferred. Upon the sale or transfer of a permitted business, the person selling the business shall notify the new owner that the new owner is required to obtain a new commercial use permit pursuant to this subchapter.

~~(9) The recipient of a commercial use permit may not sell, lease, rent, or otherwise receive compensation from another person or entity for the opportunity to use the permit or associated use units.~~

(10) If the recipient of a commercial use permit sells or transfers ~~their permitted business in its entirety~~ in entirety the part of his/her business that is operated under that commercial use permit, the department shall issue a new commercial use permit to the new owner so long as ~~they~~ the seller has remitted all fees due to the department and so long as the buyer has obtained all other licenses or permits required by state or federal law~~,~~ and agrees to the terms of the permit. The new permit shall have the same expiration date as the seller's permit. ~~Any rationed units of use that have been allocated to the seller shall be transferred to the new owner of that business. Upon the sale or transfer of a permitted business, the person selling or transferring the business shall notify the new owner that the use of rationed units of use is subject to change pursuant to rules adopted by the commission and that no property right attaches to the rationed units of use.~~

(11) ~~A person selling or transferring a business is no longer eligible to receive a restricted use permit unless he/she acquires another permitted business in its entirety.~~ If the recipient of a commercial use permit sells or transfers in entirety the part of their business that operated under that commercial use permit, any rationed units of use that were previously allocated to the seller shall be reallocated to the new owner of that business. Upon the sale or transfer of a permitted business, the person selling or transferring the business shall notify the new owner that the use of rationed units of use is subject to change pursuant to rules adopted by the commission and that no property right attaches to the rationed units of use.

(12) The recipient of a commercial use permit may not sell, lease, rent, or otherwise receive compensation from another person for the opportunity to use client days or other allocated units of use, temporarily or permanently except that Smith River outfitters may lease, rent, or otherwise receive compensation from another Smith River outfitter for the opportunity to use a Smith River outfitter launch within a single use season.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

NEW RULE VI (ARM 12.14.125) FISHING ACCESS SITE PERMIT (1) A fishing access site permit is required to conduct water-based outfitting ~~and guiding~~ at fishing access sites and other department land that provides access to a nonrestricted water body.

(2) A fishing access site permit is required to conduct water-based guiding at fishing access sites and other department land that provides access to water bodies.

~~(2)~~ (3) A fishing access site permit authorizes a water-based outfitter to conduct water-based outfitting at any fishing access site or other department lands ~~in the state~~ that provides access to a nonrestricted water body unless the department specifies that a restricted use permit is required for that site. A water-based outfitter must obtain a restricted use permit to conduct water-based outfitting at a fishing access site or other department land that provides access to a restricted water body.

~~(3)~~ (4) A fishing access site permit authorizes a water-based guide, operating under the authority of a water-based outfitter, to conduct water-based guiding at any fishing access site or other department land for which the outfitter is authorized to conduct use ~~in the state that provides access to a nonrestricted water body. A water-based guide must obtain a restricted use permit to conduct water-based guiding at a fishing access site that provides access to a restricted water body~~.

~~(4)~~ (5) A fishing access site permit is an annual permit that is valid for the ~~calendar~~ license year in which the permit is issued.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

NEW RULE VII (ARM 12.14.130) FISHING ACCESS SITE PERMIT: APPLICATION PROCESS (1) A fishing access site permit may be obtained at a department regional office or through the department's internet licensing system so long as the applicant provides the required application information and remits the required permit fee.

(2) The department may require the following when applying for a fishing access site permit:

(a) a completed permit application form;

(b) an outfitter or guide license number if providing angling services;

(c) an automated license system number;

(d) permit fee; and

(e) proof of insurance that ~~indemnifies the state from any liability~~ the department judges sufficient to protect the public and the state of Montana.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

NEW RULE VIII (ARM 12.14.135) FISHING ACCESS SITE PERMITTING DECISIONS (1) There shall be no limit on the number of fishing access site permits issued.

(2) The regional supervisor may deny or revoke a fishing access site permit for failure to comply with the terms of the permit, violating department rules and regulations, or other infractions identified by the department~~, or when~~. If a nonrestricted water body is reclassified as a restricted water body~~.~~, a fishing access site permit is no longer valid at the sites that provide access to the restricted water body. The fishing access site permit holder may apply for a restricted use permit to use these sites.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

NEW RULE IX (ARM 12.14.140) RESTRICTED USE PERMIT (1) A restricted use permit is required for the following:

(a) water-based outfitting ~~or guiding~~ at a fishing access site or other department land that provides access to a restricted water body; and

(b) all other types of commercial use at a fishing access site, state park, wildlife management area, or department administrative site.

(2) A restricted use permit authorizes the recipient of the permit to conduct commercial use of the type, and at the locations, designated on the permit.

(3) A restricted use permit is valid for the time period specified on the permit, not to exceed five years. The department may modify the terms and conditions of the permit at any time. The permit holder may also request changes to a multi-year permit through submission of an updated plan of operation or other material.

(4) The department may place stipulations on the restricted use permit, including but not limited to the type, timing, location, duration, and volume of the use. The department's statewide river recreation rules shall govern the development of stipulations for water-based outfitters and guides on rivers and fishing access sites.

(5) The department may authorize the recipient of a restricted use permit to conduct use at more than one location.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

NEW RULE X (ARM 12.14.145) RESTRICTED USE PERMIT: APPLICATION PROCESS (1) A restricted use permit application must be submitted to the regional office that oversees the site or sites where the use would occur. If use is proposed for sites located in more than one department administrative region, the application may be submitted to one of the regional offices and the department may issue a single permit to authorize the use.

(2) The completed application should be submitted at least 45 days before the use is intended to begin or at least ten days before a special event, filming activity, or incidental commercial use lasting less than five days. The time period required to process applications begins when the applicant has submitted all of the required information. The department ~~shall attempt to~~ may process completed

applications received after these time periods on a case-by-case basis. The department may require additional time to process an application if the ~~applicant fails to provide the required information, or the~~ department determines that an environmental analysis is required.

(3) The department may require the following when applying for a restricted use permit:

(a) a completed restricted use permit application;

(b) an outfitter or guide license number if providing angling services;

(c) an automated license system number;

(d) permit fee;

(e) deposit or damage security bond;

(f) proof of insurance that ~~indemnifies the state from any liability~~ the department judges sufficient to protect the public and the state of Montana;

(g) proof of workers' compensation and/or an independent contractor exemption certificate;

~~(g)~~ (h) information explaining how the proposed use would benefit the public's resources or the public's enjoyment of the site; and

~~(h)~~ (i) other relevant information in sufficient detail to allow the department to evaluate the nature and impact of the proposed activity, including measures the applicant will use to prevent or mitigate adverse impacts.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

NEW RULE XI (ARM 12.14.150) RESTRICTED USE PERMITTING DECISIONS (1) The department has discretion over whether to issue a restricted use permit. Permitting decisions are based on the following factors to the extent that they are relevant:

(a) conformance with laws, rules, policies, management plans, and land use plans;

(b) contribution to the overall mission, goals, and objectives of the site;

(c) public safety;

(d) conflicts with other users in regard to type of use, timing, duration, location, site capacity, and other similar considerations;

(e) resource impacts and protection;

(f) extent to which the public interest is served;

(g) effects on adjacent land~~s~~;

(h) whether in the past the applicant complied with the terms of his/her permit or other authorization from the department and other agencies;

(i) whether the department has the fiscal and human resources to oversee the proposed use; and

(j) such other circumstances that the department finds appropriate.

(2) The availability, terms, and conditions of a restricted use permit may vary based on the regulations and management plan in place at the site where the use would occur. Prior to issuing a permit to conduct commercial use at a wildlife management area, the department must prepare a commercial use plan for that site. The commercial use plan shall:

(a) identify the types of commercial use that may be authorized at the site;

(b) establish the terms, conditions, and volume of commercial use that may be authorized; and

(c) establish the methods for allocating commercial use permits.

(3) The department's statewide river recreation rules shall govern ~~P~~permitting decisions that would ration, allocate, or otherwise restrict water-based outfitting and guiding opportunities on rivers and fishing access sites ~~shall be governed by the department's statewide river recreation rules~~. This does not include permitting decisions when the applicant or permit holder has violated the terms of a permit or violated department rules or regulations.

(4) Upon adoption of these rules, the department may continue to issue ~~a restricted use~~ permits ~~to any person or entity that was authorized to conduct commercial use prior to the adoption of these rules on department lands now requiring a restricted use permit so long as the person submits the required application material and fees~~ that were established prior to the adoption of these rules. The department shall administer these permits consistent with these commercial use rules.

(5) For permit systems established prior to the adoption of these commercial use rules, ~~When~~ when a restricted use permit expires, the department shall review the previously authorized commercial use and may issue a new restricted use permit to the permit holder upon application so long as the applicant complied with the terms of his/her permit or other authorization from the department and other agencies and so long as the applicant complied with the laws, rules, and policies of the department and other agencies. The department may adjust the terms and conditions of the new permit, including the allocated units of use.

(6) For permit systems established after the adoption of these commercial use rules, the department may develop a permit renewal system under which the previous permit holder and other commercial users are eligible to apply for the new permit. The department's statewide river recreation rules shall govern the development of a permit renewal system for water-based outfitting and guiding on rivers and fishing access sites.

~~(6)~~ (7) The regional supervisor, in ~~consultation~~ concurrence with the appropriate division administrator, shall be responsible for restricted use permitting decisions.

~~(7)~~ (8) A person who has been denied a restricted use permit or a person whose commercial use permit has been suspended or cancelled may appeal the permitting decision in writing to the director within 30 days of the date of mailing of the notice of the permitting decision. Persons not appealing within 30 days have waived their right to appeal.

~~(8)~~ (9) The director or the director's designee shall issue a written decision on the appeal. The director's decision is final.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

NEW RULE XIII (ARM 12.14.160) COMMERCIAL USE FEES (1) The department may require payment of fees for conducting commercial use on land~~s~~

owned or managed by the department. Permit fees pursuant to this rule shall be established through commission rulemaking. The department shall establish concession contract fees on a case-by-case basis. The commission may adjust permit fees as necessary to reflect changes in costs and the market and in situations where the department has an agreement or joint-permit system with other agencies.

(2) The department may waive commercial use fees on a case-by-case basis ~~when~~ for educational groups when the following conditions are met:

(a) ~~the sole purpose of the use is for educational purposes and the monetary benefits from the use or event do not exceed the cost of providing the use or event~~ the group is from a bona fide institution that meets the definition of an educational group; ~~or~~

(b) ~~the proceeds from the use or event are allocated to the maintenance, management, or the improvement or development of facilities, at the site where the use occurs.~~ the group provides a written explanation of the educational purpose of the visit; and

(c) the use is not primarily for recreational purposes.

(3) The department may waive or adjust commercial use fees on a case-by-case basis when the proceeds from the use or event are donated to the maintenance, management, or the improvement or development of facilities, at the site where the use occurs.

~~(3)~~ (4) The department may waive or adjust commercial use fees when a service provider donates their services for a charitable cause and is not compensated for the service.

~~(4) The commission may adjust permit fees as necessary to reflect changes in costs and the market and in situations where the department has an agreement or joint-permit system with other agencies.~~

(5) The department may charge a processing fee for recovery of costs associated with preparing an environmental analysis document when processing a permit application.

(6) Applicants must pay the required fees by the date specified in the terms of the permit. ~~deadlines established in the fee rule.~~

(7) With approval from the legislature, the department shall use the permit fees from commercial use at fishing access sites to help support the fishing access site program, river recreation management, and enforcement.

AUTH: 2-4-102, 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 2-4-102, 23-1-105, 23-1-106, 87-1-303, MCA

NEW RULE XIV (ARM 12.14.165) RATIONING AND ALLOCATION OF COMMERCIAL USE (1) The department's statewide river recreation rules shall govern the rationing and allocation of commercial use on rivers, including fishing access sites that provide access to rivers.

(2) The regional supervisor, in ~~consultation~~ concurrence with the appropriate division administrator, director, and the commission, may ration and allocate commercial use at a state park, wildlife management area, or department administrative site. The regional supervisor may consider the following when making rationing and allocation decisions:

(a) laws, rules, policies, management plans, and land use plans for the site;
(b) overall mission, goals, and objectives of the site;
(c) input from the public;
(d) public safety concerns;
(e) biological conditions;
(f) social conditions;
(g) use conflicts;
(h) past performance of commercial users;
(i) public demand for commercial use; and
(j) other factors as determined by the department.

(3) The regional supervisor shall describe what actions have already been taken by the department to address a particular problem or concern, why rationing is necessary, and how rationing of use would address a particular problem or concern.

(4) To the extent possible, the department must monitor and evaluate commercial use of a site to determine whether rationing is necessary and to assess whether rationing has improved conditions.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

4. The commission has repealed ARM 12.8.211 as proposed.

AUTH: 23-1-106, 87-1-303, MCA
IMP: 23-1-102

5. Under the commission's direction, the department conducted eight public scoping meetings to identify the issues pertaining to commercial use. The commission then directed the department to draft tentative administrative rules and prepare an environmental assessment of the impacts of adopting the rules. The department also drafted a commercial use permit fee rule. The public was invited to submit comments on all three documents. The commission also held eight public hearings to take testimony on the draft rules and the environmental analysis document. Seventy-four people, groups, and agencies submitted comments on the tentative administrative rules and the commercial use permit fee rule. Thirteen people, groups, and agencies submitted comments on the environmental analysis document. The following comments address the proposed administrative rules.

COMMENT 1: A number of people offered support of Alternative A in the administrative rule notice, which allowed the consideration of commercial use on Wildlife Management Areas (WMAs) in some circumstances. Their reasons for supporting Alternative A were:

- More opportunities for visitors to our state.
- More support for small businesses and the economy.
- Nonconsumptive uses have minimal, if any, impact.
- Adverse impacts will be minimal or nonexistent.

- Some commercial use of the sites, such as for photography, enhances the public value of the site.
- Denying the public's use of WMAs who use commercial services is discriminatory.

RESPONSE: The commission appreciates support for Alternative A. The commission decided to adopt rules that prohibit commercial hunting and fishing outfitting at WMAs but allow the department to consider other types of commercial use at these sites. However, only commercial uses that are compatible with the purpose and mission of WMAs may be contemplated. This does not mean that all WMAs will be open to all commercial use. Some WMAs may not allow any commercial use, depending on the situation. Under the new rules the department may exclude commercial uses on WMAs if the uses may harm the resource or result in other types of conflicts. The department is required to develop a commercial use plan for a WMA before authorizing any commercial use at the site. The plan would identify appropriate types of commercial use for a WMA and the conditions under which that use would be authorized. The plan may also determine that commercial use is not appropriate for a particular WMA. The commission does not believe prohibiting commercial use in these situations is discriminatory to one segment of the public. Rather, the commission thinks prohibiting commercial use to protect the resource and minimize conflicts benefits the entire public.

COMMENT 2: A number of people supported Alternative B which the commission did not adopt. This alternative did not allow any commercial use at WMAs. These people or organizations opposed any commercial use on WMAs for many different reasons:

- Commercial use is at odds with the intended purposes of WMAs. There is no obligation to allow commercial use.
- Commercial use at WMAs would spoil the experience of the public using these sites. The average Montanan who cannot afford to hire commercial services should be able to use these areas without added pressure and conflicts of commercial use.
- The WMA program is very successful. Part of this success is due to the exclusion of commercial use. Allowing commercial use on WMAs could jeopardize public support of the program. Commercial use on other public lands has generated problems that should be reviewed before allowing commercial use. Feasibility studies should be conducted prior to allowing commercial use.
- There is no benefit associated with commercial use at WMAs.
- Allowing commercial use might create a de facto property right for use on WMAs.
- Outfitters would find a way to exclude the public and monopolize use in these areas.
- These areas are too special and valuable to be exploited. Wildlife management areas are only a small portion of the overall public land that is

available for commercial use. There are ample opportunities to conduct commercial use on other public land without also allowing it to occur at WMAs.

- Commercial presence at WMAs might violate federal aid rules.
- Excluding commercial use is consistent with the public trust doctrine and avoiding privatization of a public resource.
- Commercial use always seeks to grow. The department can't provide enough oversite to control expansion. Once commercial use is entrenched, you can never get rid of it.

RESPONSE: The commission recognized that any commercial use rule affecting WMAs would be highly controversial. Several years ago the department and commission began evaluating commercial use. Department personnel researched other states' commercial use policies and rules and worked to develop ideas for managing commercial use on department lands. Eight public scoping meetings were held to identify the public's interests and concerns. Public input on whether or not commercial use was appropriate on WMAs was divided. Participants advocated strongly both for and against commercial use on WMAs. In weighing the options, the commission chose not to prohibit commercial use on WMAs other than prohibiting hunting and fishing outfitting. But under the new rules, the commission required the department to carefully evaluate the types, amounts, and allocation of use to balance conflicting interests through a commercial use plan that the department must develop before use can be authorized. The commission's responses to the summary of citizens' concerns are listed below.

Commercial use is at odds with the intended purposes of WMAs. There is no obligation to allow commercial use.

The final rules require the department to develop a commercial use plan for a wildlife area prior to authorizing commercial use. The plan would identify types of commercial use that could be authorized and conditions on that use to ensure it does not conflict with the intended purposes of the site. Under these rules, there is still no obligation for the department to permit commercial use if that use conflicts with the intended purposes of the site.

Commercial use at WMAs would spoil the experience of the public using these sites. The average Montanan who cannot afford to hire commercial services should be able to use these areas without added pressure and conflicts of commercial use.

The commission recognizes that there are many different kinds of recreators with many different philosophies. Using the tools provided in these rules, the commission hopes to fairly balance the interests of a variety of recreators. The commission's goal is to maintain the resource while providing recreational opportunities to a variety of interests, including those that would not be able to enjoy the resource without having the assistance of someone else take them there. The final rules require the department to develop a commercial use plan for a wildlife area prior to authorizing commercial use. The plan would identify types of commercial use that could be

authorized and conditions on that use. The department can minimize impacts to the public by carefully considering what types of commercial use are appropriate for a particular WMA and ways to manage that use.

The WMA program is very successful. Part of this success is due to the exclusion of commercial use. Allowing commercial use on WMAs could jeopardize public support of the program. Commercial use on other public lands has generated problems that should be reviewed before allowing commercial use. Feasibility studies should be conducted prior to allowing commercial use.

Determining the factors that make a program successful is a very difficult, subjective judgment. Success can be the result of many different factors. Allowing commercial use of WMAs may decrease some public support while increasing other public support. The commission and department are entrusted with the care of WMAs for the benefit of the public who is both noncommercial and commercial.

The final rules require the department to develop a commercial use plan for a wildlife area prior to authorizing commercial use. The plan would identify types of commercial use that could be authorized and conditions on that use. The department can minimize impacts to the public by carefully considering what types of commercial use are appropriate for a particular WMA and ways to manage that use.

There is no benefit associated with commercial use at WMAs.

Commercial use would benefit those members of the public seeking guided services at WMAs, e.g., bird watching, wildlife watching, horseback riding, etc. The commission and the department must carefully manage commercial use in order to meet the interests of those people who do not use commercial services and the interests of those who do.

Allowing commercial use might create a de facto property right for use on WMAs.

The commission seriously considered this issue. Its intent was to avoid creating property rights through the commercial use rules. Rule drafters also carefully considered this issue. The commission believes that New Rule V sections (7), (9), and (10) (ARM 12.14.120), and New Rule IV(3) (ARM 12.14.115) adequately express the intent to avoid creating a property right through issuance of commercial use permits.

Outfitters would find a way to exclude the public and monopolize use in these areas.

Commercial hunting and fishing outfitting will not be permitted on WMAs. The final rules require the department to develop a commercial use plan for a wildlife area prior to authorizing commercial use. The plan would identify types of commercial use that could be authorized and conditions on that use. The department can minimize impacts to the public by carefully considering what types of commercial use are appropriate for a particular WMA and ways to manage that use.

These areas are too special and valuable to be exploited. Wildlife management areas are only a small portion of the overall public lands that are available for commercial use. There are ample opportunities to conduct commercial use on other public lands without also allowing it to occur at WMAs.

Commercial use is already occurring on some WMAs. The new rules give the department tools to legally and effectively regulate that use. In determining the scope and amount of commercial use, if any, on a WMA, the department will create a commercial use plan for that site. The commercial use plan for a WMA will consider the demand for commercial use and whether this demand can be met on other public lands in the surrounding area or is unique to that site. The plan would identify types of commercial use, if any, that could be authorized and conditions on that use. The department can minimize or eliminate impacts by carefully considering what types of commercial use are appropriate for a particular WMA and ways to manage that use. And it can eliminate certain commercial uses altogether. The plan will outline what uses are appropriate, if any.

Commercial presence at WMAs might violate federal aid rules.

The rules governing federal aid allow the department to authorize commercial use at a WMA that is compatible with the intended purposes of the site. The commercial use plan for a WMA will evaluate types of commercial use to assess compatibility with intended purposes. The department will not authorize commercial use that conflicts with the intended purpose of a site.

Excluding commercial use is consistent with the public trust doctrine and avoiding privatization of a public resource.

The public trust doctrine provides that the state holds certain resources in trust for the benefit of the public. The commission agrees that wildlife is a resource the state manages for the people of Montana. The public includes both commercial and noncommercial interests. The commission thinks that under these rules both interests are considered, and the resource is not being privatized because the noncommercial public uses the site as well.

Commercial use always seeks to grow. The department can't provide enough oversite to control expansion. Once commercial use is entrenched, you can never get rid of it.

The commission intends that, under these rules, the department will stop commercial use any time a WMA is in jeopardy. The department has discretion through the authority granted in the rules to exclude or stop commercial use. Authorized use on WMAs is limited and may occur only under certain circumstances determined after department evaluation. Both the commission and the department have strongly held beliefs about protecting WMAs and will take whatever measures are necessary to do this.

COMMENT 3: The definition of commercial use should include a list of all the commercial uses that occur on department lands and waters. The list should include the types of commercial use that are exempted in the rules for the reason that in the future some of these may fall within the parameters of commercial activity restrictions.

RESPONSE: The commission adopted a definition of commercial use that defines the types of commercial use that are governed by the rules, rather than an all-inclusive definition list that intends to cover every type of commercial use that exists. The commission wanted a definition that made it clear as to what types of commercial use would be governed by the rules. A definition list that covers every conceivable activity would have been confusing. Neither the commission nor the department can foresee every commercial use, so the commission would be tasked with continually amending the rule to list as new activities emerge. A list of commercial activities could also pose a greater risk to the resource. Before the commission or department was aware of a damaging commercial activity not included in the definition list, the resource could sustain damage since no department permission would be required for an unlisted activity.

COMMENT 4: The rules should apply to vehicle transport services.

RESPONSE: In making its decision to exclude vehicle transport services from the rules, the commission considered all the requirements in the rule that might prove cost prohibitive to this business. The commission also considered the risk to the department, the impact this industry has on department sites, and the benefits provided to the public. The commission concluded that the vehicle transport services did not present a significant risk to the department and the simplest solution was to exclude them from the rules.

COMMENT 5: The commercial use rules should not apply to trapping.

RESPONSE: The final rules clarify that the rules do not apply to trapping. There already are rules in place pertaining to trapping and therefore it is not necessary to also apply the commercial use rules.

COMMENT 6: The rules should also apply to commercial use on waters that are under the control, administration, management, and jurisdiction of the state of Montana and/or department.

RESPONSE: The commission already has statewide river recreation rules that govern recreational use on rivers, including outfitters, guides, and other types of commercial use on rivers. The commercial use rules, therefore, only apply to department land.

COMMENT 7: The rule language should not be so narrowly interpreted as to preclude outfitters from utilizing their historic travel routes through WMAs while

conducting their guests from place to place in the normal conduct of their outfitting operations.

RESPONSE: The final rules allow the department to authorize a commercial hunting outfitter to travel on historic travel routes through department land for the sole purpose of gaining access to other public land where the outfitter is authorized to conduct use.

COMMENT 8: How would the rules affect waterfowl outfitters who use fishing access sites to launch boats for waterfowl hunting on some lakes and streams?

RESPONSE: The final rules allow the department to authorize a commercial hunting outfitter to use a fishing access site to gain access to a water body where the outfitter is authorized to conduct use.

COMMENT 9: The department should only issue permits to persons, not entities or businesses. If the commission retains the terms "business or entity," the rules should exclude fishing outfitters from New Rule V(3) (ARM 12.14.120) or include language to ensure that permits for fishing operations can only be issued to a person who is licensed as an outfitter subject to outfitter laws and rules.

RESPONSE: The commission agrees and changed the above-referenced rule to clarify that when authorizing water-based angling outfitting or guiding, the department may only issue the permit to a licensed outfitter or guide.

COMMENT 10: The March 1 deadline for obtaining a commercial use permit for guides would be a problem. Guides are often not on board by that date. The guides should be allowed to obtain a permit any time during the year, and if a deadline is necessary, make it July 1 instead of March 1.

RESPONSE: A guide may obtain a fishing access site permit at any time during the year. The permit is an annual permit that is valid for the license year in which the permit is issued.

COMMENT 11: I am concerned about the regional supervisor making rationing decisions. I recommended that the rules should include a statement of intent and purpose for the rationing language and include guidelines for when this occurs. The concern was that a regional supervisor could ration use with little rationale or reason.

RESPONSE: The rules state that the rationing and allocation of use on rivers is governed by the department's statewide river recreation rules. Where rationing of commercial use on department land is necessary and the new rules apply, the commission believes that regional supervisors will make fair rationing decisions. The final rules require that the regional supervisor shall describe what actions have already been taken by the department to address a particular problem or concern, why rationing is necessary, and how rationing of use would address a particular problem or concern.

COMMENT 12: I am opposed to having no limit on the number of fishing access site permits. This is in conflict with the general policy that commercial use does not conflict with, or detract from, public use and the intended purposes of a site. The department should ration all permits from the beginning based on historical use.

RESPONSE: Currently, there is no limit on commercial use at department fishing access sites located on unrestricted water bodies. The commission thinks that allowing this commercial use at it now exists is congruent with the general policy stated in the new rules. If use expands to the point that it is not in keeping with the general policy, the department has the authority to place conditions on the permitted use to return it to acceptable parameters.

The commission struck a balance by creating an unlimited fishing access site permit to authorize commercial use at fishing access sites where there are no special restrictions governing commercial use. The restricted use permit is used to authorize commercial use at places where more intensive management is needed, e.g., places where there are special restrictions in place to address conflicts.

COMMENT 13: Out-of-state outfitters should not be allowed to obtain a permit if they reside in a state that does not offer the same opportunities to Montana outfitters.

RESPONSE: The commission's interests are focused on preventing impacts to the resource and managing conflicts between people rather than excluding a segment of the population for reasons not related to the resource.

COMMENT 14: The rules should make it clear that the department has sole authority to make or allow any changes to the provisions or terms of the permit.

RESPONSE: Under the new rules, the commission delegated authority to the department to attach conditions to a permit or change permits conditions. The final rules state that the availability, terms, and conditions of a commercial use permit may vary based on the regulations and management plan in place at the site where the use would occur. The rules also state that a commercial use permit is not a property right and may be revoked, amended, or suspended at any time for cause, and that the department may modify the terms and conditions of the permit at any time.

COMMENT 15: Why is the permit issued for one year and the restricted use permit issued for up to a five-year period? Both permits should be issued for the same amount of time.

RESPONSE: Under New Rule VI (ARM 12.14.125) a fishing access site permit is limited to water-based outfitting involving fishing access sites and other department owned land. Fishing access site permits are for a specifically enumerated activity in an unrestricted place. Any outfitter can have this kind of permit unless the outfitter eliminates himself/herself by not abiding by permit conditions or department rules.

These permits can be renewed easily and need to be renewed yearly as conditions on them may need to be updated.

Restricted use permits differ from fishing access site permits in that only a certain number of restricted use permits may be issued to water-based outfitters. This type of permit also encompasses other types of commercial use besides water-based outfitting. Because of these differences, the department needs flexibility to determine what is an appropriate permitting period for each permit. The terms of a restricted use permit could be up to five years if that time period makes sense for the contemplated use. Or, the permit may be issued for only one day.

COMMENT 16: Would an outfitter be allowed to use a booking agent to book and take money from clients? The draft rules indicate that this would not be allowed.

RESPONSE: In New Rule V(8) (ARM 12.14.120) the commission clarified that the permit holder may pay an agent to recruit clients, make arrangements with clients concerning monetary consideration or services provided, and collect fees from clients provided that the agent does not conduct the authorized services.

COMMENT 17: The new rules should allow an outfitter to sell one business but retain other businesses, e.g., an outfitter who also has a hunting outfitting business, or a fishing outfitter who operates on more than one river and establishes separate businesses. Why should the buyer of an operation on one river also be required to obtain all of the rest of the business, including other rivers that they may not want to operate on?

RESPONSE: The commission agrees and changed New Rule V(9) (ARM 12.14.120) to state that if the recipient of a commercial use permit sells or transfers in entirety the part of his/her business that is operated under that commercial use permit, the department shall issue a new commercial use permit to the new owner so long as the seller has remitted all fees due to the department and so long as the buyer has obtained all other licenses or permits required by state or federal law and agrees to the terms of the permit.

COMMENT 18: The rules would still result in "blue sky value" if the department issues a permit to the buyer of a business. The permit would really be what is being sold, not the business. When a business sells, the permit should go back to the department to determine whether or not to reissue the permit. If the answer is yes, the permit should be reissued through a bidding process among qualified buyers. The state would make more money and the public interest would be served. The commercial user would rent the permit instead of owning the permit.

RESPONSE: The rules make it clear that the permit holder does not own the permit and the permit may not be sold. The permit returns to the department. The commission did, however, take into account that it would be difficult for a commercial user to sell their business if potential buyers are not able to obtain the necessary permit, which is why the rules require the department to issue a new permit to the

buyer if they agree to the terms of the permit and have obtained all required licenses or permits. In this way, the permit will remain the same. And once the term expires on the old permit, the business must acquire a new permit and go through all procedures for application.

COMMENT 19: What would the department do if the rules require the department to issue a new permit to the buyer of a business and that person is not licensed to outfit?

RESPONSE: New Rule V(4) and (7) (ARM 12.14.120) clarifies that the buyer must have obtained all other licenses or permits required by state or federal law in order to receive the new permit.

COMMENT 20: The permits should be transferable. Grazing permits, water rights, mineral rights, and liquor licenses are all transferable. Permits are already transferable on the Smith, Beaverhead, and Big Hole rivers.

RESPONSE: The commission does not intend that the permit should belong to the commercial user, and therefore permits are not transferable. Unlike permits for water rights, mineral rights, and liquor licenses, a commercial use permit is not a property right and cannot be managed as property. The department would issue a new permit to the buyer of a business if the buyer agrees to abide by permit conditions, rather than transferring the seller's permit.

COMMENT 21: There should be one permit for all fishing access sites, rather than a fishing access site permit and a restricted use permit.

RESPONSE: The reason that one permit cannot be issued for use of all fishing access sites is that on some Montana rivers there is a need for more intensive management of commercial use and therefore a special permit is necessary. Not all commercial users can operate on these rivers or have unrestricted use of these fishing access sites. This is the reason for the restricted use permit. The fishing access site permit is adequate for the majority of fishing access sites around the state. It is simple to obtain and requires minimal administrative oversight.

COMMENT 22: Would an outfitter be required to obtain a permit even if the outfitter doesn't physically use the site. E.g., the outfitter books the trip and the guide conducts the trip. Is a permit required for an off-site business that rents equipment? For example, would a business that rents inner tubes for use on the Blackfoot River be required to have a permit?

RESPONSE: An outfitter who hires a guide will be required to obtain a permit even if that outfitter is not on site while the guide conducts the trip. In this case, there is no question that the outfitter's business is using the department-owned site, even though the outfitter's employee is physically on the site, not the outfitter. A company that rents inner tubes from a location in Missoula, for example, would not be required to obtain a commercial use permit. Requiring an equipment rental business

to obtain a permit would not make sense. The department has no way to ascertain whether or not all of the rental equipment is being used on the Blackfoot River, a city park, a private swimming pool, or the Green River in Utah for example. Also, a sporting equipment store that rents sports equipment for outdoor use would not send their employees to department sites to conduct business. If this business decided to set up a rental concession at a department site it would need a commercial use permit. A town-based rental business that routinely sent its employees to a department site to distribute or collect equipment would also be required to have a permit.

COMMENT 23: A commercial use permit should not be issued to anyone who does not have legal authority to use the permit. A commercial use permit that allows someone to use a fishing access site for the purpose of commercial fishing outfitting should only be issued to licensed outfitter (not a guide). Permitting guides could lead to more illegal outfitting (guides acting as outfitters and using the guide permit to justify this practice).

RESPONSE: There should not be any basis for a guide to claim that the fishing access site permit authorizes them to conduct outfitting. Under New RuleV(3) (ARM 12.14.120), a fishing access site permit authorizes a water-based guide, operating under the authority of a water-based outfitter, to conduct water-based guiding at any fishing access site or other department land for which the outfitter is authorized to conduct use.

COMMENT 24: The guide permits will create more paperwork for the outfitters and it would be better to just charge the outfitter a higher fee.

RESPONSE: The fishing access site permit used to authorize guides will be available via the automated license system and is designed to minimize paperwork.

COMMENT 25: The commission should include language that says filming activities on department lands may not unduly conflict with visitor use at any department site and that this should be added to the permit terms.

RESPONSE: Although the commission considered this comment, it did not adopt language saying that filming may not unduly conflict with visitor use at any department site. It is necessary for the department to have the ability to alter public use opportunities at fishing access sites and state parks on a case-by-case basis in the interest of public safety and security and when there is potential for short-term conflicts. There may be times when the department would temporarily close a fishing access site to accommodate a filming event. Prior to making this decision, the department would consider the impact on the public and opportunities for the public to use other department land in the general vicinity.

COMMENT 26: Clarify New Rule VIII(2) (ARM 12.14.135) so that when a nonrestricted water body is reclassified as a restricted water body, the department would not revoke a person's statewide fishing access site permit. Instead the

department would require a restricted use permit for access sites on the reclassified water body and the fishing access site permit would still be valid for other sites.

RESPONSE: The commission added language to New Rule VIII(2) (ARM 12.14.135) to state that when a fishing access site permit is no longer valid for a given site, the permit holder may apply for a restricted use permit for that site. The fishing access site permit is still valid for use on unrestricted sites.

COMMENT 27: Take a close look at institutional, educational, and nonprofit groups for the reason that they are impacting other users and can have considerable impact on the site and the resources. These groups have the same impacts as commercial users and should be treated as such.

RESPONSE: The commission realizes that institutional and nonprofit groups also impact resources. The final rules clarify that the definition of commercial use includes nonprofit organizations and educational groups that receive money from participants in activities occurring on department lands. Therefore, these groups will be required to comply with the commercial use rules.

COMMENT 28: Allocate permit fees to the program area that generated the income. E.g., money from fishing access site permits should be allocated to the fishing access site program, including operation, maintenance, improvement, and acquisition.

RESPONSE: The final rules clarify that with approval from the legislature, the department shall use the permit fees from commercial use at fishing access sites to help support the fishing access site program, river recreation management, and enforcement.

COMMENT 29: New Rule VII(2)(e) (ARM 12.14.130) should clarify what type of liability insurance might be required: general, commercial auto, single or multiple liability coverage. Also, the insurance language of New Rule X (ARM 12.14.145) and XII (ARM 12.14.155) should be changed from "may" to "shall."

RESPONSE: The commission decided not to state what type of insurance is required and always require insurance. Since there are many different types of commercial use, the department needs flexibility to determine insurance requirements for a given situation. The department cannot foresee every type of commercial use and insurance requirements for that use. There could be cases when insurance is not required.

COMMENT 30: I'm not in favor of these rules until all other areas of management have been exhausted. More rules require more management, more enforcement, and more expense. When and if more rules are needed, the department should proceed cautiously and only implement those rules that are needed.

RESPONSE: The rulemaking process began in response to commercial use that is already occurring. The department has received complaints regarding commercial use as defined in these rules. Whenever possible, the commission believes establishing rules to prevent damage to the resource and recreational conflicts is preferable to waiting until they occur to begin rulemaking. Often, the expense of bringing a damaging situation under control far exceeds the expense of avoiding the situation in the first place.

COMMENT 31: The department should establish standards and conduct background checks before issuing and reissuing a permit, including the issuance of a permit to the buyer of a business.

RESPONSE: The commission does not agree that background checks are necessary as long as businesses are in good standing and have a good history with the department. Background checks require a great deal of expense and time and the department can implement other measures to ensure compliance with its rules.

COMMENT 32: There must be provisions for enforcement of the rules. Because of lack of funding, the department will have a difficult time enforcing the rules.

RESPONSE: The commission and department believe that enforcement already in place can be used to enforce the commercial use rules. For instance, wardens routinely check hunting and fishing licenses. They can also check commercial use permits in the same manner.

/s/ Steve Doherty
Steve Doherty, Chairman
Fish, Wildlife and Parks Commission

/s/ Rebecca Dockter
Rebecca Dockter
Rule Reviewer

Certified to the Secretary of State January 16, 2007

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.301.131, 24.301.138, 24.301.142, 24.301.146, 24.301.154, 24.301.171, 24.301.172, 24.301.173, 24.301.208, 24.301.301, 24.301.602, 24.301.710, 24.301.714, 24.301.717, 24.301.718, and 24.301.719, and the adoption of NEW RULE I pertaining to building codes	) NOTICE OF AMENDMENT) AND ADOPTION

TO: All Concerned Persons

1. On October 5, 2006, the Department of Labor and Industry (department) published MAR Notice No. 24-301-203 regarding the public hearing on the proposed amendment and adoption of the above-stated rules, at page 2319 of the 2006 Montana Administrative Register, issue no. 19.

2. On November 1, 2006, a public hearing was held on the proposed amendment and adoption of the above-stated rules in Helena. Several comments were received by the November 13, 2006, deadline.

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT 1: One commenter supported the adoption of the new building codes, stating that the Montana Building Industry Association has reviewed the new codes and supports having coordinated codes for state and local program use. The commenter requested clarification that the adoption of the International Residential Code (IRC) specifically excludes Attachment P of the IRC, which allows jurisdictions adopting it to require automatic fire sprinkler systems in all new one- and two-family dwellings and townhouses.

RESPONSE 1: The department acknowledges and appreciates the comment. In response to the clarification regarding Appendix P of the IRC, the department is not proposing adoption of Appendix P at this time. All appendix chapters of the codebooks must be specifically and individually adopted in addition to the codebook and if not specifically adopted, the appendix chapters are not allowed for use by state or local building programs. Appendix P contains a statement at the beginning of the appendix that "[t]he provisions contained in this appendix are not mandatory unless specifically referenced in the adopting ordinance." Therefore, the commenter can be assured that Appendix P is not being proposed for adoption at this time.

COMMENT 2: One commenter thanked the department for the opportunity to participate in the rule process and supports the adoption of the new elevator codes.

RESPONSE 2: The department acknowledges and appreciates the comment.

COMMENT 3: One commenter thanked the State of Montana for adopting the 2006 Uniform Plumbing Code (UPC). The commenter also suggested that the Uniform Mechanical Code (UMC), also published by the International Association of Plumbing & Mechanical Officials (IAPMO), would work just as well for Montana. The commenter stated that if the department considers adopting the UMC, IAPMO would offer its assistance in the adoption to protect the health of the public.

RESPONSE 3: The department acknowledges and appreciates the comment. The department has not proposed adoption of the UMC in this notice and therefore cannot take action at this time with respect to the comment. The department will consider IAPMO's offer of assistance when considering the adoption of a new mechanical code.

COMMENT 4: One commenter requested the department's assurance that the adoption of the National Board Inspection Code (NBIC) in ARM 24.301.710(4) and (5) will not increase the cost of repairs to boilers being inspected.

RESPONSE 4: The department acknowledges the comment and specifically notes that the adoption of the NBIC will not increase the cost of boiler repairs. The introduction to the NBIC clearly states that if any provision within the code conflicts with the requirements of the jurisdiction, the jurisdictional regulation shall govern. Adoption of the NBIC should in no way be construed as a change in what is required for boiler inspection, repair, or alteration and is being adopted to achieve uniformity of inspection procedures among all inspectors.

COMMENT 5: One commenter noted that the NBIC requires all repairs to boiler and pressure vessels be conducted by an NBIC "R" stamp holder. ARM 24.301.722 currently accepts, but does not require the "R" stamp. The commenter suggested amending ARM 24.301.722 to achieve consistency with the NBIC requirement.

RESPONSE 5: The department acknowledges and appreciates the comment. As stated in response four, the department does not intend to change any boiler or pressure vessel inspection, repair, or alteration requirements at this time due to adoption of the NBIC. The department has not proposed any amendment to ARM 24.301.722 in this notice and therefore cannot take action at this time with respect to the comment. The department will consider the comment when next amending the department's rules relating to boilers.

COMMENT 6: Comments were received concerning the amendments to ARM 24.301.717 and 24.301.718 which change the time allowed from 30 to 15 days

for insurance inspectors to submit inspection reports (ARM 24.301.717) and for insurance companies to notify the department of new or expired insurance accounts (ARM 24.301.718). The comments stated that 15 days is an unreasonable requirement for insurance inspectors and companies to meet as many inspectors do not reside in Montana and may have inspection areas covering several states. An inspector who conducts a week of inspections in Montana and then travels to another state may easily take more than 15 days to process and submit the necessary paperwork to Montana. It was also noted that most other jurisdictions allow 30 days for submission of these items and the time frame appears to work well.

RESPONSE 6: The department acknowledges the comments and agrees that 15 days may be unreasonable. The department was previously unaware of the large inspection areas that insurance inspectors cover and did not anticipate the potential hardship on insurance inspectors or insurance companies. Due to the comments received, the department will not reduce the time frames in ARM 24.301.717 and 24.301.718 as proposed and the required submission dates will remain at 30 days.

COMMENT 7: One commenter stated that amending ARM 24.301.719 as proposed could result in an insurer performing an inspection and submitting a report only to have the department's inspector make a separate visit to issue the number. The commenter suggested removing all references to "special inspector" in this rule, stating that the state inspector would conduct all initial inspections and assign a number to all new boilers, which is consistent with 50-74-105 and 50-74-206, MCA. One commenter suggested removing all references to "special inspector" from ARM 24.301.719.

RESPONSE 7: The department agrees that amending ARM 24.301.719 as proposed could result in both a state inspector and a special inspector visiting the same location. The department proposed the amendment to provide options as to which inspector can perform an initial inspection while still requiring that the department assign the jurisdictional number. The department agrees that the proposed change would only complicate the issue and is withdrawing the proposed amendments to this rule at this time.

COMMENT 8: One commenter suggested that the proposed new language in ARM 24.301.719 be deleted and that the department issue identification numbers to inspectors on an as needed basis.

RESPONSE 8: As stated in response seven above, the department is withdrawing the proposed amendments to this rule.

COMMENT 9: One commenter expressed concern regarding ARM 24.301.208 stating that the proposed amendments are not fair and equitable and do not agree with basic auditing concepts adopted by the federal government and the Montana legislature. The commenter stated that these procedures are unnecessary

and conflict with the Montana Single Audit Act (2-7-502, MCA). The commenter suggested that rules required by the department be included within the compliance requirements provided by Local Government Services so that auditors can ensure compliance with all program rules within the regular audit. The commenter is opposed to requiring the city, county, or town to pay for the agreed upon procedures engagement and suggests that the department pay for the cost of the engagement. The commenter suggested that the best solution to alleviate the hardship on smaller programs would be to increase the reserve fund balance and revenue thresholds that dictate the need for a separate engagement from $10,000 to $50,000.

RESPONSE 9: This is an existing rule that has been in effect since 1998 and the department is proposing to change the agreed-upon procedures to give auditors better guidance on how to verify compliance with state law. As the commenter noted, the department must ensure that all code enforcement functions are properly performed, including making sure that all construction related fees are only used for building code enforcement. Having the auditors use the new agreed-upon procedures will help ensure that certified cities, counties, and towns are only spending permit revenue on building code enforcement.

The commenter implied that this rule is in conflict with the Montana Single Audit Act at 2-7-502, MCA. Department staff reviewed the statute and did not identify a conflict. In addition, a staff member with the Local Government Services Bureau of the Department of Administration, which helped write the new agreed-upon procedures, was consulted and could not identify any conflicts with the Montana Single Audit Act. These new agreed-upon procedures are already found in the Compliance Supplement for Audits of Montana Local Governments that is published by the Local Government Service Bureau and are not in administrative rule. The department lacks the resources to pay for these audits as suggested by the commenter because cities, counties, and towns do not pay the department for the review and certification of their building code programs. The department agrees with the commenter's suggestion to increase the reserve fund balance and revenue balance from $10,000 when the audit is required. However, the balance amounts cannot be changed at this time because the department did not include a proposed amendment of these amounts in this notice. Increasing this amount will be considered the next time the department proposes to amend administrative rules. For these reasons the department is amending this rule exactly as proposed.

4. The department has amended ARM 24.301.131, 24.301.138, 24.301.142, 24.301.146, 24.301.154, 24.301.171, 24.301.172, 24.301.173, 24.301.208, 24.301.301, 24.301.602, 24.301.710, and 24.301.714 exactly as proposed.

5. The department is not amending ARM 24.301.719.

6. The department has amended ARM 24.301.717 and 24.301.718 with the following changes, stricken matter interlined, new matter underlined:

24.301.717 INSURANCE COMPANY TO PROVIDE WRITTEN NOTIFICATION TO THE DEPARTMENT OF CHANGE IN BOILER STATUS

(1) remains as proposed.

(2) The written notification of boiler status, referenced in (1), shall be filed with the department within 30 ~~15 working~~ days of the change in boiler status and shall include all applicable boiler information (boiler identification number or stamp, owner, location, operating certificate number, etc.).

(3) remains as proposed.

AUTH: 50-60-203, 50-74-101, MCA
IMP: 50-60-203, 50-74-202, MCA

24.301.718 BOILER INSPECTIONS (1) through (1)(e) remain as proposed.

(i) Boiler inspection reports shall be filed with the department within 30 ~~15 working~~ days after inspection on forms acceptable to the department. Such report shall indicate the boiler has been approved for operation by a special boiler inspector employed by the insurance company that insures the boiler.

(ii) remains as proposed.

AUTH: 50-60-203, 50-74-101, MCA
IMP: 50-60-203, 50-74-206, 50-74-209, MCA

7. The department has adopted NEW RULE I (24.301.402) exactly as proposed.

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

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

Certified to the Secretary of State January 16, 2007

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 37.62.101, 37.62.103, 37.62.106, 37.62.108, 37.62.110, 37.62.111, 37.62.114, 37.62.118, 37.62.121, 37.62.123, 37.62.126, 37.62.128, 37.62.134, 37.62.136, 37.62.140, 37.62.148, and 37.62.2121, and the repeal of ARM 37.62.130, 37.62.138, and 37.62.146 pertaining to child support guidelines	))))))))))))	NOTICE OF DECISION REGARDING PROPOSED ADMINISTRATIVE RULE ACTIONS

TO: All Interested Persons

1. On October 26, 2006, the Department of Public Health and Human Services published MAR Notice No. 37-393 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules, at page 2476 of the 2006 Montana Administrative Register, issue number 20.

2. A public hearing on the proposed adoption, amendment, and repeal of the above-referenced administrative rules was held on November 15, 2006.

3. The department has decided that, in light of public comments received, it will not pursue the adoption, amendment, and repeal of the above-referenced rules at this time. The department intends to carefully review the comments received and issue a new proposal through the formal rulemaking process at a future date.

/s/ Russell Cater
Rule Reviewer

/s/ Joan Miles
Director, Public Health and Human Services

Certified to the Secretary of State January 16, 2007.

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

In the matter of the adoption of New Rule I pertaining to determining unenforceable case status in child support cases	))))	NOTICE OF ADOPTION

TO: All Interested Persons

1. On November 22, 2006, the Department of Public Health and Human Services published MAR Notice No. 37-396 pertaining to the public hearing on the proposed adoption of the above-stated rule, at page 2898 of the 2006 Montana Administrative Register, issue number 22.

2. The department has adopted New Rule I (37.62.1122) as proposed.

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

COMMENT #1: If a case is found to be unenforceable will a parent be able to collect past debt without the department's agreement to re-open the case file?

RESPONSE: Yes. If the child support is owed to the custodial party, they may attempt to collect child support arrears on their own without having to receive the department's permission or agreement. However, a party's responsibility to notify the department under 40-5-202(5), MCA remains. Additionally, if circumstances or facts change, a party can apply to have their case re-opened.

/s/ Russell Cater
Rule Reviewer

/s/ Joan Miles
Director, Public Health and
Human Services

Certified to the Secretary of State January 16, 2007.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I (42.20.606), and amendment of ARM 42.20.101, 42.20.102, 42.20.106, 42.20.107, 42.20.204, 42.20.301, 42.20.302, 42.20.303, 42.20.304, 42.20.305, 42.20.307, 42.20.501, 42.20.503, 42.20.505, 42.20.515, 42.20.517, 42.20.601, 42.20.605, 42.20.615, 42.20.620, 42.20.625, 42.20.640, 42.20.645, 42.20.650, 42.20.655, 42.20.660, 42.20.665, 42.20.670, 42.20.675, 42.20.680, and 42.20.701 relating to valuation of real property, classification of nonproductive patented mining claims, agricultural land, and forest land	)	CORRECTED NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On October 26, 2006, the department published MAR Notice No. 42-2-766 regarding a public hearing on the proposed adoption and amendment of the above-stated rules at page 2533 of the 2006 Montana Administrative Register, Issue No. 20. On December 22, 2006, the department published notice of adoption and amendment at page 3103 of the 2006 Montana Administrative Register, Issue No. 24. On January 11, 2007, the department published a corrected notice of adoption and amendment at page 56 of the 2007 Montana Administrative Register, Issue No. 1, regarding ARM 42.20.307.

2. The reason for the correction to ARM 42.20.106 is because on August 10, 2006, the department published an amendment to this rule at page 1961 of the 2006 Montana Administrative Register, Issue No. 15 and those amendments were not included in the text of the rule as published on October 26, 2006 in MAR Notice No. 42-2-766. The amendment reads as follows:

42.20.106 DEFINITIONS The following definitions apply to this subchapter:
(1) and (2) remain the same.
(3) "Comparable properties" means properties that have similar utility, use, function, and are of a similar type as the subject property. Comparable properties must be influenced by the same set of economic trends, and physical, economic, governmental, and social factors as the subject property. Comparable properties must have the potential of a similar use as the subject property. For any property that does not fit into this definition, the department will rely on the definition of comparable property contained in 15-1-101, MCA.
(a) Within the definition of comparable property ~~in (1)~~, the following types of

property are considered comparable:

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

AUTH: 15-1-201, MCA
IMP: 15-6-101, 15-7-304, 15-7-306, 15-24-1501, MCA

3. The reason for the correction to ARM 42.20.503 is because the calculations for the phase-in values for 2007 and 2008 were inadvertently omitted from the proposal text in MAR Notice No. 42-2-766. The amendment reads as follows:

42.20.503 DETERMINATION OF CURRENT YEAR PHASE-IN VALUE FOR CLASS THREE, CLASS FOUR, AND CLASS TEN PROPERTY (1) For tax years 2003 through 2008, the department is required to determine the current year phase-in value for each property in class three, class four, and class ten annually. The current year phase-in value is determined by subtracting the 2002 VBR from the 2003 reappraisal value multiplied by the applicable phase-in percentage, the product of which is added to the 2002 VBR value. The calculations of the phase-in values are represented by the following formula:

2003 Phase-in =
[(2003 reappraisal value - 2002 VBR value) x 16.6%]
+ 2002 VBR

2004 Phase-in =
[(2003 reappraisal value - 2002 VBR value) x 33.32%]
+ 2002 VBR

2005 Phase-in =
[(2003 reappraisal value - 2002 VBR value) x 49.98%]
+ 2002 VBR

2006 Phase-in =
[(2003 reappraisal value - 2002 VBR value) x 66.64%]
+ 2002 VBR value

2007 Phase-in =
[(2003 reappraisal value - 2002 VBR value) x 83.30%]
+ 2002 VBR value

2008 Phase-in =
2003 reappraisal value

AUTH: 15-1-201, 15-7-111, MCA
IMP: 15-7-111, MCA

4. The reason for the correction to ARM 42.20.601 is to correct a

typographical error. The adoption notice published on December 22, 2006 stated (14) through (23) remain as proposed and it should have stated (14) through (26) remain as proposed. The amendment reads as follows:

42.20.601 DEFINITIONS The following definitions apply to this subchapter:

(1) through (12) remain as proposed.

(13) "Income from agricultural production" means the gross amount of income received from the sale of food, feed, fiber commodities, livestock, poultry, bees, biological control insects, fruits, vegetables, and also includes sod, ornamental, nursery, and horticultural crops that are raised, grown, or produced for commercial purposes, income from farm rental, the sale of draft, breeding dairy, or sporting livestock, the share of partnership of ~~S~~ family corporation gross income received from a farming or ranching business entity, or the taxpayer's share of distributable income from an estate or trust involved in an agricultural business.

(a) Wages received as a farm employee or wages received from a farm corporation are not gross income from farming.

(14) through (26) remain as proposed.

AUTH: 15-7-111, MCA
IMP: 15-1-101, 15-6-133, 15-7-201, 15-7-202, MCA

5. Replacement pages for the corrected notice of adoption and amendment were submitted to the Secretary of State on December 29, 2006.

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

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State January 16, 2007

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.21.116, 42.21.124, 42.21.132, 42.21.154, 42.21.156, 42.21.157, 42.21.158, 42.21.159, and 42.21.162 relating to personal property	)))))	CORRECTED NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 26, 2006, the department published MAR Notice No. 42-2-765 regarding a public hearing on the proposed amendment of the above-stated rules at page 2529 of the 2006 Montana Administrative Register, Issue No. 20. On December 22, 2006, the department published notice of amendment at page 3108 of the 2006 Montana Administrative Register, Issue No. 24.

2. The reason for the correction to ARM 42.21.158 is because on August 10, 2006, the department published an amendment to this rule at page 1962 of the 2006 Montana Administrative Register, Issue No. 15, and those amendments were not included in the text of the rule as published on October 26, 2006 in MAR Notice No. 42-2-765. The text of the proposed amendment may be found at page 1235 of the 2006 Montana Administrative Register, Issue No. 10, where the department added three new sections. Those sections were inadvertently omitted from the text of the amended rule as it was published in the October 26, 2006 register. The amendment reads as follows:

42.21.158 PROPERTY REPORTING REQUIREMENTS (1) through (10) remain the same.

AUTH: 15-1-201, MCA
IMP: 15-1-303, 15-8-104, 15-8-301, 15-8-309, 15-24-902, 15-24-903, 15-24-905, MCA

3. Replacement pages for the corrected notice of amendment have been submitted to the Secretary of State on December 29, 2006.

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

/s/ *Cleo Anderson*
CLEO ANDERSON
Rule Reviewer

/s/ *Dan R. Bucks*
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State January 16, 2007

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I (42.31.326); II (42.31.206); III (42.31.207); IV (42.31.208); and V (42.31.318); amendment of ARM 42.31.102, 42.31.201, 42.31.202, 42.31.203, 42.31.204, 42.31.212, 42.31.221, 42.31.303, 42.31.308, 42.31.309, 42.31.330, 42.31.345; and repeal of ARM 42.31.103, 42.31.108, 42.31.109, 42.31.205, 42.31.340, 42.31.701, and 42.31.703 relating to tobacco products and cigarettes	)))))))))))	NOTICE OF ADOPTION, AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On August 10, 2006, the department published MAR Notice No. 42-2-762 regarding the proposed adoption, amendment, and repeal of the above-stated rules at page 1943 of the 2006 Montana Administrative Register, issue no. 15.

2. A public hearing was held on August 31, 2006, to consider the proposed adoption, amendment, and repeal of the above-stated rules. The department received oral and written testimony at and subsequent to the hearing. The department has separated the testimony into two categories, those in favor and those opposed. Comments 1 through 13 represent testimony in support of the rules and comments 14 through 19 represent opposition. The department's collective response is after the last comment in each category.

3. The department received overwhelming support for the adoption of the rules from the following proponents:

COMMENT NO. 1: Linda Lee, Section Supervisor for the Montana Tobacco Youth Prevention Program (MTUPP), Department of Public Health and Human Services (DPHHS), thanked the Department of Revenue (department) for taking this subject seriously and for taking action that protects Montanans now rather than waiting for federal action.

Ms. Lee stated DPHHS supports the rules because these rules will help prevent youth from starting a lifetime of tobacco addiction. Also, the rules address the problem with one type of tobacco product, the self-identified little cigars. These rules will simply classify a product that is self-marketed as little cigars to comply with Montana's efforts to prevent the marketing of cigarettes on an individual or small pack basis as required for cigarettes and set the tax on little cigars the same as cigarettes.

Ms. Lee stated that increased marketing of new tobacco products like little cigars is a great concern because these products are in every respect a cigarette substitute designed to be used like cigarettes and to appeal to young cigarette smokers. Little cigars avoid the laws governing cigarettes - particularly Montana's

restriction on pack size and Montana's increase of the tobacco tax. Both pack size and price are proven methods to reduce tobacco consumption and youth initiation to tobacco addiction. Little cigars appeal to youth because little cigars cost less than cigarettes and they come with flavorings, such as chocolate and raspberry. Youth may mistakenly believe they are smoking a product that poses less health risks because it's labeled a cigar. But the products are made to be smoked and inhaled just like cigarettes, which means they present the same addiction and health dangers. Little cigars can be sold in any quantity, making it easier to purchase and easier to market to youth.

Montana and most states prohibit cigarettes from being sold in small packs or individually, specifically to make them higher priced, and thus, less-affordable in order to protect our youth. These laws are intended to keep less expensive "kiddie packs" of five or eight cigarettes or individually sold cigarettes, out of the hands of children. Numerous studies have established that increasing cigarette prices reduces smoking among children.

As argued by the Attorneys General of 40 states, led by Montana's Attorney General in a recent petition before the United States Department of Treasury's Alcohol, Tobacco and Trade Bureau (TTB), the manufacturers also evade the more restrictive public health protections that apply to cigarettes and not cigars. Cigarettes must carry health-warning labels, but only seven cigar manufacturers are required to place warnings on their packages. The ingredients of cigarettes, but not cigars, must be reported to the Center for Disease Control. Master Settlement Agreement (MSA) payments must be made on cigarettes, but not cigars. Cigars are not subject to the advertising and youth-targeting restrictions of the MSA.

Cigars and their use are a further concern to MTUPP. Real cigars are not a safe alternative to cigarettes, yet some former cigarette smokers perceive cigars as a safer alternative to cigarettes. One little cigar web site reinforces this belief by advertising, "if you want to quit smoking and try something better tasting, this is a great alternative!" Combining this misinformation with lower price and limited marketing restrictions we perceive our tobacco prevention gains could be reversed unless Montana acts now.

COMMENT NO. 2: Dr. Richard Sargent, Helena, Montana, stated that he was representing physicians for prevention. He also stated that he is the Vice Chairman of the Tobacco Prevention Advisory Board representing the American Heart Association, American Lung Association, American Cancer Society, and the Montana Medical Association.

Dr. Sargent stated that in the last month Federal Judge Gladys Kessler found that the tobacco industry is a racketeer-influenced and corrupt organization, and that behavior is on-going. He stated that this statement is very instructive because it helps us to say, "Let's look at what they are doing right now in the field of little cigars."

Dr. Sargent presented copies of web site documents into the record. The Phillip Morris document calls it a "cigarillos" type product that should be developed to be acceptable taste-wise for the usual cigarette smokers.

Also, in an article entitled "The Might of Minis" taken from tobacco on-line which is an article dealing with little cigars, he stated that the article shows "little

cigars" are a smoking alternative to cigarettes and not to cigars. The document states, "The popularity of mini cigars is at least partially due to the cost increase of cigarettes." This type of marketing is intended for the initiation of cigarette smoking and is merchandised separately from cigars because they are more likely to appeal to the cross-over cigarette smoker.

Dr. Sargent stated that these are little cigars aimed at the cigarette smoker and at dodging the taxes put on cigarettes.

Dr. Sargent presented data concerning per capita consumption of tobacco products in the United States and while the number of small cigars has been increasing, it still is dwarfed by the number of cigarettes sold. So when opponents of these changes say this will lead to economic devastation - look at that. This is less than 1% of their total sales.

Dr. Sargent offered a press release from the "Altria" web site that indicated small cigars with filters were developed to address the issue of the budget-conscience adult.

He also introduced material showing that, two years ago, the Connecticut Department of Revenue adopted rules similar to the ones proposed by Montana.

COMMENT NO. 3: Kelly O'Sullivan, Assistant Attorney General for the State of Montana and Chair for the Little Cigar Working Group of the National Association of Attorneys General (NAAG) stated the NAAG submitted a petition to the TTB in May 2006, requesting the TTB revise their rules in order to fairly address the issue of little cigars being sold as cigarettes.

Ms. O'Sullivan stated the Department of Justice (DOJ), as well as the Attorney General's Office very strongly support the new rules being proposed by the department.

Ms. O'Sullivan stated "little cigars" are what she calls "brown cigarettes." These are little cigars and yet they are filtered, are the size, shape, and diameter of a cigarette. They come in a pack like a cigarette and in every respect they look like a cigarette but they are wrapped in brown paper.

Ms. O'Sullivan stated the department has the legal authority to adopt these rules. The department is the taxing authority for the state of Montana and is charged with the responsibility for enforcing the tax laws of this state.

Ms. O'Sullivan explained that the definition of "cigarette" is found in 16-11-102, MCA, and that definition has three parts. The definition indicates a cigarette includes: any roll of tobacco wrapped in paper or any substance not containing tobacco; and tobacco, in any form, that is functional in the product and that, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to or purchased by consumers as a cigarette.

Ms. O'Sullivan stated the key language in looking at these rules is the phrase, "is offered to or purchased by consumers as a cigarette." Also, the third section of the statutory definition is "a roll of tobacco wrapped in any substance containing tobacco that, because of its appearance or the type of tobacco used in the filler and regardless of its packaging and labeling, is likely to be offered to or purchased by consumers as a cigarette." Based on this statute, as well as 16-11-201, MCA, Ms. O'Sullivan stated the department has the legal authority to adopt rules to further define cigarettes.

Ms. O'Sullivan stated 16-11-201, MCA, refers to the powers of the department to prescribe rules not inconsistent with the provisions of chapter 16, MCA, for the detailed and efficient administration of that chapter.

Ms. O'Sullivan stated the rules would change the tax classification of these little brown cigarettes but what the rules would not do is require these products to be escrowed, be on directories, or have MSA payments paid. The DOJ is charged with administering the statutes relating to the MSA. The fact that the department has chosen wisely to go forward with these rules does not affect the administration of the MSA laws.

Ms. O'Sullivan stated Montana citizens passed I-149, which raised tobacco taxes $1.00 per pack. That tax increase went into effect January 2005. Children are price sensitive consumers and part of the reason for I-149 was to keep tobacco products out of the hands of children. So to the extent the tobacco product costs more, it is more difficult for a child to buy that product. But what has happened now, with the advent of these little cigars, is that these products are taxed as "cigars" which means they are taxed at 50% of the wholesale value of the product, as opposed to cigarettes which are taxed at $1.70 per pack. The federal excise taxes paid on a pack of cigarettes are $3.90. Federal excise taxes on a pack of little cigars, such as these, are $0.40. The Montana state tax on a carton of 200 cigarettes is $17.00. The Montana state tax for a carton of little cigars is based on the wholesale value of the little cigars but if we assume the wholesale value is $7.80, then the tax on a carton of little cigars would be $3.60. So a carton of cigarettes would be taxed in Montana at $20.90. A carton of little cigars is taxed in Montana at $4.00. So clearly there is tremendous tax difference between a cigarette and a little cigar and that tax difference is part of the reason why the department has chosen to come forward with these rules in order to take these products out of the hands of children.

Ms. O'Sullivan stated single sticks and 10-pack little cigars are available in some of the convenient stores in Montana and they are available to children at a very low price.

Little cigar sales have gone up 95% since 1999. They have increased 85% since 2002. Thus far, if little cigar consumption continues as it is at this point, 2006 will equal the highest little cigar sales ever set in the United States, which was set in 1973. She stated that there is some evidence that youth are trading cigarettes for little cigars but that there isn't a lot of data available. She was aware of only two specific studies related to youth and in both cases the youth reported smoking cigar products more than cigarette products.

Ms. O'Sullivan stated there is a concern regarding the pack size because when the MSA was signed in 1998 it contained a provision that all cigarettes must be sold in packs of at least 20 or more. Unfortunately, that law had a sunset provision of December 2001. Montana enacted a minimum pack size which is provided in 16-11-307, MCA. That statute requires cigarettes to be sold in packs of at least 20. Little cigars are not required to be sold in packs of at least 20, so there are "kiddie packs," which include 8 packs, 5 packs, or single sticks of little brown cigarettes that are available for children to consume.

Ms. O'Sullivan further stated that these little cigars are almost all flavored and the flavors are ones that appeal to children. These include flavors such as:

wildberry, cherry, grape, tangerine, and blackberry. They are basically the modern day version of a candy cigarette.

Ms. O'Sullivan stated these products are placed in a manner that they are competing with cigarettes, they are not back behind the counter with the cigarettes, they are not even with the other cigars, they are on the counter with the beef jerky and the bubble-gum, where the kids are likely to see them.

Ms. O'Sullivan stated that manufacturers of these products are not required to place warning labels on these packs like cigarettes. The Federal Cigarette Advertising Act applies only to cigarettes. That law is administered by the Federal Trade Commission (FTC) but the FTC does not determine whether a product is a cigarette or a little cigar. The agency that is charged with doing that is the TTB, and the FTC simply looks at whatever the label on the package says and they take that at face value - if it says "cigars" then it is not required to have a warning label on it. Because of a lawsuit initiated by the FTC, seven of the largest cigar manufacturers do put warning labels on their products, but the rest of them are not required to do so and, therefore, do not.

Ms. O'Sullivan stated the entity that decides if a product is a cigar or cigarette is the tobacco product manufacturer. They make a product, they decide what it is, they label it, and then they pay the appropriate amount of tax on it. If they label it as a cigarette they have to put the warning labels on it, they have to report the ingredients to the Center for Disease Control (CDC) of the Federal Department of Health and Human Services. But if they decide it is a cigar, then they don't have to put warning labels on it, they don't have report to the CDC, and they pay a much lower tax rate. That is allowed because the federal TTB has issued a ruling, Ruling 73-22, that allows tobacco product manufacturers to self-designate their products. That was one of the main issues the states took to the TTB in May 2006, and that was the reason the petition was presented because it was felt that the TTB needs to be responsible for making the decision about what really is a cigar or a cigarette and they should not be leaving that decision to the tobacco manufacturer. So, in May 2006, 39 states and one territory petitioned the TTB to issue new rules that would define cigars and cigarettes. The TTB stated they hope to have rules by 2009 to address these problems. She stated that it is not known when the TTB will issue those rules, maybe it will be next week, maybe it will be 2009, but even if they do issue them there is no guarantee that the rules will be anything that will be appropriate for Montana. Ms. O'Sullivan stated that is why she applauds the department for these insightful standards and the excellent job of looking at Montana's interests and values, the health of our children, and doing what needs to be done to protect them now rather than later. The department has developed very specific criteria of what makes a cigarette and supports the rules that will define little cigars or "brown cigarettes" as cigarettes for tax classification purposes.

COMMENT NO. 4: Dr. Robert Shepard, Helena, Montana, provided testimony in support of the rules and described various tobacco products and explained the differences in these products. A "cigar" is typically rolled tobacco, rolled in tobacco leaf, there is no paper, and there is no filter. A "cigarillo" is "little cigar" in Spanish and is typically cut tobacco, but is rolled, doesn't have a filter and sometimes, they have a little bite piece on the end. A "cigarette" is cut tobacco

rolled in paper, generally has a filter, and comes in a particular size and shape. A "little cigar" is cut tobacco rolled in paper and has a filter. The only difference between a "cigarette" and a "little cigar" is a "little cigar" is a cigarette with a tan and the "little cigar" is often flavored.

Dr. Sargent presented a pack that he described as very stylish with a spider on the front, pops open, and is very cool. This pack contains ten sticks. This product is wrapped in paper, uses cut tobacco, has a filter, and has its own built-in lighter.

Dr. Sargent showed a single little cigar and a lip gloss container designed to be sold to children and explained these two items are easily confused by their packaging.

Dr. Sargent stated that the research data is very clear - one cigarette a week for six weeks will addict the majority of adolescents that smoke at that level. But since people range in a differential amount as little as one cigarette will addict some children. In others it may take more. But there is always a range. A cigarette a week for six weeks is enough to get the majority of kids addicted. That is why the tobacco industry does single sales. They would like to talk about tobacco being a choice. It is not a choice, it is an addiction, and once you become addicted it is one of the most difficult addictions to quit. He stated that statistics go like this: If you dabble with alcohol, the odds are 1-10 that you will become an alcoholic; if you dabble with cocaine, the odds are 1-6 that you will become a coke addict; and if you dabble with nicotine, the odds are 9-10 you are going to get hooked. That is why the industry wants kids to dabble in it and why they want single sales.

COMMENT NO. 5: Tyler Steinebach, a senior at Superior High School testified in favor of the rules because he believes that the little cigars are a problem with school age children. He stated that he had two ten-stick packs of little cigars and a single strawberry flavored little cigar which he had purchased and he is only 17. He stated this sale and purpose of the purchase had been reported to the owner of the store. He explained that he had shown the strawberry flavored little cigar to his seven-year-old cousin and asked her what she thought it was. She told him she thought it was a marker. So he took her to the store where he had purchased it and had her look through the selection of "markers" and she picked out one she wanted. He then told her what the product really was. He stated that he did this to point out that these products are attractive to kids not only her age but many 10 and 12 year olds. He stated he has seen these young people smoking the chocolate mint flavored ones and that these young people have told him these little cigars are much better than the cigarettes they used to smoke. Also, when their parents talk about how they are addicted to smoking two packs of cigarettes a day, these kids say that they don't have to worry about getting addicted to a pack of those cigarettes because they can get a pack of eight little cigars and that way they can control how many they use. He stated that what he has found is that if they smell good, taste good, and look good, kids are likely to try them, especially if they are also easy to get and easy to conceal. He also stated that when he purchased the single strawberry flavored mini cigar the store clerk didn't even know what she had sold him but when he told her what it was, she immediately asked for it back.

He stated that he believes these little cigars should be in packs of at least 20 just like the rules asked for and it should be classified as a cigarette. Calling them a

little cigar only gives the kids a little more confidence that they are not smoking a cigarette. He stated that he believes the tobacco industry is doing a good job at what they are trying to do, which is to get kids to use their products because it is working.

COMMENT NO. 6: Dick Paulson, Executive Director of the American Lung Association of the Northern Rockies representing that association and the children across Montana, stated that those organizations fully support the proposed changes related to packaging and sale of tobacco products. This really is a full-fledged effort aimed at our children in trying to evade the tax provisions Montanans so strongly support. He stated he had received a call from a mother begging him for a program that would help her 12-year-old son quit smoking. We need to send a strong message to the businesses that are also selling these products because they are setting them out where the youth have access to them, and they are designed to entice our kids with the cute packaging and candy flavors at a very low price. This is truly unacceptable and he supports the department in making these needed changes.

COMMENT NO. 7: Kathy McGowan, American Cancer Society, thanked the department and the Department of Justice for the collaboration in getting these rules in front of the public. It is very heartening for the rest of us in the advocacy community to have your acknowledgement of this problem.

Ms. McGowan stated that these proposed rules more accurately reflect the intent of the initiative which the American Cancer Society and the Alliance for Healthy Montana got behind just a short while ago, and basically that it is very disheartening that our own folks in our own communities have chosen to take an end run around that initiative. She stated that it behooves all of us as caretakers of the health of our youth and the rest of our citizens to make sure that that end run is blocked. We very much thank you for helping in that regard.

COMMENT NO. 8: Cliff Christian, American Heart Association and American Stroke Association, testified that he had been hooked on nicotine because he believed Mickey Mantel when he told me "Lucky Strikes" were cool to smoke. He believed him because he loved Mickey Mantel, which is not dissimilar from what we see today in the tobacco advertising for little cigars.

Mr. Christian discussed comparing the heart of a young athlete which is strong and mighty and pumps the blood the way it should, in contrast to someone with heart disease from smoking. The heart, it is complicated but for lack of a better explanation - a heart that has dealt with tobacco for many years is like a broken carburetor and it just barely functions. Also, look at a lung of a baby or a young child - the lungs are pink, strong, and are pumping oxygen so when that little child goes out for recess those lungs are going to be pumping like crazy. Compare that with a lung of a smoker of 20 years, that may have emphysema, and in order to move from the couch to the car has to have oxygen injected into their nose so they can live. Because without that oxygen, their lungs are going to stop functioning sooner than normal. But that person, with that black ugly tar-filled lung caused from tobacco, is still going to die an early death.

Mr. Christian showed two items, one with brown paper wrapped around it which is a cigarette with a "tan", and another one with bright white paper. But they both wrap around tobacco so they are virtually the same product.

Mr. Christian stated that he believes the department has the authority to adopt the rules. Also, we have hired one of the best attorneys in the country to look at whether or not the department has the authority, and you do. The Department of Justice has said you have the authority and it does. So, let's get this done. Promulgate it as fast as we can, and get it into place as fast as we can. He stated he was afraid the department would delay the adoption long enough for the legislature to take a look at it.

COMMENT NO. 9: Christine Page Nei, Government Relations Director for the American Cancer Society, stated she was presenting testimony on behalf of the Campaign for Tobacco Free Kids. The Campaign for Tobacco Free Kids is this nation's largest nonprofit, nongovernmental, educational, advocacy organization solely devoted to reducing the harm caused by tobacco use and exposure to second-hand smoke, especially among children, and it lends its support to the proposed rule changes by the department.

Ms. Page Nei stated the criteria outlined by the department's proposals are reasonable and clearly distinguish between real cigars and cigarettes, which are simply masquerading as little cigars. If in fact a tobacco product is truly a cigar, the manufacturer of the product should not have any difficulty meeting the requirements of this provision. Real cigars are not sold in packs containing 20 to 25 sticks. Real cigars are not available for sale in cartons of 10 packs, sold in soft packs, hard packs, flip-top boxes, clamshells, or other cigarette type boxes. Real cigars are not the length and diameter found in commercially manufactured cigarettes. They are not sold with cellulose acetate or integrated filters. They are not sold in weights less than three pounds per thousand sticks. They are not marketed or advertised to consumers as a cigarette or cigarette substitute.

The department has proposed a fair system by which manufacturers of tobacco products including little cigars and cigarettes can receive a decision in a timely manner as to whether or not their products fall within this new proposed definition. This proposal is fair to cigarette manufacturers, whose products are competing with little cigars for market share. This proposal is fair to traditional cigar manufacturers, whose products would not fall under the auspices of this proposal. And this proposal would fairly include those products (little cigars) that have been designed to avoid categorization, and taxation, as cigarettes.

There is a growing body of evidence seen at the national level which shows a resurgence in cigar use, particularly among youth, driven by four key factors: 1) The price deferential between cigarettes and cigars, particularly little cigars, that makes cigars significantly cheaper and more affordable and encourages initiation of cigar use and decreases quit attempts; 2) the increase in the availability of flavored cigars that appeal to youth; 3) few restrictions on the marketing and advertising of cigars; and 4) efforts by tobacco manufacturers to label products as little cigars as opposed to cigarettes (thus avoiding higher cigarette taxes and making the products more affordable) and designing little cigars (and their packaging) to appear very similar to cigarettes.

Ms. Page Nei stated the tobacco manufacturers provide lots of support to back up their claim. There are three policies these manufacturers would like the department to see as relevant. One - the key policy issue is the popularity of cigars in this price disparity that exits between the cigarettes and cigars. Second - the explosive growth in flavored cigar products on the market. Finally - cigars and cigar manufacturers are not covered by the marketing, promotional, and sales restrictions imposed by the Master Settlement Agreement Kelly O'Sullivan talked about.

The point they want to make is that together the issues of price disparity, enticing flavors, and few limits on marketing and advertising are converging into a significant public health problem that needs to be addressed, at least in part, by strong measures such as those being proposed by the department.

COMMENT NO. 10: Betty Beverly, Executive Director, Montana Senior Citizens Association, also a partner with the Alliance for Healthy Montana. She stated they have been working since 1999 on this tobacco issue and as a "grandmother" and "great-grandmother", she is really concerned about the packaging of these little cigars. She also stated that many senior citizens are addicted to tobacco, and they are on oxygen. So many of them wish they had never become addicted because they have such debilitating disease from tobacco. These senior citizens tell her they don't want to see this happen to their children and their grandchildren and their great-grandchildren.

Ms. Beverly stated she really commends the department and the Department of Justice for bringing forth these rules and looks forward to a speedy resolution.

COMMENT NO. 11: Jim Ahrens, Chairman of the Alliance for Healthy Montana stated he supports the rules and mentioned that the intensive care units across the state have many patients with tobacco related illnesses. The alliance is a group of organizations, including insurers, hospitals, doctors, social service agencies, public health agencies, heart, lung, cancer, stroke, AARP, Montana Senior Citizens, and several others who have been involved in all of the initiatives dealing with reducing tobacco usage in Montana. He stated they had all worked hard on this issue, and they commend the department for its work putting the rules forward and urge the department to move the rules forward quickly.

COMMENT NO. 12: Erin McGowan Fincham, representing the State Auditor's Office, thanked the department for bringing these rules forward. Ms. McGowan Fincham stated Commissioner Morrison has worked closely with the Alliance for a Healthy Montana on two initiatives, both Initiative 146, which identified that tobacco addiction is very critical and a portion of the tobacco settlement funding should go toward that process, and Initiative 149, which allocated funding to various health care programs. One of those health care programs, Insure Montana, is administered by the State Auditor's Office. Both of those initiatives passed by over 60% of the public vote, which says that in the Montana public's eye tobacco prevention, preventing our youth from picking up tobacco habits, is very critical. Over 60% of our voting public supported those measures. She stated she had visited with Montana adults who used tobacco products who supported both of those measures in order to prevent youth initiation.

Ms. McGowan Fincham stated they very much support the clarification in the rule brought forward by the department and it is very obvious the circumvention of the cigarette tax in this instance disproportionately targets Montana youth, so it is critical the cigarette tax avoidance be prevented both to prevent future generations from beginning to use tobacco products, and to allow the department to collect cigarette taxes as intended by Montana law.

COMMENT NO. 13: G. Steven Brown, Attorney at Law, representing the American Cancer Society (AMS) and American Heart Association (AHA), provided supplemental written testimony in favor of the adoption of proposed New Rules I through IV and the amendment and repeal of the department's existing rules.

Mr. Brown addressed comments made by opponents at the hearing as follows: The opponents suggested that the department's proposed new rules unlawfully "engraft contradictory language" to the statutory definition of "cigarette" and that the attempt to tax "little cigars" and similar products as cigarettes is an "end run" around the 2005 legislation. The opponents' suggestion that the department's proposed new rules violate the rulemaking requirements of the Montana Administrative Procedure Act (MAPA), controlling statutes, and applicable case law is without merit.

The department has unambiguous authority to adopt rules consistent with and necessary for the "detailed and efficient administration" of Title 16, chapter 11, MCA, which is entitled "Tax on Cigarettes." Section 16-11-103(l), MCA. Included in the delegation of rulemaking authority is the power to "adopt rules for the effective collection and refund of the tax imposed" under Title 16, chapter 11, MCA. The department also has the authority to administer parts of the Youth Access Act (Title 16, chapter 11, part 3, MCA) and may adopt rules to "implement Sections 16-11-301 through 16-11-308." Section 16-11-312, MCA. The sale of cigarettes, including cigarettes disguised as "little cigars," is clearly subject to the department's rulemaking, taxation, and regulatory powers.

Montana's rules of statutory construction provide that the definition of a word or phrase in any Montana statute "is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears." Section 1-2-107, MCA. The opponents' assertion that the expansive definition of "cigarette" in 16-11-102(2), MCA, was not intended to be used to tax and/or regulate the sale of "little cigars" to consumers, especially sales to minors, is baseless. Nothing in the 2005 legislation revising the definition of "cigarette" remotely suggests that the amended definition of "cigarette" could only be used to regulate cigarette smuggling or internet sales. The opposite is true. The department is obligated by law to apply the expansive statutory definition of "cigarette" to all of the functions it performs under Title 16, chapter 11, MCA.

Within the context of the preceding statutory provisions, the opponents' accusation that the department is impermissibly engrafting additional and contradictory requirements on to the enabling legislation by classifying "little cigars" as cigarettes fails. Proposed New Rules I through IV are in "harmony" and consistent with the enabling legislation and the statutory definition of the term "cigarette" in 16-11-102(2), MCA; are reasonably necessary to effectuate the purpose of the enabling statute; and increase the fairness of the department's

regulatory/taxation process by establishing an administrative process for hearing and deciding challenges to a determination that a tobacco product is a cigarette. Bick v. State Department of Justice, (1986) 224 Mont. 455, 458-459, 730 P.2d 418. Proposed New Rule II provides reasonable objective criteria consistent with the statutory definition of the term "cigarette" for distinguishing between a "cigarette" and a "cigar." These criteria provide greater certainty to those who sell tobacco products in Montana and protect the public, and especially minors, from an obvious attempt by the tobacco industry to circumvent Montana's clearly stated public policy of regulating and taxing tobacco sales in the state.

AMS and AHA urge the department to adopt and amend its administrative rules as proposed in MAR Notice No. 42-2-762.

RESPONSE TO COMMENTS NO. 1 - 13: The department would like to thank all the proponents for their comments and support in what the department believes to be a very important action.

The department takes its responsibility of enforcing the Youth Access to Tobacco Products Control Act in Title 16, MCA, very seriously, as well as the authority to administer the tax that governs tobacco sales in this state. These rules will establish criteria for the department to follow when making a determination of whether little cigars should be classified as cigarettes for the tax application process.

Since the rule hearing in August, the TTB has drafted proposed amendments to the federal definitions of "cigarette" and "cigar" for federal taxing purposes. The department does not know if or when those amendments may become effective. If the TTB adopts its proposed definition of "cigarette", and there is no guarantee that they will, the resulting classification of most "little cigar" products will mirror the results of the department's rules.

The department has no doubt that it has full authority to adopt these rules as they are proposed. Some proponents voiced concern that the department would not act quickly or that it would allow the legislature to address this issue. At this time, Montana's 2007 Legislature has convened and there is a likelihood that this subject will be presented to that body for consideration. Therefore, the department has elected to adopt New Rules II (42.31.206) and III (42.31.207) with a delayed effective date of July 1, 2007. That will allow opponents the opportunity to bring this issue to the Legislature for action.

4. The department received oral and written objections to the adoption of the rules from the following:

COMMENT NO. 14: Mark Staples, representing the Montana Wholesalers, and who emphatically noted such, stated that he does not represent, nor has heard from, nor is involved with, big tobacco on this issue. He does not know what their position is, and doesn't care.

Mr. Staples started his testimony by making the comparison between the hearing process and the legislative process by stating that this hearing strikes him today as deja vu, just like a legislative hearing. Same room, same parties, same testimonies, and many of which he does not disagree with as they are riveting and meaningful. He states he is friends with many of the proponents and hopes they feel

the same way. Mr. Staples' testimony compares this hearing to a legislative hearing by stating the only thing missing is the duly elected legislators who are not appointed but who are constitutionally empowered to decide such issues as these: to raise taxes, and, to be honest, to extend categorical restrictions and make sweeping public policy that may be necessary, valid, and justified.

Mr. Staples further stated that most of the arguments made by the proponents are policy arguments and that for those that know that he is a lawyer and that he believes in the process know that it should be correctly applied and anticipated that he would bring this up as an improper forum for this. He states that the truth of the matter is that the arguments from the other side that have retained national-caliber lawyer have been policy arguments that lie before the legislature.

Mr. Staples further states that what is missing in this hearing are those who ask questions, those who weigh the issues and then proceed through a committee deliberating decisions moving it to the next body and then through the bidding process – the legislature.

Mr. Staples further emphasized that everyone has been told never to take this issue to the legislature and to try to avoid the legislature. We have been told this by a group that is more organized, has more grass-roots, more e-mail capacity, more instant messaging that he has encountered in the past 25 years. He has never met a more effectively organized, strategizing, and successful lobbying legal group and states that if that is a "back-handed compliment" they can take it as that. This group has learned their lessons from "Big Tobacco" in an initiative drive 8-10-12 years ago where they were out-organized, out-spent, and who swore, which you can see, would never happen again. So you can see this is hardly a shrinking violet group that can't make an absolutely overwhelming case to a legislature and put on a very good initiative at the drop of a hat.

Mr. Staples identified himself as one of two opponents and stated that a little background was necessary. He stated he felt there was an irregularity in the drafting of this administrative rule as a draft was sent out earlier to the wholesaler community, and manufacturers, whereas a matter of fact "Big Tobacco" was behind this. Mr. Staples indicated this statement was made because he was told by insiders in the Department of Revenue that "Big Tobacco" did not want some of their sales migrated to little cigars or they do not want the miniscule portion of the settlement fund gone. Mr. Staples proceeds to explain that the original hearing notice was sent out advertising a hearing date the second week of September. This date was the date people prepared for; however, less than three weeks ago, the date was suddenly changed, and therefore, we will not see much of a turn out from opponents. He states that even though the opponents are not here, there are legitimate arguments and opposition.

Mr. Staples agreed that this is much about the youth of Montana, and he emphasized from a personal standpoint, and that of the wholesalers and retailers, they would agree that the products that resemble "lipstick tubes" in single sticks should be pulled from the store shelves. He mentioned that it was not required by law that these products be removed, because there isn't a law that says these little cigars can't be sold separately. He stated that this product has been around for some 80 years, most of which has had the same packaging and flavoring that appealed to middle-aged women and was around long before they were ever taxed.

Mr. Staples stated that this rule action was so sweeping, so comprehensive that nothing but a "big fat stogy" would escape the rules, and if that is what Montana wants it should not be done in rules.

Mr. Staples questioned how the department could presume to enforce this action by rule. He stated that the operative word to consider from the law was "likely." The law states in part, "likely to be sold or purchased as a cigarette", and he questioned where that almost unconstitutionally vague definition came from. He pointed out that it was inserted into law by the 2005 Legislature through a cooperative effort of the Department of Revenue, Department of Justice, wholesalers, and retailers to address internet sales, cross-border smuggling, and mail-order sales. It was also added to give agencies the important tools needed to deal with those subjects. He stated that, to his knowledge during the months of preparing the bill, which was drafted through a collaborative effort, and the months spent passing it through the legislature, the issue of little cigars was never mentioned.

Mr. Staples pointed out that there are laws in Montana against selling tobacco to children which provide for massive penalties for retailers who break these laws. He indicated that sting operations are conducted daily in Montana and a statutory mandate requires the retailers to achieve a compliance level, of which to his knowledge the retailers have never fallen below. This would imply that compliance is high.

Mr. Staples stated that this law was a difficult one to get enacted. Big Tobacco opposed the bill, his clients, the wholesalers and retailers, defended the bill saying that it was the right thing to do for Montana in order to address smuggling and internet sales.

Mr. Staples stated the statistics presented at the hearing were slim and there were no surveys conducted in Montana, and the proponents to this rule have tremendous resources to conduct surveys to find out if this really is a problem.

Mr. Staples further stated that there are more cigarettes sold in Montana in three days than the entire category of little cigars in a year. He indicated that this is all about losing revenue and adding this category of tobacco to the Master Settlement.

Mr. Staples stated that this is not a subject that should be brought before a Hearing Examiner who helped draft the rules. That is not due process. There are laws in place that deal with underage smoking, and if they are not effective, amend them. He stated the department has the power to extend the current rules to achieve what they don't believe they are achieving. If the department believes young people are buying, despite the restrictions and penalties imposed, then it should go to the legislature and address the things that were omitted from the initiative drive and seek a tax increase.

Mr. Staples stated that he had discussed these rules with the largest chain of convenient stores in the state and told them that he didn't think these products should be on the counters or that there should even be single stick sales. He further stated that he intended to use his persuasive powers to get these products off the counters immediately.

Mr. Staples indicated that if the department didn't believe that the TTB was doing its job then it should tell the Montana Legislature and ask them to fix the law to

address this issue. He stated the Montana Supreme Court has said, "The courts have uniformly held that administrative regulations are impermissibly out of harmony with legislative guidelines if they engraft additional and contradictory requirements on the statute and if they engrafted additional contradictory requirements on the statute which were not envisioned by the legislature." He further stated that but for slipping the word "likely" into the definitional section of the bill, that this department could not have passed, which is a statement of fact that cannot be denied, they could not have passed this bill, nor could the DOJ without the wholesalers and retailers of this state. This may not be unconstitutional, but it is unconscionable.

COMMENT NO. 15: Ronna Alexander, representing the Convenient Store Association in Montana, testified that about 80% of those businesses fit the description of a convenient store. She further stated that it is true some of the members that sell small cigars have seen an increase of sales of some of these products since the sales of cigarettes have decreased over the last couple of years with the large tax increases recently put into effect. The overall decrease on an average for our industry right now is about 30% compared to three years ago when tobacco products represented about 35% of their gross profit margins. She stated that this is somewhat of a negative effect on that industry but nobody really cares about the negative effect to the industry.

Ms. Alexander stated that she takes great exception to a statement by Ms. O'Sullivan that Ms. Alexander believes to be quite false. Her statement was, "that mini cigars are available to children in convenient stores." Ms. Alexander stated that is not true - convenient stores do not sell tobacco products to kids. There are laws against it and significant penalties for doing so. There are occasional times when convenient stores, bars, and grocery stores have an incident in a sting operation where they sell to a minor. She states that the last SYNAR report (federal Synar Amendment 1992), that she had seen shows 93% compliance in Montana. She indicated that the members of her association don't want to sell tobacco products to kids and they serve the community in many positive ways.

Ms. Alexander reiterated the comments made by Mr. Staples concerning the enactment of House Bill 687 and stated that she also believes the rules cover an area not intended by the bill which would create a tax increase for these products. She stated that it may need to be changed but that the legislature needs to address it rather than through rules.

Ms. Alexander stated Montana has a responsibility to find a balance between consumers and the businesses that serve consumers and this doesn't seem to be a balance. She suggested that the legislature will be meeting in four months and this subject would be more appropriate in that venue.

COMMENT NO. 16: Denis Asay, representing the Smoker Friendly tobacco stores in Montana, provided written comments. He stated that they operate stores in eight cities including Billings, Bozeman, Helena, Great Falls, Havre, Kalispell, Missoula, and Lewistown.

Mr. Asay stated they understand that the goal of the rule is to try and prevent minors from purchasing little cigars. However, they take serious

exception to the means to achieve this goal. He stated that currently, little cigars are taxed at 50% of the wholesale price and cigarettes are taxed at a rate of $1.70 per pack. By reclassifying little cigars as cigarettes, the practical impact would be taxing little cigars at $1.70 per pack rather than at 50% of the wholesale price. This would represent a significant tax increase on little cigars.

Mr. Asay stated that if the goal of the rule is to prevent minors from purchasing little cigars, increasing a tax is not the proper way to go about it. He further stated that in their tobacco stores, they don't allow minors to enter the store unless they are accompanied by a parent. Minors know they are not supposed to be in a Smoker Friendly tobacco store, so they don't have the ability to access little cigars at these stores. Moreover, convenient store owners train their employees not to sell tobacco to minors because of the severe penalties and fines they would face if a clerk were to inadvertently sell tobacco products to an underage person. Retailers are not in the business of selling tobacco to minors.

Mr. Asay stated a number of consumers who buy little cigars are senior citizens. He stated that the statements that packaging little cigars to make them attractive to young smokers simply is not true. Mr. Asay invited the department to spend a day in one of their stores and see that the purchasers of little cigars are by and large our state's older citizens.

Mr. Asay stated excise taxes are the most regressive taxes imposed on the population harming those least able to afford the tax. Little cigars, like all tobacco products, are a legal product purchased by adult consumers. If this tax is imposed, consumers of little cigars will simply stop purchasing them from Montana retailers. Consumers will purchase little cigars most likely over the Internet and Montana will lose all of the excise tax it would have otherwise collected.

Mr. Asay stated they take great pride in their stores and over the years they have invested not only money but time to cultivate loyal customers. He further stated they want to keep those customers, but this proposed rule will make little cigars much more expensive and will most likely cause our customers to purchase their little cigars over the internet. He stated that he didn’t believe their customers should not be forced to purchase the tobacco products in other states over the internet.

COMMENT NO. 17: J. Thomas Ryan, representing Swisher International, Inc. (Swisher), presented written comments stating that Swisher is a manufacturer and distributor of cigars and smokeless tobacco products; it is not, and never has been, in the cigarette business. He further stated among Swisher's better known cigar brands are Swisher Sweets, King Edward, BlackStone, and Santa Fe. Each of these brands is made in a wide variety of shapes and styles to appeal to the multitude of preferences expressed by Swisher customers, including little cigar smokers.

Mr. Ryan stated Swisher, which has made and sold cigars throughout the United States for 100 years or more, started offering little cigars for sale in the early 1980s in response to an increasing demand for smaller cigars in light of the growing difficulty smokers had in finding times and places to enjoy traditional sized cigars. In fact, recent years have seen a dramatic shift away from the larger panetelas and coronas of all Swisher brands and toward the smaller cigarillos or little cigars sold

under those brand names.

He further stated to many nonsmokers, little cigars have been thought to be merely a marketing strategy devised by cigarette makers to avoid high excise taxes and the relatively new burden cigarette makers accepted by entering into the Master Settlement Agreement of 1998 ("MSA") to settle the numerous lawsuits outstanding against them. Accordingly, numerous attempts have been made to increase taxes on little cigars, to treat little cigar makers as cigarette makers who failed to sign the MSA and generally to make it more difficult for little cigars to be viably marketed.

Mr. Ryan stated that little cigars are a legitimate category of tobacco product that has existed for more than 25 years and around which a system of regulations has grown up to assure that they are not perceived as or confused with cigarettes and, most importantly, so that the category is not used as a way for cigarette manufacturers to avoid payment of cigarette excise taxes. Little cigars are fundamentally different from cigarettes: the two are made from different materials, are smoked in different ways and provide different forms of satisfaction. Further, little cigars are taxed separately from cigarettes by the federal government as well as by almost all of the states. In addition, no little cigar maker was a party to the lawsuits settled by the MSA; nor did any of them accept the burdens of the MSA (which, in fact, makes no reference either to little cigars or to their manufacturers).

Mr. Ryan stated TTB has taken great care to distinguish between cigarettes and little cigars in order to establish a national definition for little cigars. To that end, it has defined the kind of filler tobacco that must be used in little cigars, described the specifications for the only reconstituted tobacco that will qualify for use as little cigar wrapper, and established specific guidelines for the way little cigar packages must be marked to avoid confusion with cigarettes as well as limitations on the advertising and marketing of these products. Further, the TTB has long monitored such factors as alkalinity and carbohydrate levels in little cigars to ascertain whether manufacturers were in fact selling disguised cigarettes. While there may have been some manufacturers who have ignored these TTB requirements and labeled their cigarette products as little cigars, the vast majority of little cigars sold in the United States comply with federal law.

Mr. Ryan stated that because of the confusion of regulators in some states who had not taken note of the little cigar business until recently and, perhaps also, because of an overeagerness to replace tax and other revenue being lost as cigarettes decline in popularity and sales, a number of jurisdictions have taken steps to increase the tax on little cigars or to make them fit into a more productive category than their own.

He further stated that while the legislatures in a number of jurisdictions have increased the excise tax on little cigars to the level at which cigarettes are taxed, other jurisdictions like Montana have opted to take a short cut around their legislature by trying to redefine little cigars as cigarettes in an attempt to accomplish their goal outside the legislative process. This latter tactic has a profoundly chaotic effect on the cigar market, and most jurisdictions which have started down this road have recognized the risks and retreated.

Mr. Ryan stated that, to date, unfortunately, Montana appears to be continuing on this course despite the dire consequences that will result:

(i) thorough confusion in the market place;

(ii) perhaps permanent injury to an industry with an old and legitimate history;

(iii) one constitutional crisis that pits a state's regulators against their federal counterparts, and another in which regulators seek to usurp legislative power; and

(iv) a disruption of interstate commerce.

Mr. Ryan stated that federal law requires little cigar packages to be marked as such and to bear health warnings relevant to cigars, not to cigarettes. By redefining little cigars as cigarettes, Montana authorities will create confusion by requiring cigarette tax stamps - and perhaps cigarette warning labels - to appear on cigar packages alongside prescribed cigar warnings. Consumers who want products that taste, smell, and draw like cigarettes will be encouraged to purchase products that are entirely different.

Mr. Ryan stated few cigar manufacturers will be willing to alter their packaging to conform to Montana regulation rather than federal law and so will probably elect not to sell their products to Montana distributors. Then, unless retailers obtain products from outside Montana and alter the packaging in a way that will violate federal law and invite litigation from manufacturers, sales of little cigars through legitimate retail channels in the state will diminish dramatically and consumers will be forced to purchase little cigars from other jurisdictions (reducing excise tax revenue that would have been collected on in-state sales).

Mr. Ryan further stated that by redefining the term "cigarette" to include little cigars, the department also will set the stage for a federal preemption lawsuit, litigation to prevent the injury to interstate commerce that will result from non-Montana distributors being prohibited from selling legitimate products across state lines into Montana as well as lawsuits to prevent regulators from assuming the authority of the legislature to levy taxes.

Mr. Ryan stated the definition of "cigarette" contained in the proposed regulation noted above was constructed solely as an ultra vires attempt to turn little cigars into something they are not and to raise taxes and other revenues which the legislature has chosen not to levy. Its elements were selected so that virtually every little cigar produced in the United States will be deemed a cigarette in Montana.

He further stated that if the department is interested in eliminating the confusion between little cigars and cigarettes, it should support TTB's enforcement of the distinctions it has drawn, including the new rulemaking which the TTB plans to announce momentarily, rather than proceeding down a path that will only result in litigation, chaotic markets, and misinformed consumers.

COMMENT NO. 18: James A. Deer, Secretary and Legal Counsel for Single Stick,. Inc. (Single Stick), submitted written comments strongly urging the department to not adopt the rules. He stated Single Stick is a company which has been engaged in the cigar business since 1998. It manufactures both large and small cigars in its own facilities located in Phoenix, Arizona, and in Stantonsburg, North Carolina. Single Stick sells its cigar products in interstate commerce with customers in 45 states of the United States and in foreign countries. Single Stick manufactures its products under permits issued by the TTB, which enforces a comprehensive system of legislation, regulations, and rulings which govern the manufacture and sale of tobacco products, including cigarettes and cigars. Single Stick's products carry the federally required information on their packaging. Single Stick has voluntarily submitted its products for testing in the TTB's national

laboratory, and all of the products submitted have been classified by the TTB as cigar products.

Mr. Deer stated Single Stick markets its products to adult consumers in packages including a 20 count, 10 count, 8 count, and singly. Single Stick, pursuant to the resolution of its board, does not target minors in its advertising. He stated Single Stick does not advertise in media which appeals to minors, or show its products in any advertising context which would encourage minors to use the product. Single Stick does not offer materials bearing its products' logo or premiums or incentives such as "gear" nor has it ever employed figures or cartoons such as "Marlboro Man" or "Joe Camel." He stated that the vast majority of tobacco products consumed in the United States are products manufactured by the major cigarette manufacturers as reported annually for years in the SAMSHA studies of smoking by minors. Single Stick is an active member of the Cigar Association of America and endorses its statement and policies against sales or inducements to minors.

Mr. Deer also stated that Single Stick supports and adopts the comments filed by the Cigar Association in its opposition dated August 31, 2006, and strongly opposes the adoption of the rules. He argued as a reason not to adopt the rules that the classification of the product and taxation of it as a cigarette would, because of the inability to apply tax stamps and lack of adequate denominations for its packages, effectively remove its products, which are otherwise legal, from the marketplace. Other methods exist for the taxation of cigar products which would not place this impermissible burden on interstate commerce.

Mr. Deer stated the provision in Rule IV which requires "clear and convincing evidence" in an administrative hearing is contrary to the existing standards of proof in an administrative action in Montana and is not authorized by statute.

He further stated it is their belief the rules as written violate the separation of powers clause in the Montana Constitution, and are preempted as to the attempted redefinition of the little cigar product by the federal rules as administered by the TTB as part of a comprehensive federal system of regulation touching all parts of the tobacco business. They violate of the Commerce Clause insofar as they interfere with the packaging and sale of products which are otherwise illegal in interstate commerce.

COMMENT NO. 19: Thomas A. Briant, Executive Director, National Association of Tobacco Outlets (NATO), submitted written testimony in opposition to the proposed rule because the department is increasing the excise tax on little cigars which is beyond the scope of the agency's authority and because the underlying purpose of the rule (preventing minors from purchasing little cigars) is already accomplished through the vigilance of retailers and their efforts to stop the sale of tobacco products to minors.

Mr. Briant stated that Article VIII of the Montana State Constitution grants the Montana Legislature the power to adopt taxes through the enactment of legislative statutes. This grant of power to enact taxes through the legislative process precludes state administrative agencies from usurping that very power. In fact, Section 2 of Article VIII states that the legislature cannot surrender, suspend, or contract away the power to tax. However, the reclassification of little

cigars as cigarettes will change the way little cigars are taxed. That is, little cigars will no longer be taxed at 50% of the wholesale price, but taxed as if they were cigarettes at $1.70 per pack. The end result will be a significant tax increase on little cigars that has not been enacted by the legislature. In the absence of legislative action to change the method of taxation on little cigars, the proposed rule should be withdrawn since it oversteps the administrative authority of the department.

Mr. Briant stated with regard to the department's purpose to prevent minors from purchasing little cigars, that goal is also being met without the need to adopt this proposed rule. He further stated that NATO represents primarily tobacco stores in which the sale of tobacco products generally accounts for 90% or more of a store's revenue. With this high percentage of "adult only" tobacco products offered for sale, tobacco store owners as a rule do not allow underage children into their store unless accompanied by a responsible adult or parent. Tobacco store retailers are very similar to liquor stores in this regard and remain vigilant by not allowing minors in their stores, let alone allowing them to browse the store and shop for any tobacco products.

Mr. Briant stated the appropriate venue for consideration of this proposed rule is the Montana Legislature. With the legislature's power to enact taxes, and this proposed rule changing both the method and rate of taxation on a legal tobacco product, the department is precluded by the Montana Constitution from proceeding with this rulemaking procedure regarding the reclassification of little cigars. He further stated that NATO requests the department cease rulemaking proceedings on this matter and refer the issue to the state legislature.

RESPONSE TO COMMENTS NO. 14-19: The opponents suggested that the department's proposed new rules unlawfully engraft contradictory language to the statutory definition of "cigarette" and that the attempt to tax "little cigars" and similar products as cigarettes is an "end run" around the 2005 legislation of House Bill 687. The opponents further suggest that the department's proposed new rules violate the rulemaking requirements of the Montana Administrative Procedure Act (MAPA), controlling statutes, and applicable case law. However, the department disagrees because the department has unambiguous authority to adopt rules to enforce Title 16, chapter 11, MCA. In addition to this rulemaking authority, the department also has been delegated authority to administer parts of the Youth Access to Tobacco Products Control Act (Title 16, chapter 11, part 3, MCA) and may adopt rules to "implement Sections 16-11-301 through 16-11-308." This authority includes the sale of cigarettes, including cigarettes which may be disguised as "little cigars," and is clearly within the department's rulemaking, taxation, and regulatory powers.

Opponents have asserted that the department is expanding the definition of "cigarette" as found in 16-11-102(2), MCA, and that statute was not intended to be used as a taxing authority or to establish a regulation mechanism for little cigars. This assertion is without merit. Nothing in the 2005 legislation revising the definition of "cigarette" or its legislative history suggests that the amended definition of "cigarette" may only be used to regulate cigarette smuggling or internet sales. The opposite is true. The department is obligated by law to apply the new statutory definition of "cigarette" to all of the functions it performs under Title 16, chapter 11,

MCA, and to assume that the legislative change carried with it the intent to modify what products are considered "cigarettes" in Montana.

The department believes that proposed New Rules I through IV are in fact consistent with the enabling legislation and the statutory definition of the term "cigarette" in 16-11-102(2), MCA. The department further believes these rules are necessary to effectuate the purpose of the enabling statute; and increase the fairness of the department's delegated regulatory and taxing responsibilities by establishing an administrative process for hearing and deciding challenges to determinations that a tobacco product is a cigarette.

As stated in Response to Comments 1 through 13 above, the TTB has proposed amendments to the federal definitions of "cigarette" and "cigar" and the department is not certain that the amendments will be implemented. However, even if TTB adopts the proposal, the department has three concerns that are not addressed by TTB's proposal. Those concerns are:

(a) TTB's determination that a product is a cigarette does not relieve the department of the responsibility to make a similar determination under Montana's tax code. Montana's definition of "cigarette" differs from that of the TTB. It is necessary that the department provide, by rule, the specific criteria the department will use to make this determination.

(b) TTB's regulations do not include a minimum package size. In order to prevent the single stick sales of little cigars in Montana, the department needs to independently classify these products as cigarettes under Montana code so that Montana's minimum package size applies.

(c) TTB has extended the comment period on its proposed amendments until March 26, 2007. Finalization of the amendments is anticipated to occur sometime around the last quarter of 2007, and implementation of the proposed amendments is estimated to be around the first quarter of 2008. To protect Montana's citizens, especially its youth, the department needs to address this issue sooner than that.

Although it is clear that the department has full authority to adopt these rules as proposed, in order to accommodate the opponents' request to bring this matter before the 2007 Legislature, the department has elected to adopt New Rules II (42.31.206) and III (42.31.207) with a delayed effective date of July 1, 2007.

5. As a result of the comments received the department adopts New Rule III with the following changes, new matter underlined, stricken matter interlined:

NEW RULE III (42.31.207) DEPARTMENT DETERMINATIONS (1) through (6) remain the same.

(7) ARM 42.31.206 and 42.31.207 are not effective until July 1, 2007.

AUTH: 16-11-103, MCA
IMP: 16-11-102, MCA

6. Therefore, the department adopts New Rule III (42.31.207) with the amendments listed above and adopts New Rule I (42.31.326), New Rule II (42.31.206), New Rule IV (42.31.208), New Rule V (42.31.318); amends ARM 42.31.102; 42.31.201, 42.31.202, 42.31.203, 42.31.204, 42.31.212, 42.31.221,

42.31.303, 42.31.308, 42.31.309, 42.31.330, 42.31.345; and repeal of ARM 42.31.103, 42.31.108, 42.31.109, 42.31.205, 42.31.340, 42.31.701, and 42.31.703 as proposed.

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

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State January 16, 2007

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 or Register) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject

1. Consult ARM topical index.
   Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute

2. Go to cross reference table at end of each Number and title which lists MCA section numbers and Department corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 2006. This table includes those rules adopted during the period September 1 through December 31, 2006 and any proposed rule action that was pending during the past six-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 2006, this table, and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule, and the page number at which the action is published in the 2006 and 2007 Montana Administrative Register.

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

AGRICULTURE, Department of, Title 4

I-IV Montana Pulse Crop Research and Market Development Program, p. 1977, 2403
4.11.1201 and other rule - Specific Agricultural Ground Water Management Plan, p. 1765, 2109
4.12.3009 and other rule - Seed Laboratory Fees, p. 1929, 2129
4.12.3013 Seed Civil Penalties Matrix, p. 2996

STATE AUDITOR, Title 6

6.6.5203 Small Business Health Insurance Purchasing Pool - Premium Assistance and Premium Incentive Payments - Tax Credits, p. 1502, 1954

COMMERCE, Department of, Title 8

I Administration of the 2007-2008 Federal Community Development Block Grant (CDBG) Program, p. 2999
8.99.901 and other rules - Award of Grants and Loans under the Big Sky Economic Development Program, p. 1

EDUCATION, Title 10

(Superintendent of Public Instruction)
10.7.106 and other rules - General Fund: Quality Educator Payments - At Risk Student Payments - Indian Education for All Payments - American Indian Achievement Gap Payments - School Finance, p. 2728, 3070

(Board of Public Education)
I Assignment of Persons Providing Instruction to Braille Students, p. 2869
10.54.5010 and other rules - Science Content Standards - Performance Descriptors, p. 2175, 2910
10.58.102 and other rules - Educator Preparation Programs, p. 2198
10.65.101 Pupil Instruction-related Days, p. 1769, 2404

(Montana State Library)
10.102.4001 Reimbursement to Libraries for Interlibrary Loans, p. 1197, 2405

FISH, WILDLIFE, AND PARKS, Department of, Title 12

(Fish, Wildlife, and Parks Commission)
12.6.2205 and other rules - Exotic Species, p. 1771, 1935, 2823
12.8.211 and other rules - Commercial Use of Lands under the Control of the Department, p. 1779

12.9.802 and other rules - Game Damage Hunts - Management Seasons - Game Damage Response and Assistance, p. 1105, 1201, 1867

ENVIRONMENTAL QUALITY, Department of, Title 17

17.50.213 Motor Vehicle Recycling and Disposal - Reimbursement Payments for Abandoned Vehicle Removal, p. 2444, 2961
17.53.105 Hazardous Waste - Incorporation by Reference of Current Federal Regulations into the Hazardous Waste Program, p. 2288, 3074
17.74.343 and other rules - Asbestos Control - Asbestos Control Program, p. 125, 1574, 1876
17.74.350 and other rules - Asbestos Control - Incorporation by Reference of Current Federal Regulations into the Asbestos Control Program - Definitions - Asbestos Project Control Measures, and Clearing Asbestos Projects, p. 2291, 2962
17.74.502 and other rules - Methamphetamine Cleanup Program - Incorporation by Reference of Current Federal Regulations into the Methamphetamine Cleanup Rules and Clearance Sampling, p. 2285, 2963
17.85.101 and other rules - Alternative Energy Revolving Loan Program, p. 1678, 3075, 34

(Board of Environmental Review)
17.8.101 and other rules - Incorporation by Reference of Current Federal Regulations and Other Materials into Air Quality Rules, p. 823, 1956
17.8.501 and other rules - Air Quality - Definitions - Air Quality Operation Fees - Open Burning Fees, p. 1504, 2410
17.8.740 and other rules - Air Quality - Definitions - Incorporation by Reference - Mercury Emission Standards - Mercury Emission Credit Allocations, p. 1112, 2575
17.30.617 and other rule - Water Quality - Outstanding Resource Water Designation for the Gallatin River, p. 2294
17.30.630 Water Quality - Temporary Water Quality Standards, p. 1981, 3072
17.30.1303 and other rule - Water Quality - Incorporations by Reference - Concentrated Animal Feeding Operations, p. 3002

(Board of Environmental Review and the Department of Environmental Quality)
17.24.132 and other rules - Air Quality - Asbestos - Hazardous Waste - Junk Vehicles - Major Facility Siting - Metal Mine Reclamation - Opencut Mining - Public Water Supply - Septic Pumpers - Solid Waste - Strip and Underground Mine Reclamation - Subdivisions - Underground Storage Tanks - Water Quality - Revising Enforcement Procedures Under the Montana Strip and Underground Mine Reclamation Act, Metal Mine Reclamation Laws, and Opencut Mining Act - Providing Uniform Factors for Determining Penalties, p. 2523, 1139, 1379, 1874

TRANSPORTATION, Department of, Title 18

18.6.202 and other rules - Transportation Commission - Outdoor Advertising, p. 276, 1878

CORRECTIONS, Department of, Title 20

I-XIX Regional Correctional Facilities, p. 2872, 36

JUSTICE, Department of, Title 23

23.12.103 and other rules - Responsibility for Costs - Criminal History Records Program, p. 2477, 2959
23.16.1802 and other rules - Frequency of Reporting by Approved Accounting Systems - Definitions - Letters of Withdrawal - Record Keeping Requirements, p. 2297, 2916
23.16.1802 and other rules - Identification Decal for Video Gambling Machines - Define System Availability - Definitions - Online Permitting for Video Gambling Machines - Issuance of Updated Gambling Operator Licenses After Permitting - Renewal of Gambling Operator Licenses - Quarterly Reporting Requirements - Accounting System Vendor License Fee - Requirement for Parties to Multi-game Agreements to Connect to an Approved System, p. 1936, 2131
23.16.1901 Video Gambling Machine Specifications, p. 2890, 42
23.17.101 and other rules - MLEA Attendance - MLEA Performance Criteria - Rules, Regulations, Policies, and Procedures - Waiver of Rules, p. 1690, 2302, 2917

LABOR AND INDUSTRY, Department of, Title 24

Boards under the Business Standards Division are listed in alphabetical order following the department rules.

I Board of Personnel Appeals - Summary Judgment Practice and Procedure, p. 2311, 3077
I-V Country of Origin Placarding for Beef, Pork, Poultry, and Lamb, p. 2469
24.11.452A and other rules - Unemployment Insurance, p. 1699, 2411
24.17.127 Prevailing Wage Rates for Public Work Projects - Building Construction Services, p. 1217, 2832
24.21.411 and other rules - Apprenticeship and Training Program, p. 2073, 2658
24.29.1401 and other rules - Allowable Medical Service Billing Rates for Workers' Compensation Claims, p. 2759
24.29.2831 Penalties Assessed Against Uninsured Employers, p. 1703, 2040
24.30.1302 and other rule - Occupational Health and Safety in Mines, p. 1706, 2041
24.301.131 and other rules - Building Codes, p. 2319

24.351.215 License Fee Schedule for Weighing and Measuring Devices, p. 1356, 2661

(Board of Alternative Health Care)

I & II Fee Abatement - License Renewal for Activated Military Reservists, p. 706, 1881

24.111.401 and other rules - General Provisions - Certification for Specialty Practice of Naturopathic Childbirth Attendance - Licensing and Scope of Practice for Direct-entry Midwifery - Continuing Education - Unprofessional Conduct - Additional Recommended Screening Procedures - Nonroutine Applications, p. 3006

(Board of Barbers and Cosmetologists)

24.121.407 and other rule - Premises and General Requirements - Restrooms, p. 4

(Crane and Hoisting Operating Engineers Program)

I Incorporation by Reference of ANSI B30.5, p. 1509, 2042

(Board of Dentistry)

24.138.301 and other rules - General Provisions - Licensing - Renewals and Continuing Education - Unprofessional Conduct - Screening Panel - Anesthesia - Professional Assistance Program - Reactivation of a Lapsed License - Reactivation of an Expired License - Definition of Nonroutine Application - Fee Abatement - Reinstatement of License for Nonpayment of Renewal Fee - Denturist License Reinstatement - Complaint Procedure, p. 1795, 43

(Board of Medical Examiners)

I-IX Professional Assistance Program, p. 1015, 1957

24.101.413 and other rule - With the Department of Labor and Industry - Renewal Dates and Requirements - Renewals, p. 11

24.156.901 and other rules - Fees - Applications - Approval of Schools - Reciprocity Licenses - Renewals Pertaining to Osteopathic Physicians, p. 8

24.156.1601 and other rules - Physician Assistant Licensure, p. 483, 1958

(Board of Nursing)

8.32.301 and other rules - Nursing, p. 956, 2035

(Board of Optometry)

24.168.301 and other rules - Definitions - General Provisions - Diagnostic Permissible Drugs - Therapeutic Pharmaceutical Agents - Continuing Education - Screening Panel - Fee Abatement - Examinations - Approved Courses and Examinations - New Licensees - Applicants for Licensure - Therapeutic Pharmaceutical Agents-Complaint Procedure, p. 2450

(Board of Outfitters)
24.171.401 and other rules - Fees - Inactive License - Transfer of River-use Days - Unprofessional Conduct and Misconduct - Guide Logs, p. 2769

(Board of Pharmacy)
24.174.401 and other rule - Fees - Dangerous Drug Fee Schedule, p. 1814, 2134

(Board of Plumbers)
24.180.401 and other rules - General Provisions - Licensing and Scope of Practice - Reciprocity Licensure - Temporary Exemptions - Reciprocity, p. 2892

(Board of Private Security Patrol Officers and Investigators)
8.50.423 and other rules - Private Security Patrol Officers and Investigators - Fee Schedule - Firearms Training Course Curriculum and Standards, p. 605, 1926
24.182.401 and other rules - Fee Schedule - Licensure Requirements - Type of Firearm - Requirements for Firearms Instructor Licensure - Armed Requalification Required Annually - Company Licensure and Branch Offices - Rules for Branch Office, p. 1710, 2918

(Board of Psychologists)
24.189.301 and other rules - Definitions - Fee Schedule - Use of Title - Required Supervised Experience, p. 2461

(Board of Radiologic Technologists)
24.204.208 and other rules - Applications - Limited Permit Applications - Types - Permits - Practice Limitations - Permit Examinations - Renewal - Proof of Good Standing, p. 1819, 2659
24.204.401 and other rules - Fee Schedule - Limited Permit Holder Fees - Continuing Education - Unprofessional Conduct, p. 2314

(Board of Real Estate Appraisers)
24.207.401 and other rules - Fees - Adoption of USPAP by Reference - Appraisal Review - Mentor Requirements, p. 3022

(Board of Realty Regulation)
24.210.602 Examination, p. 1824, 46

(Board of Respiratory Care Practitioners)
24.213.402 and other rule - Application for Licensure - Examination, p. 1716, 2660

(Board of Speech-Language Pathologists and Audiologists)
24.222.301 and other rules - Definitions - Fees - Licensing and Scope of Practice - Speech Pathology and Audiology Aides - Continuing Education - Unprofessional Conduct - Fee Abatement - Licensure of Speech-Language Pathologists and Audiologists, p. 1337, 2413

LIVESTOCK, Department of, Title 32

32.2.403 Diagnostic Laboratory Fees, p. 1359, 1882
32.3.104 and other rules - Disease Control, p. 2775

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

36.11.304 and other rules - Equipment Operation in the SMZ - Retention of Trees and Clearcutting in the SMZ - Site-specific Alternative Practices - Definitions - Penalties for Violation of the Streamside Management Zone Law, p. 499, 1883

(Board of Oil and Gas Conservation)
36.22.1242 Privilege and License Tax Rates on Oil and Gas, p. 1827, 2110

PUBLIC HEALTH AND HUMAN SERVICES, Department of, Title 37

I Determining Unenforceable Case Status in Child Support Cases, p. 2898
I-XIV State Trauma Care System, p. 723, 1896
I-XXVIII Home and Community-based Services for Adults with Severe Disabling Mental Illness, p. 1996, 2665
37.5.103 and other rules - Fair Hearing Procedures and Temporary Assistance for Needy Families (TANF), p. 2784, 47
37.5.125 and other rules - Older Blind Program, p. 1987, 48
37.12.401 Laboratory Testing Fees, p. 1227, 2043
37.30.102 Vocational Rehabilitation IPE Care Requirements, p. 18
37.30.405 Vocational Rehabilitation Program Payment for Services, p. 1223, 1892
37.62.101 and other rules - Child Support Guidelines, p. 2476
37.78.102 and other rule - Temporary Assistance for Needy Families (TANF) Incorporation of Policy Manuals, p. 3026
37.78.102 and other rules - Temporary Assistance for Needy Families (TANF), p. 1720, 2415
37.80.101 and other rules - Child Care Assistance Program, p. 1555, 2964
37.82.101 and other rules - Medicaid Assistance, p. 21
37.82.101 and other rule - Medicaid Eligibility, p. 1830, 2418
37.82.101 Medicaid Assistance, p. 1550, 2417
37.85.406 and other rules - Medicaid Reimbursement of Hospitals, Provider Based Entities, and Birthing Centers, p. 2793, 3078
37.86.1001 and other rules - Medicaid Dental Services - Durable Medical Equipment - Eyeglass Services - Ambulance Services - Transportation, p. 1126, 1894
37.86.2803 and other rules - Medicaid Reimbursement for Inpatient and Outpatient Hospital Services, p. 2024, 2849

37.95.102 and other rules - Licensure of Day Care Facilities, p. 2572, 201, 1424, 2136
37.104.101 and other rules - Emergency Medical Services, p. 1368, 2420
37.108.507 Components of Quality Assessment Activities, p. 14
37.112.101 and other rules - Tattooing and Body Piercing, p. 2339
37.114.101 and other rules - Control of Communicable Diseases, p. 1512, 2112

PUBLIC SERVICE REGULATION, Department of, Title 38

38.5.2202 and other rules - Pipeline Safety - National Electrical Safety Code, p. 2372, 2966
38.5.3301 and other rules - Telecommunications Service Standards, p. 1844, 2967

REVENUE, Department of, Title 42

I & II Hospital Utilization Fee for Inpatient Bed Days, p. 2562, 3109
I-VI Movie and Television Industries and Related Media - Tax Credit, p. 1564, 1960
42.3.101 and other rules - Waiver of Penalties and Interest, p. 3051
42.11.104 and other rules - Liquor Vendors, Purchasing, and Distribution, p. 3031
42.13.101 and other rules - Regulations of Liquor Licensees, p. 3044
42.18.107 and other rules - General Provisions and Certification Requirements for Appraising Property, p. 2520, 3101
42.19.401 and other rules - Low Income Property - Disabled Veterans Tax Exemptions - Energy Related Tax Incentives - New Industrial Property, p. 2555, 3102
42.20.101 and other rules - Valuation of Real Property - Classification of Nonproductive Patented Mining Claims, Agricultural Land, and Forest Land, p. 2533, 3103, 56
42.20.106 and other rule - Manufactured and Mobile Homes, p. 1238, 1961
42.21.113 and other rules - Personal, Industrial, and Centrally Assessed Property Taxes, p. 2375, 2979
42.21.116 and other rules - Personal Property, p. 2529, 3108
42.21.158 Property Reporting Requirements, p. 1235, 1962
42.31.102 and other rules - Tobacco Products and Cigarettes, p. 1943

SECRETARY OF STATE, Title 44

1.2.419 Scheduled Dates for the 2007 Montana Administrative Register, p. 2820, 3112
44.2.203 Priority Handling of Documents, p. 1569, 2138
44.3.101 and other rules - Elections, p. 2077, 2671

(Commissioner of Political Practices)
44.12.204 Payment Threshold--Inflation Adjustment for Lobbyists, p. 2400, 2982

BOARD APPOINTEES AND VACANCIES

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

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

In this issue, appointments effective in December 2006 appear. Vacancies scheduled to appear from February 1, 2007, through April 30, 2007, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

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

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of January 1, 2007.

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

BOARD AND COUNCIL APPOINTEES FROM DECEMBER 2006

Appointee	Appointed by	Succeeds	Appointment/End Date
Board of Aeronautics (Transportation)			
Mr. Robert Buckles Bozeman Qualifications (if required): commercial airlines representative	Governor	Denney	12/27/2006 1/1/2011
Mr. A. Christopher Edwards Billings Qualifications (if required): fixed base operator	Governor	Leslie	12/27/2006 1/1/2011
Mr. Fred Lark Lewistown Qualifications (if required): public representative	Governor	Rabenberg	12/27/2006 1/1/2011
Mr. Charles Manning Lakeside Qualifications (if required): aviation education representative	Governor	reappointed	12/27/2006 1/1/2011
Human Rights Commission (Labor and Industry)			
Ms. Maria Beltran Worden Qualifications (if required): public representative	Governor	Wilmer	12/27/2006 1/1/2011
Ms. Emorie Davis Bird East Glacier Park Qualifications (if required): public representative	Governor	Cajune	12/27/2006 1/1/2011

BOARD AND COUNCIL APPOINTEES FROM DECEMBER 2006

Appointee	Appointed by	Succeeds	Appointment/End Date
Human Rights Commission (Labor and Industry) cont.			
Mr. Steve Fenter	Governor	Copps	12/27/2006
Billings			1/1/2011
Qualifications (if required): public representative			
Mr. Ryan C. Rusche	Governor	reappointed	12/27/2006
Wolf Point			1/1/2011
Qualifications (if required): public representative			
Labor-Management Advisory Council on Workers' Compensation (Labor and Industry)			
Lt. Governor John Bohlinger	Director	not listed	12/1/2006
Helena			12/1/2008
Qualifications (if required): none specified			
Mr. Doug Buman	Director	not listed	12/1/2006
Seattle			12/1/2008
Qualifications (if required): representing injured workers			
Mr. Bill Dahlgren	Director	not listed	12/1/2006
Missoula			12/1/2008
Qualifications (if required): representing employers			
Ms. Jacquie Helt	Director	not listed	12/1/2006
Missoula			12/1/2008
Qualifications (if required): representing injured workers			

BOARD AND COUNCIL APPOINTEES FROM DECEMBER 2006

Appointee	Appointed by	Succeeds	Appointment/End Date
Labor-Management Advisory Council on Workers' Compensation (Labor and Industry) cont.			
Ms. Annette Hoffman	Director	not listed	12/1/2006
Billings			12/1/2008
Qualifications (if required): representing employers			
Mr. Riley Johnson	Director	not listed	12/1/2006
Helena			12/1/2008
Qualifications (if required): representing employers			
Mr. Don Judge	Director	not listed	12/1/2006
Helena			12/1/2008
Qualifications (if required): representing injured workers			
Mr. Jerry Keck	Director	not listed	12/1/2006
Helena			12/1/2008
Qualifications (if required): ex-officio			
Mr. Dan Lee	Director	not listed	12/1/2006
Missoula			12/1/2008
Qualifications (if required): representing injured workers			
Mr. Jason Miller	Director	not listed	12/1/2006
Helena			12/1/2008
Qualifications (if required): representing injured workers			
Ms. Connie Welsh	Director	not listed	12/1/2006
Helena			12/1/2008
Qualifications (if required): representing employers			

BOARD AND COUNCIL APPOINTEES FROM DECEMBER 2006

Appointee	Appointed by	Succeeds	Appointment/End Date
Labor-Management Advisory Council on Workers' Compensation (Labor and Industry) cont.			
Mr. Bob Worthington	Director	not listed	12/1/2006
Helena			12/1/2008
Qualifications (if required): representing employers			
State Employee Group Benefits Advisory Council (Administration)			
Mr. Tom Bilodeau	Director	not listed	12/8/2006
Helena			12/31/2006
Qualifications (if required): MEA-MFT representative			
State Workforce Investment Board (Labor and Industry)			
Mr. Mike McGinley	Governor	Prinkki	12/8/2006
Dillon			7/1/2007
Qualifications (if required): county commissioner			

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2007 through APRIL 30, 2007

Board/current position holder	Appointed by	Term end
Board of Athletics (Labor and Industry)		
Ms. Jamie Jones, Great Falls Qualifications (if required): public representative	Governor	4/25/2007
Board of Clinical Laboratory Science Practitioners (Labor and Industry)		
Ms. Charliene Staffanson, Deer Lodge Qualifications (if required): public member	Governor	4/16/2007
Ms. Karen McNutt, Sidney Qualifications (if required): clinical laboratory science practitioner	Governor	4/16/2007
Board of Dentistry (Labor and Industry)		
Mr. Clifford R. Christenot, Libby Qualifications (if required): denturist	Governor	3/29/2007
Dr. Sheldon Ivers, Great Falls Qualifications (if required): dentist	Governor	3/29/2007
Ms. Carol Price, Clancy Qualifications (if required): dental hygienist	Governor	3/29/2007
Board of Livestock (Livestock)		
Mr. John C. Paugh, Bozeman Qualifications (if required): sheep producer	Governor	3/1/2007
Mr. Lee Cornwell, Glasgow Qualifications (if required): cattle producer	Governor	3/1/2007

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2007 through APRIL 30, 2007

Board/current position holder	Appointed by	Term end
Board of Optometry (Labor and Industry)		
Dr. Larry Obie, Havre	Governor	4/3/2007
Qualifications (if required): registered optometrist		
Ms. Delores Hill, Mosby	Governor	4/3/2007
Qualifications (if required): public member		
Board of Regents of Higher Education (Education)		
Mr. Mark Semmens, Great Falls	Governor	2/1/2007
Qualifications (if required): Independent from District 3		
Directors of the State Compensation Insurance Fund (Administration)		
Ms. Mardi Madsen, Billings	Governor	4/28/2007
Qualifications (if required): representative of private enterprise		
Mr. Derek Scoble, Clancy	Governor	4/28/2007
Qualifications (if required): representative of private enterprise and a policyholder		
Governor's Disabilities Advisory Council (Governor's Office)		
Mr. Belden Billy, Box Elder	Governor	3/30/2007
Qualifications (if required): representative of the disabled community		
Ms. Connie Bremner, Browning	Governor	3/30/2007
Qualifications (if required): representative of senior programs		
Ms. Julia Hammerquist, Kalispell	Governor	3/30/2007
Qualifications (if required): representative of the disabled community		

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2007 through APRIL 30, 2007

Board/current position holder	Appointed by	Term end
Governor's Disabilities Advisory Council (Governor's Office) cont.		
Mr. Dustin J. Hankinson, Missoula	Governor	3/30/2007
Qualifications (if required): representative of the disabled community		
Ms. Julie Bryher Herak, Basin	Governor	3/30/2007
Qualifications (if required): caregiver/family member		
Mr. Mike Mayer, Missoula	Governor	3/30/2007
Qualifications (if required): representative of the disabled community and disabled services providers		
Ms. Susie McIntyre, Great Falls	Governor	3/30/2007
Qualifications (if required): representative of the disabled community and disabled services providers		
Mr. William Neisess, Helena	Governor	3/30/2007
Qualifications (if required): representative of the disabled community		
Mr. Brian Roat, Red Lodge	Governor	3/30/2007
Qualifications (if required): representative of disabled services providers		
Ms. Patti Scruggs, Whitefish	Governor	3/30/2007
Qualifications (if required): representative of special education		
Ms. Marie Pierce, Sidney	Governor	3/30/2007
Qualifications (if required): disabilities community		
Montana Arts Council (Education)		
Mr. John B. Dudis, Kalispell	Governor	2/1/2007
Qualifications (if required): public member		

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2007 through APRIL 30, 2007

Board/current position holder	Appointed by	Term end
Montana Arts Council (Education) cont.		
Ms. Mary Crippen, Billings	Governor	2/1/2007
Qualifications (if required): public member		
Mr. Neal Lewing, Polson	Governor	2/1/2007
Qualifications (if required): public member		
Ms. Delores Heltne, Havre	Governor	2/1/2007
Qualifications (if required): public member		
Ms. Cyndy Andrus, Bozeman	Governor	2/1/2007
Qualifications (if required): public member		
Montana Pulse Crop Advisory Committee (Agriculture)		
Ms. Leta Campbell, Harlem	Director	2/14/2007
Qualifications (if required): Marketing		
Public Employees Retirement Board (Administration)		
Ms. Carole Carey, Ekalaka	Governor	4/1/2007
Qualifications (if required): public employee		
State Compensation Mutual Insurance Fund Board (Governor)		
Mr. Joe Dwyer, Billings	Governor	4/28/2007
Qualifications (if required): representative of a Montana State Fund policy holder		