

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 24

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 The Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 print 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.

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BEFORE THE DEPARTMENT OF AGRICULTURE  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )  
4.9.401 relating to raising the wheat and ) NOTICE OF PUBLIC HEARINGS  
barley assessment ) ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On January 20, 2009, at 2:00 p.m. the Montana Department of Agriculture will hold a public hearing at the Holiday Inn's Big Hole Conference Room, 5500 Midland Road, Billings, Montana, to consider the proposed amendment of the above-stated rule.

2. On January 21, 2009, at 9:00 a.m. the Montana Department of Agriculture will hold a public hearing at the Cottonwood Inn, U.S. Highway 2E, Glasgow, Montana, to consider the proposed amendment of the above-stated rule.

3. On January 22, 2009 at 9:00 a.m. the Montana Department of Agriculture will hold a public hearing at the Wheat Building's Conference Room, 750th St SW, Great Falls, Montana, to consider the proposed amendment of the above-stated rule.

4. 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 January 7, 2009, to advise us of the nature of the accommodation that you need. Please contact Cort Jensen 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.

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

4.9.401 WHEAT AND BARLEY ASSESSMENT AND REFUNDS (1) There shall be levied an assessment of:

(a) ~~12-1/2~~ 20 mills per bushel upon all wheat sold in the state of Montana;  
and

(b) ~~20~~ 30 mills per hundredweight on all barley sold in the state of Montana.

(2) All assessments are subject to refund provided the following criteria are met:

(a) Application for assessment refund shall be in writing on forms provided by the committee.

(i) Forms will be furnished upon application to the Montana Wheat and Barley Committee, P.O. Box 3024, Great Falls, Montana 59403-3024.

(b) Written application for refund of the wheat or barley assessments must be submitted by the first seller of the wheat or barley or by an individual with the first seller's power of attorney.

(c) Refund application forms shall be submitted 30 days after the date of first sale and no later than 90 days from the date of the first sale of wheat or barley for which a refund is filed.

AUTH: 80-11-205, MCA

IMP: 80-11-206, MCA

Reason: The Wheat and Barley Committee (administratively attached to the Department of Agriculture) voted to raise the assessment as allowed by Title 80, MCA. The committee believes the increase is necessary to fully fund the needed wheat and barley research and to increase marketing.

Economic Impact: This increase will cause a .0075 cent increase on wheat and .01 cent increase on barley per cwt. This will result in approximately an additional \$900,000 per year to be utilized by the Wheat and Barley Committee based on a five year average estimate. This increase will affect approximately 5504 wheat farms and 2704 barley farms according to the 2002 farm census (2007 numbers are not yet available).

6. Concerned persons may submit their data, views, or arguments concerning the proposed action either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Cort Jensen 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 5 p.m. on January 28, 2009.

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, e-mail, and mailing address of the person and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. 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](http://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/ Ron de Yong  
Ron de Yong, Director

/s/ Cort Jensen  
Cort Jensen, Rule Reviewer

Certified to the Secretary of State, December 15, 2008.

BEFORE THE ALTERNATIVE HEALTH CARE BOARD  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 24.111.2102 and 24.111.2103 ) PROPOSED AMENDMENT  
pertaining to continuing education )

TO: All Concerned Persons

1. On January 14, 2009, at 9:30 a.m., a public hearing will be held in room B-07, 301 South Park Avenue, Helena, Montana to consider the proposed amendment 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 Alternative Health Care Board (board) no later than 5:00 p.m., on January 9, 2009, to advise us of the nature of the accommodation that you need. Please contact Cheryl Brandt, Alternative Health Care Board, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2394; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdahc@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: The board concluded that granting extensions of time for naturopathic physicians and midwives to complete continuing education (CE) requirements was difficult to administer and has not proven to be effective. The board is amending ARM 24.111.2102 and 24.111.2103 to no longer grant extensions of time for CE completion. Instead, the board is eliminating the cap on the number of credits that can be obtained by nonlive means of delivery to facilitate licensee completion of CE requirements by the renewal date. In addition, the board notes that availability of late renewal during the period following the renewal date under 37-1-141, MCA, effectively establishes a 45 day grace period for completion of CE requirements. The board is also amending these rules to clarify what is acceptable as documentary proof of completion of nonlive CE programs. Authority cites are amended to provide the complete sources of the board's rulemaking authority.

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

24.111.2102 NATUROPATHIC PHYSICIAN CONTINUING EDUCATION REQUIREMENTS (1) remains the same.

~~(2) No more than five continuing education credits per renewal period may be obtained through electronic or other nonlive means of program delivery.~~

(3) through (6) remain the same but are renumbered (2) through (5).

~~(7)~~ (6) In accordance with 37-1-131, MCA, compliance with this rule shall be attested to by the naturopath on the renewal application ~~except as provided in (8)~~. The board will conduct random audits after each renewal period closes of 20 percent of all naturopaths with renewed licenses, for documentary verification of compliance. Documentary evidence of program completion must be maintained by the naturopath for a period of two years for audit purposes. Documentary evidence of completion of nonlive programs (e.g., internet, videotape, audiotape, DVD) may be in the form of proof that the naturopath passed an exam on the program content, a certificate of completion, or the naturopath's notes summarizing the program content.

~~(8) Prior to the renewal date set by ARM 24.101.413, a naturopath may apply to the board for an extension of time to complete continuing education requirements for the period then concluding. The request must enclose a detailed plan for completion of the requirements. The board may, in its sole discretion and for good cause shown, grant an extension of time of a specific duration. If granted, the naturopath must submit documentary verification of compliance by the extension deadline set by the board.~~

(9) and (10) remain the same but are renumbered (7) and (8).

AUTH: 37-1-131, ~~37-1-141~~, 37-1-319, 37-26-201, MCA

IMP: 37-1-131, 37-1-141, 37-1-306, MCA

#### 24.111.2103 MIDWIVES CONTINUING EDUCATION REQUIREMENTS

(1) remains the same.

~~(2) No more than five continuing education credits per renewal period may be obtained through electronic or other nonlive means of program delivery.~~

(3) through (6) remain the same but are renumbered (2) through (5).

~~(7)~~ (6) In accordance with 37-1-131, MCA, compliance with this rule shall be attested to by the midwife on the renewal application ~~except as provided in (8)~~. The board will conduct random audits after each renewal period closes of 20 percent of all midwives with renewed licenses, for documentary verification of compliance. Documentary evidence of completion of nonlive programs (e.g., internet, videotape, audiotape, DVD) may be in the form of proof that the midwife passed an exam on the program content, a certificate of completion, or the midwife's notes summarizing the program content. Documentary evidence of program completion must be maintained by the midwife for a period of two years for audit purposes.

~~(8) Prior to the renewal date set by ARM 24.101.413, a midwife may apply to the board for an extension of time to complete continuing education requirements for the period then concluding. The request must enclose a detailed plan for completion of the requirements. The board may, in its sole discretion and for good cause shown, grant an extension of time of a specific duration. If granted, the midwife must submit documentary verification of compliance by the extension deadline set by the board.~~

(9) and (10) remain the same but are renumbered (7) and (8).

AUTH: 37-1-131, ~~37-1-141~~, 37-1-319, 37-27-105, MCA

IMP: 37-1-131, 37-1-141, 37-1-306, MCA



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 Alternative Health Care Board, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to [dlibsdahc@mt.gov](mailto:dlibsdahc@mt.gov), and must be received no later than 5:00 p.m., January 22, 2009.

6. An electronic copy of this Notice of Public Hearing is available through the department and board site on the World Wide Web at [www.althealth.mt.gov](http://www.althealth.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 that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Alternative Health Care Board, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to [dlibsdahc@mt.gov](mailto:dlibsdahc@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. Lorraine Schneider, attorney, has been designated to preside over and conduct this hearing.

ALTERNATIVE HEALTH CARE BOARD  
MAGGI BEESON, N.D., 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 December 15, 2008

BEFORE THE BOARD OF REALTY REGULATION  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 24.210.641 unprofessional ) PROPOSED AMENDMENT  
conduct )

TO: All Concerned Persons

1. On January 16, 2009, at 9:00 a.m., a public hearing will be held in room 439, 301 South Park Avenue, Helena, Montana to consider the proposed amendment of the above-stated rule.

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 Realty Regulation (board) no later than 5:00 p.m., on January 9, 2009, to advise us of the nature of the accommodation that you need. Please contact Barb McAlmond, Board of Realty Regulation, 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 dlibsdrre@mt.gov.

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

24.210.641 UNPROFESSIONAL CONDUCT (1) through (5)(l) remain the same.

~~(m) failing, as a seller's agent, to continue to submit to the seller all offers and counter offers received by the licensee until such time as a pending transaction has been closed or the listing agreement terminates,~~ participate in negotiations as defined in 37-51-102, MCA, unless the seller has waived this obligation in writing. ~~Seller agents are not obligated to continue to actively market the property after an offer has been accepted by the seller unless directed in writing to do so by the seller.~~

(n) failing, as a seller's agent, to submit to the seller all offers and counter offers received by the licensee until such time as a pending transaction has been closed or the listing agreement terminates unless the seller waives these obligations in writing. Seller agents are not obligated to continue to actively market the property after an offer has been accepted by the seller unless directed in writing to do so by the seller.

(o) failing, as a buyer agent, to participate in negotiations as defined in 37-51-102, MCA, unless the buyer has waived these obligations in writing.

~~(p)~~ (p) failing, as a buyer agent, to submit to the buyer all offers and counter offers until an offer has been accepted or the buyer broker agreement terminates unless the buyer waives these obligations in writing. Buyer agents have no obligation to continue ~~are not obligated~~ to show properties to their clients buyer after

an offer has been accepted unless otherwise directed in writing to do so by the buyer;

(o) through (ac) remain the same but are renumbered (q) through (ae).

~~(ad)~~ (af) failing to respond to a request from the board; or

~~(ae)~~ (ag) a licensee shall not engage in or conduct business as a real estate licensee, or advertise as a real estate licensee, or engage in or conduct the business of a real estate licensee at a time when the licensee's real estate license has expired or is on inactive status;

(ah) acting as a buyer agent without a written buyer broker agreement;

(ai) acting as a seller agent without a written listing agreement;

(aj) acting as a dual agent in a transaction if the licensee is a principal;

(ak) acting as a seller agent in a transaction if the licensee is the buyer in the same transaction;

(al) acting as a buyer agent in a transaction if the licensee is the seller in the same transaction;

(am) submitting a competing offer as a principal in a transaction with the licensee's client; or

(an) failing to account for or misappropriation of funds being held in trust.

(6) remains the same.

AUTH: 37-1-131, 37-1-136, 37-1-319, 37-51-203, MCA

IMP: 37-1-141, 37-1-306, 37-1-307, 37-1-312, 37-1-316, 37-1-319, 37-51-102, 37-51-202, 37-51-313, 37-51-314, 37-51-321, 37-51-512, MCA

**REASON:** The board determined it is reasonable and necessary to amend this rule for clarity and formatting consistency among all sections. The board is adding to unprofessional conduct the failure of buyer and seller agents to participate in negotiations. Negotiation is included in the definitions of broker and salesperson at 37-51-102, MCA, and the board is amending this rule to align with the practice definitions. The board is amending (5)(p) of this rule to achieve consistency between similar requirements on seller agents in (5)(n). The board never intended to have different requirements between seller and buyer agents regarding the necessity to submit offers and counter offers.

It is reasonably necessary to add specific conflict of interest situations the board considers unprofessional conduct. The amendment will put licensees on notice that these acts are a violation of current responsibilities set forth in 37-51-313 and 37-51-314, MCA.

The 2007 Montana Legislature enacted Chapter 502, Laws of 2007 (Senate Bill 153), an act revising professional and occupational licensing laws. The bill was signed by the Governor on May 16, 2007, and became effective October 1, 2007. Section 24 of the bill was codified at 37-51-324, MCA, to provide penalties for noncompliance by real estate brokers and property managers with trust account provisions. Following a review of all trust account rules, the board is adding (5)(an) to reinforce 37-1-316(14), MCA, and to implement the legislation by adding the failure to account for or the misappropriation of trust funds as unprofessional conduct.

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Realty Regulation, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2323, or by e-mail to [dlibsdrre@mt.gov](mailto:dlibsdrre@mt.gov), and must be received no later than 5:00 p.m., January 26, 2009.

5. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at [www.realestate.mt.gov](http://www.realestate.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.

6. 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 that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Realty Regulation, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2323, e-mailed to [dlibsdrre@mt.gov](mailto:dlibsdrre@mt.gov), or made by completing a request form at any rules hearing held by the agency.

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

8. Barb McAlmond, program manager, has been designated to preside over and conduct this hearing.

BOARD OF REALTY REGULATION  
CINDY WILLIS, 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 December 15, 2008

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

In the matter of the amendment of ARM )  
24.219.301 definitions, 24.219.401 and )  
24.219.405 fees, 24.219.501 )  
application, 24.219.504 licensure, )  
24.219.509 status conversion, )  
24.219.601 application, 24.219.604 )  
licensure, 24.219.609 status conversion, )  
24.219.2101 and 24.219.2201 )  
continuing education, 24.219.2301 and )  
24.219.2305 unprofessional conduct, )  
pertaining to social work examiners and )  
professional counselors )

TO: All Concerned Persons

1. On January 20, 2009, at 1:30 p.m., a public hearing will be held in room 439, 301 South Park Avenue, Helena, Montana to consider the proposed amendment 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 Social Work Examiners and Professional Counselors (board) no later than 5:00 p.m., on January 16, 2009, to advise us of the nature of the accommodation that you need. Please contact Cynthia Breen, Board of Social Work Examiners and Professional Counselors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2392; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail [dlibsdsdp@mt.gov](mailto:dlibsdsdp@mt.gov).

3. GENERAL STATEMENT OF REASONABLE NECESSITY: Authority and implementation cites are being amended throughout the rules to accurately reflect all statutes implemented through the rules, to provide the complete sources of the board's rulemaking authority, and to delete references to repealed statutes.

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

24.219.301 DEFINITIONS (1) remains the same but is renumbered (5).  
(2) remains the same but is renumbered (1).  
~~(3) (8) "Qualified supervisor" means a licensed social worker, licensed psychologist, or a licensed and board-certified psychiatrist.~~ "Supervisor," when used

to refer to a person who supervises the work of an applicant for licensure, means a licensed clinical social worker, a licensed clinical professional counselor, a licensed psychologist, or a licensed and board-certified psychiatrist. A supervisor shall have three years of post-licensure experience or board-approved training in clinical supervision. A For social work applicants, a licensed psychologist or psychiatrist shall only qualify to supervise up to one half of the total post-graduate hours required, with a licensed social worker supervisor required for at least half and a supervisor holding the license for which the applicant has applied must supervise at least half of the total post-graduate hours required for licensure.

(4) remains the same but is renumbered (2).

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

(3) "Dual relationship" means a situation in which a licensee is in a professional role with a person and:

(a) at the same time is in another role with the same person;

(b) at the same time is in a relationship with a person closely associated with or related to the person with whom the licensee has the professional relationship; or

(c) promises to enter into another relationship in the future with the person or a person closely associated with or related to the person.

(4) "Exploitation" means the manipulation or use or the attempted manipulation or the attempted use of a professional relationship with a client, student, or supervisee for the licensee's emotional, financial, romantic, sexual or personal advantage or for the advancement of the licensee's personal, religious, political, or business interests.

(7) "Sexual contact" includes but is not limited to sexual intercourse, either genital or anal, cunnilingus, fellatio, or the handling of the breasts, genital areas, buttocks, or thighs, whether clothed or unclothed.

AUTH: 37-1-131, 37-22-201, MCA

IMP: 37-1-131, 37-22-102, ~~37-22-201~~, 37-23-101, 37-23-102, MCA

**REASON:** The board discovered that some applicants are not receiving the quality of supervision the board determined is necessary for licensure. The board also concluded that social work applicants should receive at least half of their post-graduate training from supervisors holding a social work license to ensure that applicants understand the methodology and generally accepted practices of social workers. The board is therefore amending the definition of "supervisor" accordingly and to achieve consistency in terminology used throughout the rules. The board is adding definitions for "dual relationship," "exploitation," and "sexual contact" to address confusion and clarify the unprofessional conduct rules.

#### 24.219.401 FEE SCHEDULE FOR SOCIAL WORKERS

(1) through (4) remain the same.

(5) Inactive license fee (based on annual renewal)

50

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

AUTH: 37-1-134, 37-22-201, ~~37-22-302~~, MCA

IMP: 37-1-134, 37-1-141, ~~37-22-301~~, 37-22-302, MCA

REASON: The board is amending ARM 24.219.401 and 24.219.405 to set reasonable annual fees for placing a social worker or professional counselor license on inactive status and renewing on inactive status. In reviewing board processes, department staff discovered that there is no separate process for maintaining an inactive license even though they involve less work and time than active licenses. Inactive licensees are currently required to pay \$100 for each year the license was on inactive status when they convert back to active status. The board determined it is reasonably necessary to reduce this fee to be commensurate with the actual costs of processing inactive licenses and to require the fee each year at renewal. The board estimates that the fee change will affect approximately 145 inactive social workers and professional counselors and will result in a decrease in annual board revenue of \$7250.

24.219.405 FEE SCHEDULE FOR PROFESSIONAL COUNSELORS

(1) through (4) remain the same.

(5) Inactive license fee (based on annual renewal)

50

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

AUTH: 37-1-134, 37-22-201, MCA

IMP: 37-1-134, 37-1-141, 37-23-206, MCA

24.219.501 APPLICATION PROCEDURES

(1) through (4) remain the same.

(5) Applicants shall be allowed a maximum of three attempts to successfully pass the examination.

(6) After the third attempt, if the applicant has not achieved a passing score, the applicant must request in writing to the board to retake the examination. The board may require the applicant to complete a preapproved remediation plan prior to additional exam administrations.

(7) If the applicant fails to satisfy the requirements for licensure within one year of the date the application is determined by the department to be complete, the application will expire, the application fee will be forfeited, and a new completed application and application fee will be required.

AUTH: 37-1-131, 37-22-201, MCA

IMP: 37-1-131, 37-22-301, MCA

REASON: The board determined it is reasonably necessary to amend this rule and ARM 24.219.601 to limit an applicant's retaking of the licensure examination. Licensing examination providers and the Association of Social Work Boards (ASWB) have discovered that individuals are taking the examinations multiple times in order to share examination questions and answers with others. The board considers the examination to be an important indicator of an applicant's competence and is amending this rule to adopt provisions of the Model Social Work Practice Regulations of the ASWB that will make it more difficult for these individuals to defeat the integrity of the examination. The board also concluded that applicants

legitimately attempting to pass the examination but who had failed a number of times had not demonstrated that they were minimally competent to practice. The board determined that the public would be better protected and the applicants better prepared if those applicants were required to develop a plan that would help them attain minimal competence prior to retaking the examination.

24.219.504 LICENSURE REQUIREMENTS (1) and (1)(a) remain the same.

(b) supervision, on a form approved by the board, which shall include at least 100 documented hours of individual or group supervision by a qualified supervisor. At least 50 percent of the 100 hours shall be individual and face-to-face by a licensed social worker, and at least ten hours of which includes direct observation of the service delivery. Each supervisory session shall be documented with ~~the following information:~~ a record of supervision. The applicant must maintain the record of supervision, which may be requested by the board and must include:

(i) and (ii) remain the same.

(iii) content summary (excluding confidential information);

(iv) evidence of the applicant's minimal competencies in the areas of an identified theory base, application of a differential diagnosis, establishing and monitoring a treatment plan, development and appropriate use of the professional relationship, assessing the client for risk of imminent danger, and implementing a professional and ethical relationship with clients and colleagues;

(v) content demonstrating the applicant's developing competence in the areas identified in (1)(b)(iv); and

(vi) attestation of the record of supervision by the supervisor. Falsification or misrepresentation of the record of supervision shall be considered unprofessional conduct and may result in discipline of the supervisor's license.

(c) through (2) remain the same.

AUTH: 37-1-131, 37-22-201, MCA

IMP: 37-1-131, 37-22-102, 37-22-201, 37-22-301, MCA

REASON: The board determined that the current requirements for documentation of applicants' supervision were often inadequate to show that the applicants were minimally competent to practice. The board concluded that having a more formal record of supervision would enable the board to make a better determination about a licensee's qualifications and ensure consistent quality of supervision. The board is amending this rule and ARM 24.219.604 to clearly and adequately set forth the information needed by the board. The board is also amending this rule to require that supervisors attest to the record of supervision to prevent application fraud and ensure that applicants receive the required supervision.

24.219.509 APPLICATION TO CONVERT AN INACTIVE STATUS LICENSE TO AN ACTIVE STATUS LICENSE AND CONVERSION FROM INACTIVE TO ACTIVE STATUS (1) A licensee may place a license on inactive status by either indicating on the renewal form that inactive status is desired, or by informing the board office, in writing, that an inactive status is desired. The license must have been active and in good standing prior to the first time it is placed on inactive status.



It is the sole responsibility of the inactive licensee to keep the board informed as to any change of address during the period of time the license remains on inactive status. Inactive licensees must pay the inactive license fee annually to maintain license status.

(2) A license shall not be on inactive status for more than five consecutive years. At the end of the fifth year that a license has been on inactive status, the license must be converted to active status. If the license is not converted to active status, the provisions of 37-1-141, MCA, apply to the renewal, lapse, expiration, or termination of the license.

~~(4)~~ (3) An inactive status license does not entitle the holder to practice as a licensed social worker in the state of Montana. Upon application and payment of the ~~appropriate fee~~ required fee in accordance with ARM 24.219.401, the board may ~~reactivate~~ convert an inactive license if the applicant does each of the following:

(a) signifies to the board in writing that, upon issuance of the active license, the applicant intends to be an active practitioner in the state of Montana; ~~and~~

(b) presents satisfactory evidence that the applicant has not been out of active practice for more than five years; and that the applicant has attended ~~20~~ 10 hours of continuing education per year of inactive status with a maximum of ~~40~~ 50 hours of continuing education which comply with the continuing education rules of the board, and is approved by the board. The continuing education hours must have been acquired within the 24 months immediately preceding application to ~~reactivate~~ convert to active status; and

(c) remains the same.

AUTH: 37-1-319, 37-22-201, MCA

IMP: 37-1-319, MCA

REASON: The board notes that current rules provide for converting inactive licenses to active licenses, but contain no provisions for placing a license on inactive status. The board is amending this rule and ARM 24.219.609 to specify processes for putting social worker and professional counselor licenses on inactive status to address licensee confusion and correct the omission from the rules. The board is amending the catchphrases of both rules to more accurately reflect the content.

24.219.601 APPLICATION PROCEDURE (1) through (4) remain the same.

(5) Applicants shall be allowed a maximum of three attempts to successfully pass the examination.

(6) After the third attempt, if the applicant has not achieved a passing score, the applicant must request in writing to the board to retake the examination. The board may require the applicant to complete a preapproved remediation plan prior to additional exam administrations.

(7) If the applicant fails to satisfy the requirements for licensure within one year of the date the application is determined by the department to be complete, the application will expire, the application fee will be forfeited, and a new completed application and application fee will be required.

AUTH: 37-1-131, 37-22-201, 37-23-103, MCA

IMP: 37-1-131, 37-23-202, MCA

REASON: See the reasonable necessity statement for ARM 24.219.501.

24.219.604 LICENSURE REQUIREMENTS (1) For the purpose of 37-23-202, MCA, a planned graduate program of study is one which requires 60 semester hours (90 quarter hours), primarily counseling in nature, six semester hours (nine quarter hours) of which were earned in an advanced counseling practicum which resulted in a graduate degree from an institution accredited to offer a graduate program in counseling. An institution accredited to offer such a degree program is a college or university accredited by various associations of colleges and secondary schools. The planned graduate program shall be recognized by the department chairman or an equivalent position. The applicant's planned graduate program shall meet the following minimum board requirements:

(a) an identifiable starting date evidenced by a letter of admission to the program, or other similar document;

(b) completion of current Council for Accreditation of Counseling and Related Educational Programs (CACREP) core courses as evidenced by submission of a summary sheet on education on a form prescribed by the board;

(c) acceptance of a maximum of 12 post-baccalaureate graduate semester (18 quarter) credits or up to 20 semester (30 quarter) credits of a completed graduate counseling degree transferred from other institutions or programs; and

(d) acceptance of credits granted six years or less from the applicant's date of graduation from the planned graduate program. ~~Credits shall be completed in the following areas:~~

~~(a) counseling theory;~~

~~(b) counseling techniques; and~~

~~(c) supervised counseling experience (this practicum shall be practica taken at the graduate school level which includes supervision by a counselor educator with a minimum of one hour of face-to-face consultation with the supervisor for every ten hours of practicum site experience) and at least six hours in each of the following areas:~~

~~(i) Human growth and development includes studies that provide a broad understanding of the nature and needs of individuals at all developmental levels. Emphasis is placed on psychological, sociological and physiological approaches. Also included are areas such as human behavior (normal and abnormal), personality theory and learning theory, and demonstrated competence and familiarity in the use of current professional diagnostic manuals.~~

~~(ii) Social and cultural foundations includes studies of change, ethnic groups, subcultures, changing roles of women, sexism, urban and rural societies, population patterns, cultural mores, use of leisure time and differing life patterns.~~

~~(iii) The helping relationship includes philosophic bases of the helping relationship, consultation theory and/or an emphasis on the development of counselor and client (or consultee) self-awareness and self-understanding.~~

~~(iv) Groups includes theory and types of groups, as well as descriptions of group practices, methods dynamics and facilitative skills. It includes either a supervised practice and/or a group experience.~~

~~(v) Life-style and career development includes areas such as vocational-choice theory, relationship between career choice and life-style, sources of occupational and educational information, approaches to career decision-making processes and career development exploration techniques.~~

~~(vi) Appraisal of the individual includes the development of a framework for understanding the individual, including methods of data gathering and interpretation, individual and group testing, case study approaches and the study of individual differences. Ethnic, cultural and sex factors are also considered.~~

~~(vii) Research and evaluation includes areas such as statistics, research design and development of research and demonstration proposals. It also includes understanding legislation relating to the development of research, program development and demonstration proposals, as well as the development and evaluation of program objectives.~~

~~(viii) Professional orientation includes goals and objectives of professional counseling organizations, codes of ethics, legal consideration, standards of preparation, certification and licensing and role identity of counselors.~~

~~(2) through (3)(g)(iii) remain the same.~~

~~(iv) a final log detailing dates and durations of supervisory contacts and issues discussed during these contacts may be requested by the board; a record of supervision must be maintained by the applicant and may be requested by the board in its review of the application. The record of supervision must include:~~

~~(A) date and length of supervision in increments not less than 15 minutes;~~

~~(B) names of applicant, supervisor (including type of license and number) and signatures of both;~~

~~(C) content summary (excluding confidential information);~~

~~(D) evidence of the applicant's minimal competencies in the areas of an identified theory base, application of a differential diagnosis, establishing and monitoring a treatment plan, development and appropriate use of the professional relationship, assessing the client for risk of imminent danger, and implementing a professional and ethical relationship with clients and colleagues;~~

~~(E) content demonstrating the applicant's developing competence in the areas identified in (3)(g)(iv)(D); and~~

~~(F) attestation of the record of supervision by the supervisor. Falsification or misrepresentation of the record of supervision shall be considered unprofessional conduct and may result in discipline of the supervisor's license.~~

~~(v) through (5) remain the same.~~

AUTH: 37-1-131, 37-22-201, ~~37-23-103~~, MCA

IMP: 37-1-131, 37-23-202, MCA

**REASON:** The board is amending (1) of this rule to specify the board's intent that the core courses in a professional counselor applicant's planned graduate program meet current and not past CACREP standards. The board is amending the supervision record requirements in (3) for the reasons stated for the proposed amendment of ARM 24.219.504.

24.219.609 APPLICATION TO CONVERT AN INACTIVE STATUS LICENSE TO AN ACTIVE STATUS LICENSE AND CONVERSION FROM INACTIVE TO ACTIVE STATUS

(1) A licensee may place a license on inactive status by either indicating on the renewal form that inactive status is desired, or by informing the board office, in writing, that an inactive status is desired. The license must have been active and in good standing prior to the first time it is placed on inactive status. It is the sole responsibility of the inactive licensee to keep the board informed as to any change of address during the period of time the license remains on inactive status. Inactive licensees must pay the inactive license fee annually to maintain license status.

(2) A license shall not be on inactive status for more than five consecutive years. At the end of the fifth year that a license has been on inactive status, the license must be converted to active status. If the license is not converted to active status, the provisions of 37-1-141, MCA, apply to the renewal, lapse, expiration, or termination of the license.

~~(4)~~ (3) An inactive status license does not entitle the holder to practice as a licensed professional counselor in the state of Montana. Upon application and payment of the appropriate fee required fee in accordance with ARM 24.219.405, the board may reactivate convert an inactive license if the applicant does each of the following:

(a) signifies to the board in writing that, upon issuance of the active license, the applicant intends to be an active practitioner in the state of Montana; and

(b) presents satisfactory evidence that the applicant has not been out of active practice for more than five years; and that the applicant has attended ~~20~~ 10 hours of continuing education per year of inactive status with a maximum of ~~40~~ 50 hours of continuing education which comply with the continuing education rules of the board, and is approved by the board. The continuing education hours must have been acquired within the 24 months immediately preceding application to ~~reactivate~~ convert to active status; and

(c) remains the same.

AUTH: 37-1-319, 37-22-201, ~~37-23-103~~, MCA

IMP: 37-1-319, MCA

REASON: See the reasonable necessity statement for ARM 24.219.509.

24.219.2101 HOURS, CREDITS, AND CARRY OVER (1) Each social work licensee of the Board of Social Work Examiners and Professional Counselors shall earn 20 clock hours of accredited continuing social work education ~~for~~ each year after 1985. The 20 clock hours required shall include a minimum of 2 clock hours of instruction in ethics. Clock hours or contact hours shall be the actual number of hours during which instruction was given.

(2) through (5) remain the same.

AUTH: 37-1-131, 37-1-319, 37-22-201, MCA

IMP: 37-1-131, 37-1-306, MCA

REASON: The board determined it is reasonable and necessary to amend this rule and ARM 24.219.2201 to require that all board licensees take continuing education (CE) in ethics. The board concluded that requiring that ethics comprise at least 2 of the required 20 clock hours of annual CE will remind licensees of their ethical obligations and keep them apprised of the generally accepted standards of professional conduct.

24.219.2201 HOURS, CREDITS, AND CARRY OVER (1) Each licensee of the Board of Social Work Examiners and Professional Counselors shall earn 20 clock hours of accredited continuing professional counselor education for each year after 1986. The 20 clock hours required shall include a minimum of 2 clock hours of instruction in ethics. Clock hours or contact hours shall be the actual number of hours during which instruction was given.

(2) through (5) remain the same.

AUTH: 37-1-131, 37-1-319, 37-22-201, MCA

IMP: 37-1-131, 37-1-306, MCA

REASON: See the reasonable necessity statement for ARM 24.219.2101.

24.219.2301 UNPROFESSIONAL CONDUCT FOR SOCIAL WORKERS

(1) ~~Violation of any of the following constitutes unprofessional conduct:~~ Any violation of this rule constitutes unprofessional conduct.

(2) A licensee shall not:

(a) through (c) remain the same.

~~(d) Have sexual relations with a client, solicit sexual relations with a client or to commit an act of sexual misconduct or a sexual offense if such act, offense or solicitation is substantially related to the qualifications, functions or duties of the licensee.~~ Accept as clients persons with whom he or she has engaged in sexual contact.

~~(e) Engage in sexual acts with a client or with a person who has been a client within the past 18 months. A licensee shall not provide social work services to a person with whom the licensee has had a sexual relation at any time.~~ Engage in sexual contact or a romantic relationship with current clients.

(f) Engage in sexual contact with a former client for at least three years after termination of professional services. The licensee who engages in such activity after three years following termination of professional services bears the burden of demonstrating that there has been no exploitation, in light of all relevant factors, including:

(i) the amount of time that has passed since professional services terminated;

(ii) the nature and duration of the professional services;

(iii) the circumstances of termination;

(iv) the client's personal history;

(v) the client's current mental status;

(vi) the likelihood of adverse impact on the client; and

(vii) any statements or actions made by the licensee during the defined professional relationship suggesting or inviting the possibility of a post-termination sexual or romantic relationship with the client.

(f) through (h) remain the same but are renumbered (g) through (i).

(i) Engage in a dual relationship with a client or former client if the dual relationship has the potential to compromise the client's well being, impair the licensee's objectivity and professional judgment, or creates or increases the risk of exploitation of the client. If a dual relationship arises as a result of unforeseeable and unavoidable circumstances, the licensee shall promptly take appropriate professional precautions. Appropriate professional precautions must ensure that the client's well being is not compromised and that no exploitation occurs and should include consultation, supervision, documentation, or obtaining written informed consent of the client.

(k) Participate in bartering, unless bartering is considered to be essential for the provision of services, negotiated without coercion, and entered into at the client's initiative and with the client's informed consent. Licensees who accept goods or services from clients as payment for professional services assume the full burden of demonstrating that this arrangement will not be detrimental to the client or the professional relationship.

(l) Falsify or misrepresent a record of supervision submitted in connection with an application for licensure.

AUTH: 37-1-131, 37-1-319, 37-22-201, MCA

IMP: 37-1-131, 37-1-306, 37-1-316, 37-1-319, 37-22-201, MCA

REASON: The board determined it is reasonably necessary to amend this rule and ARM 24.219.2305 to address confusion among readers through better organization and by clarifying certain types of unprofessional conduct. The board is also amending both rules to establish consistency in format and language between the unprofessional conduct rules of social workers and professional counselors.

The board has determined it is reasonably necessary to amend the prohibition on sexual contact with former clients. The board concluded that due to the severity of the harm caused by such relationships, eighteen months between ending professional services and sexual contact with a client is not sufficient to ensure the protection of the public. Therefore, the board is amending these rules to require a minimum of three years between terminating professional social work and counseling services and initiating sexual contact with a former client.

The board has noticed an increase in the number of complaints involving licensees and clients engaged in dual relationships. The board also concluded that in many cases, the resultant harm to the client is severe and the dual relationship impedes the client's ability to receive appropriate care. The board is amending these rules to adequately and clearly set forth the prohibition of some dual relationships as unprofessional conduct.

Studies recognizing the potential for bartering relationships to become harmful to clients have prompted national professional associations to restrict bartering in their codes of conduct. The board is amending these rules to restrict

bartering between licensees and clients and reduce the potential for client harm in professional relationships.

It is reasonably necessary to amend these rules and include the falsification of supervision records as unprofessional conduct to prohibit fraud by license applicants or their supervisors and to comply with proposed amendments to ARM 24.219.504 and 24.219.604.

24.219.2305 UNPROFESSIONAL CONDUCT FOR PROFESSIONAL COUNSELORS (1) ~~Violation of any of the following constitutes unprofessional conduct:~~ Any violation of this rule constitutes unprofessional conduct.

(2) A licensee shall not:

(a) through (c) remain the same.

~~(d) Have sexual relations with a client, solicit sexual relations with a client or to commit an act of sexual misconduct or a sexual offense if such act, offense or solicitation is substantially related to the qualifications, functions or duties of the licensee.~~ Accept as clients persons with whom he or she has engaged in sexual contact.

~~(e) Engage in sexual acts with a client or with a person who has been a client within the past 18 months. A licensee shall not provide licensed professional counselor services to a person with whom the licensee has had a sexual relation at any time.~~ Engage in sexual contact or a romantic relationship with current clients.

(f) Engage in sexual contact with a former client for at least three years after termination of professional services. The licensee who engages in such activity after three years following termination of professional services bears the burden of demonstrating that there has been no exploitation, in light of all relevant factors, including:

(i) the amount of time that has passed since professional services terminated;

(ii) the nature and duration of the professional services;

(iii) the circumstances of termination;

(iv) the client's personal history;

(v) the client's current mental status;

(vi) the likelihood of adverse impact on the client; and

(vii) any statements or actions made by the licensee during the defined professional relationship suggesting or inviting the possibility of a post-termination sexual or romantic relationship with the client.

~~(f) through (h) remain the same but are renumbered (g) through (i).~~

(i) Engage in a dual relationship with a client or former client if the dual relationship has the potential to compromise the client's well being, impair the licensee's objectivity and professional judgment, or creates or increases the risk of exploitation of the client. If a dual relationship arises as a result of unforeseeable and unavoidable circumstances, the licensee shall promptly take appropriate professional precautions. Appropriate professional precautions must ensure that the client's well being is not compromised and that no exploitation occurs and should include consultation, supervision, documentation, or obtaining written informed consent of the client.

(k) Participate in bartering, unless bartering is considered to be essential for the provision of services, negotiated without coercion, and entered into at the client's initiative and with the client's informed consent. Licensees who accept goods or services from clients as payment for professional services assume the full burden of demonstrating that this arrangement will not be detrimental to the client or the professional relationship.

(l) Falsify or misrepresent a record of supervision submitted in connection with an application for licensure.

AUTH: 37-1-131, 37-1-319, 37-22-201, ~~37-23-103~~, MCA

IMP: 37-1-131, 37-1-316, 37-1-319, MCA

REASON: See the reasonable necessity statement for ARM 24.219.2301.

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 Social Work Examiners and Professional Counselors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to [dlibsdsdp@mt.gov](mailto:dlibsdsdp@mt.gov), and must be received no later than 5:00 p.m., January 28, 2009.

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.swpc.mt.gov](http://www.swpc.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 that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Social Work Examiners and Professional Counselors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to [dlibsdsdp@mt.gov](mailto:dlibsdsdp@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 SOCIAL WORK EXAMINERS  
AND PROFESSIONAL COUNSELORS  
LINDA CRUMMET, LCSW, PRESIDENT

/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 December 15, 2008

BEFORE THE DEPARTMENT OF LIVESTOCK  
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PROPOSED
ARM 32.23.301, pertaining to fees	)	AMENDMENT
charged by the department on the	)	
volume on all classes of milk	)	NO PUBLIC HEARING
	)	CONTEMPLATED

TO: All Concerned Persons

1. On January 24, 2009, the Department of Livestock proposes to amend the above-stated rule.

2. The Department of Livestock will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Livestock no later than 5:00 p.m. on January 16, 2009 to advise us of the nature of the accommodation that you need. Please contact Christian Mackay, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001; phone: (406) 444-9321; TTD number: 1 (800) 253-4091; fax: (406) 444-1929; e-mail: cmackay@mt.gov.

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

32.23.301 LICENSEE ASSESSMENTS (1) through (1)(b) remain the same.

(c) A fee of ~~\$0.03~~ \$0.025 per hundredweight on the total volume of all milk subject to the Milk Control Act sold by a producer.

(d) A fee of ~~\$0.03~~ \$0.025 per hundredweight on the total volume of milk subject to the Milk Control Act sold by a distributor, excepting that which is sold to another distributor.

(e) A fee of ~~\$0.15~~ \$0.155 per hundredweight per month, with a minimum of \$50.00 per month, whichever is greater, or a maximum of \$1,050.00 per month, on the volume of all classes of milk produced and sold by a person licensed by the department, to be used for the administration of the milk inspection and milk diagnostic laboratory functions of the department.

(i) remains the same.

AUTH : 81-23-104, 81-23-202, MCA  
IMP: 81-23-103, 81-23-202, MCA

REASON: The rule is being amended to change fees that are currently charged by the Department of Livestock for administration of milk inspections and the milk diagnostic laboratory and the fee currently charged to fund the Milk Control Bureau. This fee change will not impact the 80 milk producers involved as it is reducing the assessment on the producers to fund the milk bureau by \$0.005 and increasing the

assessment on the producers by the same amount, (\$0.005) for the diagnostic laboratory and milk inspections. The department estimates the fee changes will affect approximately 80 persons and will result in no change in annual revenue.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Christian Mackay, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001, by faxing to (406) 444-1929, or by e-mailing to [cmackay@mt.gov](mailto:cmackay@mt.gov) to be received no later than 5:00 p.m. January 21, 2009.

5. If persons who are directly affected by the proposed action wish to express their data, views, and arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written comments they have to the same address as above. The written request for hearing must be received no later than 5:00 p.m. January 21, 2009.

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 public hearing will be held at a later date. Notice of the public hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be more than 25, based upon the population of the state.

7. An electronic copy of this proposal notice is available through the department's site at [www.mt.gov/liv](http://www.mt.gov/liv).

8. The Montana Department of Livestock maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by this department. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies the area of interest that the person wishes to receive notices regarding. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Christian Mackay, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001; faxed to (406) 444-1929 "attention Christian Mackay"; or e-mailed to [cmackay@mt.gov](mailto:cmackay@mt.gov). Request forms may also be completed at any rules hearing held by the department.

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

DEPARTMENT OF LIVESTOCK

BY: /s/ Christian Mackay  
Christian Mackay  
Executive Officer  
Board of Livestock  
Department of Livestock

BY: /s/ Carol Grell Morris  
Carol Grell Morris  
Rule Reviewer

Certified to the Secretary of State December 15, 2008.

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

In the matter of the amendment of ) NOTICE OF PROPOSED  
ARM 37.86.2405, 37.86.2505, and ) AMENDMENT  
37.86.2605 pertaining to Medicaid )  
transportation reimbursement for ) NO PUBLIC HEARING  
mileage ) CONTEMPLATED

TO: All Concerned Persons

1. On January 23, 2009, the Department of Public Health and Human Services proposes to amend the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on January 5, 2009, to advise us of the nature of the accommodation that you need. Please contact Rhonda Lesofski, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.86.2405 TRANSPORTATION AND PER DIEM, REIMBURSEMENT

(1) The department pays the lower of the following reimbursement rates for transportation services:

(a) remains the same.

(b) the department's Personal and Commercial ~~Transportation and Per Diem Fee Schedule~~ adopted in this rule.

(2) The department adopts and incorporates by reference the department's ~~Personal Transportation Fee Schedule effective July 2008~~ which Montana Medicaid Fee Schedule, Personal and Commercial Transportation dated October 2008 that sets forth the reimbursement rates for transportation, per diem, and other Medicaid services. A copy of the department's fee schedule is posted at the Montana Medicaid provider web site at <http://medicaidprovider.hhs.mt.gov>. A copy of the fee schedule may also be obtained from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(3) and (4) remain the same.

(5) Mileage for transportation in a personally owned vehicle is reimbursed at the rate provided in the department's personal and commercial transportation fee schedule.

AUTH: 53-2-201, 53-6-113, MCA  
IMP: 53-6-101, 53-6-113, 53-6-141, MCA

37.86.2505 SPECIALIZED NONEMERGENCY MEDICAL TRANSPORTATION, REIMBURSEMENT (1) through (1)(b) remain the same.

(2) The department adopts and incorporates by reference the department's fee schedule dated ~~July~~ October 2008 which sets forth the reimbursement rates for specialized nonemergency medical transportation services and other Medicaid services. A copy of the fee schedule is posted at the Montana Medicaid provider web site at <http://medicaidprovider.hhs.mt.gov>. A copy of the department's fee schedule may be obtained from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

AUTH: 53-2-201, 53-6-113, MCA  
IMP: 53-6-101, 53-6-113, 53-6-141, MCA

37.86.2605 AMBULANCE SERVICES, REIMBURSEMENT (1) through (1)(b) remain the same.

(2) The department adopts and incorporates by reference the ~~department's Ambulance Montana Medicaid Fee Schedule, Ambulance effective July dated~~ October 2008. A copy of the fee schedule is posted at the Montana Medicaid provider web site at <http://medicaidprovider.hhs.mt.gov>. A copy of the department's fee schedule may be obtained from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(3) through (4) remain the same.

AUTH: 53-2-201, 53-6-113, MCA  
IMP: 53-6-101, 53-6-113, 53-6-141, MCA

4. The Department of Public Health and Human Services (the department) is proposing the amendment of ARM 37.86.2405, 37.86.2505, and 37.86.2605 pertaining to Medicaid transportation reimbursement for mileage, including ambulance mileage. The proposed changes would increase the mileage reimbursement amount for personal medical transportation from \$0.25 to \$0.33 per mile, commercial and specialized nonemergency from \$0.79 to \$1.04 and would also increase the ambulance ground transportation rate from \$2.79 to \$3.68 per mile. The increased mileage rates would be applied retroactively to October 1, 2008.

The proposed amendments are necessary to compensate for rising fuel costs. The increased mileage rates are intended to preserve health care access for Montana Medicaid recipients.

If the department did not amend these rules to increase mileage rates, rising fuel costs will eventually make it too expensive for transportation providers and Medicaid

recipients to travel to distant locations for medically necessary services. Montana is a geographically large state with a relatively small population. Medical services are concentrated in a few of the largest population centers. The department is concerned that Medicaid recipients' access to medically necessary services could be restricted by rising fuel costs. The proposed changes in mileage rates are the best way to keep fuel costs from becoming a barrier to medically necessary travel.

Fiscal effects

The department estimates that in State Fiscal Year (SFY) 2008, the proposed amendments will increase Montana Medicaid expenditures a total of \$355,792. Estimated federal and state general fund cost increases for the proposed rule changes would be:

<u>SFY 2009</u>	<u>PROGRAM</u>	<u>FEDERAL</u>	<u>STATE</u>	<u>TOTAL</u>
ARM 37.86.2405	Transportation/Per Diem	\$238,909	\$112,221	\$351,130
ARM 37.86.2505	Specialized Nonemergency Transportation	\$742	\$349	\$1,091
ARM 37.86.2605	Ambulance	\$2,429	\$1,141	\$3,571

Number of persons affected

The proposed rule changes could affect an estimated 102,400 Medicaid recipients, 33 commercial and nonemergency transportation providers, and 119 ambulance providers.

The department intends to apply the transportation rate increases retroactively to October 1, 2008. No detrimental effects to affected persons would result from retroactive application.

5. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: Rhonda Lesofski, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., January 21, 2009.

6. 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 to Rhonda Lesofski at the above address no later than 5:00 p.m., January 21, 2009.

7. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons 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 directly affected has been determined to be 25 persons based on 102,552 Medicaid recipients and providers.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

9. An electronic copy of this Proposal Notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State 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 Secretary of State works 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.

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

/s/ John Koch  
Rule Reviewer

/s/ Anna Whiting Sorrell  
Anna Whiting Sorrell, Acting Director  
Public Health and Human Services

Certified to the Secretary of State December 15, 2008.



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

In the matter of the adoption of New Rules I through IX pertaining to mental health center services for youth with serious emotional disturbance (SED) ) NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On January 14, 2009, at 3:00 p.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed adoption of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on January 5, 2009, to advise us of the nature of the accommodation that you need. Please contact Rhonda Lesofski, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

RULE I MENTAL HEALTH CENTER SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE, DEFINITIONS For purposes of this subchapter, the following definitions apply:

(1) "Community-based psychiatric rehabilitation and support (CBPRS)" means rehabilitation services provided in home, school, and community settings for youth with serious emotional disturbance. Services are provided by trained mental health personnel under the supervision of a licensed mental health professional and according to a rehabilitation plan.

(2) "Comprehensive school and community treatment" is defined in ARM 37.86.2224.

(3) "In-training mental health professional services" are services provided under the supervision of a licensed mental health professional by an individual who has completed all academic requirements for licensure as a psychologist, clinical social worker, or licensed professional counselor and is in the process of completing the supervised experience requirement for licensure.

(4) "Licensed mental health center" is defined in ARM 37.87.102. For purposes of this subchapter the following provisions also apply:

(a) For a mental health center to be licensed, there are specific services that must be provided to its clients in accordance with ARM 37.106.1906.

(b) A mental health center may provide other appropriate services with an endorsement by the department in accordance with ARM 37.106.1906.

(5) "Mental health center services for youth with serious emotional disturbance" reimbursed by Medicaid means community-based psychiatric rehabilitation and support services, comprehensive school and community treatment programs, day treatment services, in-training mental health professional services, outpatient therapy services, mental health professional services, and targeted case management services.

(6) "Mental health professional" is defined in ARM 37.87.102.

(7) "Outpatient therapy service" is defined in ARM 37.87.102.

(8) "Serious emotional disturbance (SED)" criteria are defined in ARM 37.87.303.

(9) "Treatment day" means a calendar day, including night, daytime, or evening, during which a youth receives services according to applicable requirements.

(10) "Youth" is defined in ARM 37.87.102.

(11) "Youth day treatment" means a program which provides, in accordance with mental health center license requirements, an integrated set of mental health, education, and family intervention services to youth with serious emotional disturbance.

AUTH: 53-2-201, 53-6-101, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, MCA

#### RULE II MENTAL HEALTH CENTER SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE, PROVIDER REQUIREMENTS

(1) These requirements are in addition to those rule provisions generally applicable to Medicaid providers.

(2) Mental health center services may be provided only by a facility which is licensed as a mental health center defined in ARM 37.87.102.

(3) Provider requirements contained in ARM 37.88.905 are incorporated and referenced for mental health center services for youth with serious emotional disturbance.

AUTH: 53-2-201, 53-6-101, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, MCA

#### RULE III MENTAL HEALTH CENTER SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE, COVERED SERVICES (1) Mental health center services for youth with serious emotional disturbance include:

(a) Community-based psychiatric rehabilitation and support services:

(i) are provided on a face-to-face basis primarily with a youth, or on a face-to-face basis with family members, teachers, employers, or other key individuals in the youth's life when such contacts are clearly necessary to meet goals established in the youth's individual rehabilitation treatment plan;

(ii) have as their purpose:

(A) the maximum attainment of mental functioning;

(B) the minimization or elimination of deterioration in mental functional status;

and

(C) the maintenance of mental health functional status of a youth.

(iii) must be prior authorized by the department or its designee to be provided in comprehensive school and community treatment programs, day treatment, partial hospitalization, therapeutic group home facilities, therapeutic foster homes, therapeutic family homes, or other residential facilities in accordance with all of the following:

(A) youth with extraordinary behavioral needs whose behaviors have not resulted in criminal or status offenses may be eligible for community-based psychiatric rehabilitation and support;

(B) proposed services must be reviewed on a case-by-case basis by the department or its designee to determine the medical necessity and number of units authorized as defined in (1)(a)(ii); and

(C) sufficient documentation supporting the medical necessity for the additional services must be provided by the requestor.

(iv) excludes the following services except as provided in (1)(a)(iii):

(A) interventions provided in a hospital, skilled nursing facility, intermediate nursing facility, or psychiatric residential treatment facility;

(B) case planning activities, including but not limited to, attending meetings, completing paperwork and other documentation requirements, and traveling to and from the youth's home, or other location;

(C) therapeutic interventions by licensed mental health professionals, regardless of the location of the service;

(D) activities that are purely recreational in nature;

(E) services provided within the school classroom that are educational, including but not limited to educational aides;

(F) habilitation services; and

(G) services within day treatment, therapeutic group home, therapeutic foster home, therapeutic family home, or other residential facilities solely for the purpose of staff safety.

(b) Comprehensive school and community treatment in accordance with ARM 37.86.2224.

(c) Youth day treatment services as defined in [RULE I].

(d) In-training mental health professional services as defined in [RULE I]. Such services must be supervised by a licensed mental health professional in the same field, and, other than licensure, the services are subject to the same requirements that apply to licensed mental health professionals.

(e) Outpatient therapy services such as:

(i) psychotherapy and related services provided by a mental health professional acting within the scope of the professional's license; and

(ii) family therapy, if medically necessary for the treatment of the Medicaid eligible youth who is involved in the family therapy:

(A) family therapy may be provided with or without the Medicaid eligible youth present;

(B) adequate documentation must be present to document the direct benefit to the Medicaid eligible youth in accordance with the treatment plan;

(C) individual and family therapy are targeted at reducing or eliminating symptoms or behaviors related to a youth's mental health diagnosis as specified in the treatment plan;

(D) the mental health professional is required to develop and implement a treatment plan for the youth and family; and

(E) individual therapy includes diagnostic interviews where testing instruments are not used.

(f) Targeted case management services in accordance with Title 37, chapter 86, subchapter 37.

(g) Mental health professional services provided according to mental health center licensing requirements as part of mental health center services.

(i) To the extent otherwise permitted by applicable Medicaid rules, such mental health professional services may be billed by the mental health center either as mental health center services or by the mental health professional under the applicable Medicaid category of service, but may not be billed as both mental health center services and mental health professional services.

(ii) Mental health professional services may be covered and reimbursed by Medicaid only if the mental health professional is enrolled as a provider and the services are provided according to the Medicaid rules and requirements applicable to the mental health professional's category of service and within the scope of practice, including but not limited to medication management.

(iii) Mental health center services covered by the Medicaid program include the medical director component of a physician's services to a mental health center, but do not include the professional component of physician services covered in ARM 37.86.101, 37.86.104, and 37.86.105. The professional component of physician services may be billed according to the provisions of (1)(g)(i) or ARM 37.86.101, 37.86.104, and 37.86.105.

AUTH: 53-2-201, 53-6-101, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, MCA

#### RULE IV MENTAL HEALTH CENTER SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE, NONCOVERED SERVICES

(1) Mental health professional services, provided in a hospital on an inpatient basis, that are covered by Medicaid as part of the diagnosis related group (DRG) payment under ARM 37.86.2907 are not reimbursable as mental health center services. These noncovered services include:

(a) mental health professional services provided by mental health professionals who are staff members of a mental health center which has a contract with a hospital involving consideration;

(b) services provided for purposes of discharge planning as required by 42 CFR part 482.43; and

(c) services including but not limited to group therapy that are required as a part of hospital licensure or certification.

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

RULE V MENTAL HEALTH CENTER SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE, REIMBURSEMENT (1) Medicaid

reimbursement for mental health center services shall be the lowest of:

- (a) the provider's actual (submitted) charge for the service; or
- (b) the rate established in the Medicaid Mental Health and Mental Health Services Plan, Individuals Under 18 Years of Age Fee Schedule adopted in ARM 37.86.2207.

(2) For day treatment services, Medicaid will not reimburse a mental health center provider for more than one fee per treatment day per youth. This does not apply to mental health professional services to the extent such services are separately billed in accordance with these rules or targeted case management services for youth with serious emotional disturbance.

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

RULE VI MENTAL HEALTH SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE (SED) RESPITE CARE SERVICES, DEFINITION

For purposes of this subchapter, the following definitions apply:

- (1) "Respite care" means relief services that allow family members, who are regular care givers of a youth with a serious emotional disturbance (SED), to be relieved of their care giver responsibilities for a temporary, short-term period.
- (2) "SED" criteria are defined in ARM 37.87.303.
- (3) "Youth" is defined in ARM 37.87.102.

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

RULE VII MENTAL HEALTH SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE (SED) RESPITE CARE SERVICES, LIMITATIONS

- (1) Respite care services may be provided only on a short term basis, such as part of a day, weekends, or vacation periods.
- (2) Respite care services may be provided in a youth's place of residence or through placement in another private residence or other related community setting, excluding psychiatric residential treatment facilities.
- (3) Respite care services are limited to available funding each state fiscal year.
  - (a) Retroactive funds for respite care services are not available.
- (4) Youth must meet SED criteria and must also be receiving Medicaid funded mental health services.

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

RULE VIII MENTAL HEALTH SERVICES FOR YOUTH WITH SERIOUS

EMOTIONAL DISTURBANCE (SED) RESPITE CARE SERVICES, PROVIDER PARTICIPATION

(1) Licensed and enrolled mental health centers may provide respite care services upon approval of enrollment and according to the written provider agreement between the provider and the department and the requirements of this subchapter.

(2) The provisions of ARM 37.85.402 shall apply for purposes of provider enrollment. Providers must enroll with the department's Medicaid fiscal agent in the same manner and according to the same requirements applicable under the Montana Medicaid program. The department may accept current Medicaid enrollment for purposes of enrollment, if the provider agrees, in a form acceptable to the department, to be bound by applicable requirements.

(3) For purposes of enrollment, providers must be and remain enrolled in the Montana Medicaid program for the same category of service and must meet the same qualifications and requirements that apply to the provider's category of service under the Montana Medicaid program.

(4) All providers of mental health services must maintain records which fully demonstrate the extent, nature, and medical necessity of services provided to youth with SED. These records must be retained for a period of at least six years and three months from the date of service in accordance with ARM 37.85.414.

(5) The provider of respite care services must ensure that its employees providing the services are:

- (a) physically and mentally qualified to provide this service to the youth;
- (b) aware of emergency assistance systems and crisis plans;
- (c) knowledgeable of the physical and mental conditions of the youth;
- (d) knowledgeable of common medications and related conditions of the youth; and
- (e) capable of administering basic first aid.

AUTH: 53-2-201, 53-6-101, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, MCA

RULE IX MENTAL HEALTH SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE (SED) RESPITE CARE SERVICES, PROVIDER REIMBURSEMENT

(1) Respite care services are non-Medicaid funded services except for youth with SED enrolled in the Psychiatric Residential Treatment Facility Waiver in accordance with ARM 37.87.1303 through 37.87.1343.

(2) Providers' claims for respite care services provided to youth with SED must be submitted to the department's Medicaid Management Information System (MMIS) contractor according to requirements set forth in ARM 37.85.406. Payments will be made to the provider through the department's MMIS contractor.

(3) Reimbursement for respite care services is as provided in Medicaid Mental Health and Mental Health Services Plan, Individuals Under 18 Years of Age Fee Schedule, as adopted in ARM 37.86.2207.

(4) Providers of respite care services must accept the amounts payable under this rule as payment in full for the respite care services provided to youth with SED.

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

4. The Department of Public Health and Human Services (department) is proposing new Rules I through V for mental health center services for youth with SED as part of the reorganization of the mental health rules for youth with SED. This is part of the department's effort to separate rules providing for youth mental health services from those for adult mental health services. The proposed new rules are necessary to improve the administration of mental health center services for youth that are complicated by ambiguous rules related to covered services and eligibility. The department took this opportunity to edit and punctuate the mental health center services rules to make them easier to read and interpret. The proposed rules will not increase or decrease provider reimbursement or recipient benefits.

The department is also proposing new Rules VI through IX for respite care services provided to youth with SED. Respite care services are reimbursed by non-Medicaid funds. Mental health centers are currently the providers of the services. These new rules would govern respite services, limitations, provider participation, and reimbursement.

#### RULE I

Proposed new Rule I would include the definitions pertaining solely to mental health center services. Many of the definitions currently found in the existing mental health center rules that are combined for youth and adults have been included in this proposed new rule. The department's alternative to the proposed changes was to leave the mental health center rules for adults and youth in one chapter of the rules. The department did not choose this alternative because it is currently difficult for consumers and providers to locate rules for youth with SED. Department staff will more readily be able to maintain the rule set and maintain federal and state compliances should requirements change.

#### RULE II

Proposed new Rule II would contain requirements mental health centers must meet to provide services to Montana Medicaid eligible youth with SED. To avoid redundancy, the department proposes to incorporate by reference those provider requirements contained in ARM 37.88.905.

#### RULE III

The department proposes this new rule to outline the covered services provided by a mental health center to Medicaid eligible youth with SED. The proposed rule would define community-based psychiatric rehabilitation and support services (CBPRS) and would contain criteria for when these services may be prior authorized by the department or its designee in certain situations. In addition, many of the services

currently in the existing mental health center rules that are combined for youth and adults have been included in this new proposed rule.

#### RULE IV

The department is proposing new Rule IV to list those services that are not reimbursable under Montana Medicaid. This language is based on ARM 37.88.906 that is combined for youth and adults. No additional noncovered services would be added.

#### RULE V

Proposed reimbursement for mental health center services to youth with SED in new Rule V would be applicable to youth with SED and similar to the current language in the existing ARM 37.88.907 that is combined for youth and adults. The proposed rule for day treatment services would specify that Medicaid will not reimburse a mental health center provider for more than one fee per treatment day per youth. This would not apply to mental health professional services to the extent that such services are separately billed in accordance with these rules or targeted case management rules for youth with SED.

#### RULE VI

The department is proposing new Rule VI to describe respite care services as relief services that would allow family members who are regular care-givers of the youth with SED to be relieved temporarily of their care giver responsibilities.

#### RULE VII

The department is proposing new Rule VII to assist providers, consumers, and advocates in understanding the limitations of non-Medicaid funded respite care services. The services would be limited to available funding per each state fiscal year and the youth with SED must currently be receiving Medicaid funded mental health services. Funding for these services is limited and the department wishes to make clear that they are not an entitlement.

#### RULE VIII

The department is proposing new Rule VIII to help mental health centers clearly understand their requirements as respite care service providers. The provider must be a licensed mental health center and be enrolled as a Medicaid provider through our fiscal agent even though reimbursement comes entirely from state funds. The provider must maintain records fully demonstrating the extent, nature, and medical necessity of respite care services provided to youth with SED. The provider must ensure that its employees providing respite services are physically and mentally qualified to provide this service to the youth, are aware of emergency assistance systems and crisis plans, are knowledgeable of the physical and mental conditions



of the youth, knowledgeable of common medications and related conditions of the youth, and capable of administering basic first aid.

### Rule IX

The department is proposing new Rule IX to specify that respite care services are non-Medicaid funded services and are paid through the department's MMIS contractor. The respite care service code is included on the fee schedule for Medicaid Mental Health and Mental Health Services Plan for Individuals under 18 years of age. Reimbursement is considered payment in full and a respite care provider who accepts reimbursement by the state under this rule may not bill others for any part of the service.

### Persons and entities affected

In state fiscal year (SFY) 2008, there were ten mental health centers providing respite care services and 572 youth receiving respite services yearly in the state of Montana. All could be affected by the proposed changes.

### Fiscal and benefit effects

The department does not expect the proposed new rules to increase or decrease fees, costs, or benefits. No fiscal or benefit effects are expected because the proposed rules are intended to reorganize and clarify rules for existing services. In SFY 2008, the department paid \$353,562.61 for respite care services.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Rhonda Lesofski, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., January 22, 2009.

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

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this Proposal Notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of

State 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 Secretary of State works 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.

/s/ John Koch  
Rule Reviewer

/s/ Anna Whiting Sorrell  
Anna Whiting Sorrell, Acting Director  
Public Health and Human Services

Certified to the Secretary of State December 15, 2008.

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM ) NOTICE OF PUBLIC  
42.13.601 relating to small brewery closing ) HEARING ON PROPOSED  
time restrictions ) AMENDMENT

TO: All Concerned Persons

1. On January 14, 2009, at 1:00 p.m., a public hearing will be held in the 4 East Conference Room on the Fourth Floor of the Sam W. Mitchell Building, at Helena, Montana, to consider the amendment of the above-stated rule.

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

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Revenue no later than 5:00 p.m., January 5, 2009, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-3696; or e-mail canderson@mt.gov.

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

42.13.601 SMALL BREWERY RESTRICTIONS (1) through (3) remain the same.

(4) Product samples for on-premises consumption may not be sold, offered for sale, or given away before 10 a.m. or after 8 p.m.

(5) On-premises consumption and possession shall not be permitted before 10 a.m. or after 10 p.m. The brewery shall be responsible for removing all product samples from patrons' possession in order to comply with this provision.

(6) A small brewery may sell growlers. A growler is any refillable, resealable container that a brewer fills on the brewery premises for off-premises consumption.

AUTH: 16-1-303, MCA

IMP: 16-3-213, 16-3-214, MCA

REASONABLE NECESSITY: On October 30, 2008, the department conducted a negotiated rulemaking meeting with brewery owners and law enforcement officers to discuss a reasonable time for the concluding consumption of samples in the breweries in Montana. The proposed amendments shown above in ARM 42.13.601 are a result of that meeting.

The proposed amendments are necessary to provide a specific time period

that all consumption must have occurred so that local law enforcement and state investigators will be able to appropriately determine if there has been a violation of the law and rules. An end to consumption time is necessary for enforcement efficiency and certainty and to ensure that all sales for on-premises consumption occur within the stated hours. Accordingly, the health, safety, and welfare of Montana citizens are protected by providing regulatory certainty with respect to sales and consumption.

New section (6) is necessary to clarify that breweries may sell growlers and patrons may only consume a growler off-premise. The rule is necessary to confirm that the licensed activity of selling brewery samples in a customer provided container is permissible, but that container must be sealable and not consumed on the premises. The restriction of consumption on premises is necessary to ensure that the on-premises consumption limits are enforceable. Accordingly, the health, safety, and welfare of the citizens of Montana are protected by providing regulatory certainty with respect to containers.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-3696; or e-mail [canderson@mt.gov](mailto:canderson@mt.gov) and must be received no later than January 23, 2009.

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

6. An electronic copy of this Notice of Public Hearing is available through the department's site on the World Wide Web at [www.mt.gov/revenue](http://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 Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its 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.

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

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply. The department checked the Legislative Registry of the Secretary of State and did not find the bill sponsor's name on the list requesting notification of rule actions after leaving office.

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

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

Certified to Secretary of State December 15, 2008

BEFORE THE DEPARTMENT OF ADMINISTRATION  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM ) NOTICE OF AMENDMENT AND  
2.5.502 and adoption of New Rule I ) ADOPTION  
pertaining to contract security )

TO: All Concerned Persons

1. On November 6, 2008, the Department of Administration published MAR Notice No. 2-5-407 regarding the proposed amendment and adoption of the above-stated rules at page 2310 of the Montana Administrative Register, Issue No. 21. On November 26, 2008, a public hearing was held on the proposed rule amendment and adoption. Several comments were received by the December 5, 2008, deadline.

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

COMMENT 1: Proposed NEW RULE I appears to impose a mandatory obligation upon agencies to state that security can be released, even if the contract has not been satisfactorily performed. The proposed wording does not appear to contemplate the situation where the contract has not been fully performed, or there is an unexpired warranty period, or there is some dispute between the agency and the contractor in which release of the security is not appropriate.

Rather than using the phrase "stating that," the commenter suggested that the phrase "stating whether" would be more appropriate, and allow an agency to identify that a problem or dispute exists regarding the contract.

RESPONSE 1: The department's intent was to require notification regarding the successful completion of a contract that required performance security, including any warranty period. To clarify the intent and process, the department has revised both NEW RULE I (ARM 2.5.305) and ARM 2.5.502 as shown below.

COMMENT 2: If the language in proposed NEW RULE I is changed as suggested, then there will need to be a modification to the proposed amendments to ARM 2.5.502(8). As proposed, there will be an automatic return of the contract security (other than of bonds) triggered by receipt of an agency's notice under NEW RULE I. ARM 2.5.502(8) could be modified to provide for return of the security upon receipt of notification of the agency's waiver of rights and claims to the security.

RESPONSE 2: ARM 2.5.502 has been revised to more clearly state that required contract security is to be returned only after an agency waives all rights and claims to the performance security.

COMMENT 3: The "expiration of the contract" may not always be the appropriate trigger to start the 30-day clock running for notification by the agency to the Department of Administration. A contract (or a portion of a contract) may be completed early, and it may be appropriate to release security before the term of the contract has expired, if the contractor has fully and successfully performed. The commenter suggested that instead of using the language "Within 30 days of" that the department consider instead the phrase "Not later than 30 days after." Making the change will give an agency the ability to provide the notice of release of claims against the contract security as soon as the agency is ready to do so, irrespective of whether the contract term has expired or not.

RESPONSE 3: The department concurs and has made the suggested change.

COMMENT 4: Finally, the commenter is unclear whether the "expiration of the contract" trigger was intended to mean the expiration of any warranty period provided by the contract. It may be that if an agency can notify the Department of Administration that because of a warranty period, the agency is not waiving its rights and claim to the security, then that is sufficient. If some other approach is ultimately adopted by the Department of Administration, however, then that approach ought to take into account the fact that the warranty period may well exceed the duration of the contract's term.

RESPONSE 4: Typically, when a warranty is required, the contract will be written so that expiration date of the contract and warranty will coincide. In cases where a warranty period extends beyond the contract period, the contract should specify that the required security will be held until the successful completion of the warranty period. The rules have been amended to take this possible situation into account.

3. In addition to the changes to the rules based on comments received, the department has revised the rules as proposed to 1) clarify that notification shall be made to an agency's own contracting office if the contract originated with that office, and 2) specify that if a claim against the contract security is being considered, that the office originating the contract shall be notified.

4. The department has amended and adopted the rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

2.5.502 BID, PROPOSAL, AND CONTRACT PERFORMANCE SECURITY

(1) through (7)(g) remain as proposed.

(8) The division shall timely return to the contractor all contract performance security, except bonds, following ~~the division's receipt of the notice~~ notification to the division that:

(a) the contract was satisfactorily completed; and

(b) the agency waives all rights and claims to the performance security as described in ARM 2.5.305.

AUTH: 18-4-221, 18-4-312, MCA  
IMP: 18-1-201, 18-4-312, MCA

RULE I (2.5.305) COMPLETION NOTIFICATION FOR CONTRACTS WITH PERFORMANCE SECURITY (1) ~~Within 30 days of the expiration of~~ When a contract requiring performance security ends, regardless of the reason, the contracting agency shall provide written notification ~~stating that to:~~

(a) the division, if the contract was established through the State Procurement Bureau; or

(b) the agency's contracting office, if the contract was established under the agency's delegated authority.

(2) This written notification shall be provided:

(a) not later than 30 days after the ending date of the contract; or

(b) if a warranty period that extends beyond the end of the contract term is specified in the contract, not later than 30 days after the ending date of the warranty.

(3) The required notification shall include, at a minimum, the following information:

(a) whether the contract has been successfully performed and, if a warranty period is specified in the contract, that no claims are pending under the warranty; and

(b) whether the agency waives all rights and claims to the contract security.

(4) If the contract was not satisfactorily completed, and a claim against the performance security is being considered, timely notification of such a situation shall be made to:

(a) the division, if the contract was established through the State Procurement Bureau; or

(b) the agency's contracting office, if the contract was established under the agency's delegated authority.

~~(2) If the contract was established through the State Procurement Bureau, the notification shall be provided to the division. If the contract was established within an agency's delegated authority, the notification shall be provided to the agency's contracting office.~~

AUTH: 18-4-221, 18-4-312, MCA  
IMP: 18-4-312, MCA

By: /s/ Janet R. Kelly  
Janet R. Kelly, Director  
Department of Administration

By: /s/ Michael P. Manion  
Michael P. Manion, Rule Reviewer  
Department of Administration

Certified to the Secretary of State December 15, 2008.



BEFORE THE TEACHERS' RETIREMENT BOARD  
OF THE STATE OF MONTANA

In the matter of the adoption of the ) NOTICE OF ADOPTION AND  
New Rules I through IX and ) AMENDMENT  
amendment of ARM 2.44.301A, )  
2.44.522, and 2.44.523 pertaining to )  
the administration of the Teachers' )  
Retirement System of the State of )  
Montana )

TO: All Concerned Persons

1. On November 6, 2008 the Teachers' Retirement Board published MAR Notice No. 2-44-405 regarding the proposed adoption and amendment of the above-stated rules at page 2313 of the 2008 Montana Administrative Register, Issue Number 21.

2. The board has amended ARM 2.44.301A, 2.44.522, and 2.44.523 and adopted New Rule I (2.44.417), II (2.44.529), III (2.44.701), IV (2.44.702), V (2.44.703), VI (2.44.704), VII (2.44.705), VIII (2.44.706), and IX (2.44.707) as proposed.

3. No comments or testimony were received.

/s/ Denise Pizzini  
Denise Pizzini, Rule Reviewer  
Teachers' Retirement System

/s/ David L. Senn  
David L. Senn  
Executive Director  
Teachers' Retirement System

Certified to the Secretary of State December 15, 2008.

BEFORE THE DEPARTMENT OF ADMINISTRATION  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM ) NOTICE OF AMENDMENT  
2.59.401 regarding credit union )  
supervisory and examination fees )

TO: All Concerned Persons

1. On November 6, 2008, the Department of Administration, Division of Banking and Financial Institutions, published MAR Notice No. 2-59-408 regarding the proposed amendment of the above-stated rule at page 2323 of the 2008 Montana Administrative Register, issue number 21.

2. No comments were received.

3. The department has amended ARM 2.59.401 exactly as proposed.

By: /s/ Janet R. Kelly  
Janet R. Kelly, Director  
Department of Administration

By: /s/ Michael P. Manion  
Michael P. Manion, Rule Reviewer  
Department of Administration

Certified to the Secretary of State December 15, 2008.

BEFORE THE DEPARTMENT OF ADMINISTRATION  
OF THE STATE OF MONTANA

In the matter of the adoption of NEW ) NOTICE OF ADOPTION  
RULE I regarding waiver of in-state office )  
requirement )

TO: All Concerned Persons

1. On November 6, 2008, the Department of Administration, Division of Banking and Financial Institutions, published MAR Notice No. 2-59-406 regarding the proposed adoption of the above-stated rule at page 2320 of the 2008 Montana Administrative Register, issue number 21.

2. No comments were received.

3. The department has adopted New Rule I (ARM 2.59.1805) exactly as proposed.

By: /s/ Janet R. Kelly  
Janet R. Kelly, Director  
Department of Administration

By: /s/ Michael P. Manion  
Michael P. Manion, Rule Reviewer  
Department of Administration

Certified to the Secretary of State December 15, 2008.

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE  
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF AMENDMENT AND
ARM 6.6.3504 and 6.6.3506	)	REPEAL
pertaining to Annual Audited Reports	)	
and Establishing Accounting Practices	)	
and Procedures to be Used in Annual	)	
Statements, ARM 6.6.6501, 6.6.6502,	)	
6.6.6503, 6.6.6504, 6.6.6505,	)	
6.6.6508, and 6.6.6509, pertaining to	)	
Actuarial Opinion, ARM 6.6.6811	)	
pertaining to Annual Audit; and the	)	
repeal of ARM 6.6.6506, 6.6.6507,	)	
and 6.6.6510 pertaining to Required	)	
Opinions, Statement of Actuarial	)	
Opinion Not Including an Asset	)	
Adequacy Analysis, and Additional	)	
Considerations for Analysis	)	

TO: All Concerned Persons

1. On October 23, 2008, the State Auditor and Commissioner of Insurance published MAR Notice No. 6-182 regarding the public hearing on the proposed amendment and repeal of the above-stated rules at page 2201 of the 2008 Montana Administrative Register, issue number 20.

2. On December 1, 2008, the State Auditor and Commissioner of Insurance held a public hearing to consider the proposed amendment and repeal of the above-stated rules.

3. The department has amended ARM 6.6.3506, 6.6.6501, 6.6.6502, 6.6.6503, 6.6.6504, 6.6.6505, 6.6.6508, 6.6.6509, and 6.6.6811 exactly as proposed.

4. The department has amended ARM 6.6.3504 as proposed with the following changes from the original proposal. New matter underlined, deleted matter interlined.

6.6.3504 CONTENTS OF ANNUAL AUDITED FINANCIAL REPORT

(1) through (2)(e) remain as proposed.

(f) notes to financial statements. These notes shall be those required by the appropriate ~~2007~~ 2008 NAIC annual statement instructions and the March ~~2007~~ 2008 NAIC Accounting Practices and Procedures Manual, which are adopted and incorporated by reference, and may be obtained by writing to the NAIC Executive Headquarters, 2301 McGee Street, Suite 800, Kansas City, MO 64108-2662. The notes shall include reconciliation of differences, if any, between the audited statutory

financial statements and the annual statement filed pursuant to 33-2-701, 33-4-313, 33-7-118, 33-30-107, and 33-31-211, MCA, with a written description of the nature of these differences.

(3) remains as proposed.

5. The department has repealed ARM 6.6.6506, 6.6.6507, and 6.6.6510 exactly as proposed.

6. No comments were heard at the hearing, but written comments were received before the comment deadline. The department has thoroughly considered the comments. A summary of the comments received, and the department's responses are as follows:

COMMENT NO. 1: The representative for the American Council of Life Insurers (ACLI) states that the dates referencing the most current version of the annual statement instructions and the accounting practices and procedures manual are already out of date.

RESPONSE: The State Auditor's Office (SAO) is changing the date references to 2008 for the annual statement instructions and for the manual. The Secretary of State's rule filing procedures do not allow the SAO to remove the dates or to file a date in a rule that is prospective.

COMMENT NO. 2: The ACLI representative comments that the proposed amendments to ARM 6.6.3506 adopt some but not all of the additional provisions in the NAIC current model law provisions. The proposed rule does not incorporate sections C and G-L of the current NAIC model rule.

RESPONSE: At this time, the SAO is only adopting the provisions that are required for accreditation of its examination department. There is only one domestic insurer in Montana that writes more than \$100,000,000 in premium. SAO will adopt those model rules at a later time, if necessary.

COMMENT NO. 3: The ACLI representative comments that ARM 6.6.6811(4)(c) allows the commissioner to waive the annual report for a captive insurer (but not a risk retention group) if "the company received its license within six months of the end of the audit year..." ACLI asks for clarification as to why this is necessary.

RESPONSE: This provision gives the commissioner the discretion to waive the annual report if the insurer was recently licensed and the commissioner, in his discretion, believes that the circumstances do not warrant an additional report to be filed, and it allows the commissioner to waive the report for conditions not covered in (4)(a) and (b).

/s/ Christina L. Goe  
Christina L. Goe  
Rule Reviewer

/s/ Janice S. VanRiper  
Janice S. VanRiper  
Deputy State Auditor

Certified to the Secretary of State December 15, 2008.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )	NOTICE OF AMENDMENT AND
17.38.101, 17.38.201A, 17.38.202, )	ADOPTION
17.38.203, 17.38.204, 17.38.208, )	
17.38.209, 17.38.216, 17.38.225, )	(PUBLIC WATER SUPPLY)
17.38.234, and 17.38.239, pertaining to )	
incorporation by reference of current )	
federal regulations and other materials in )	
the public water supply rules, and the )	
adoption of New Rule I pertaining to )	
consecutive system coverage )	

TO: All Concerned Persons

1. On August 28, 2008, the Board of Environmental Review published MAR Notice No. 17-273 regarding a notice of public hearing on the proposed amendment and adoption of the above-stated rules at page 1731, 2008 Montana Administrative Register, issue number 16.

2. The board has amended ARM 17.38.202, 17.38.203, 17.38.204, 17.38.208, 17.38.209, 17.38.216, 17.38.234, and 17.38.239 and adopted New Rule I (17.38.210) exactly as proposed. The board has amended ARM 17.38.101, 17.38.201A, and 17.38.225 as proposed, but with the following changes, deleted matter interlined, new matter underlined:

17.38.101 PLANS FOR PUBLIC WATER SUPPLY OR WASTEWATER SYSTEM (1) and (2) remain as proposed.

(3) As used in this rule, the following definitions apply in addition to those in 75-6-102, MCA:

(a) and (b) remain as proposed.

(c) "Main" means any line providing water or sewer to multiple service connections, any line serving a water hydrant that is designed for fire fighting purposes, ~~and or~~ any line that is designed to water or sewer main specifications;

(d) through (17) remain as proposed.

17.38.201A INCORPORATION BY REFERENCE--PUBLICATION DATES AND AVAILABILITY OF REFERENCED DOCUMENTS (1) Unless expressly provided otherwise, in this subchapter where the board has:

~~(a)~~ adopted and incorporated by reference a federal regulation, the reference is to the July 1, 2007, edition of the Code of Federal Regulations (CFR).

(2) through (4) remain as proposed.

17.38.225 CONTROL TESTS (1) remains as proposed.

(2) At least two chlorine residual tests must be conducted daily, one at each entry point and one in the distribution system:

(a) and (b) remain as proposed.

(c) by a consecutive system that receives chlorinated water from its wholesaler. For consecutive systems, the entry point is the point at which the purchased water enters the distribution system of the consecutive system. The department may waive, on a case-by-case basis, the requirement for:

(i) entry point sampling; and

(ii) entry point sampling and distribution system sampling, if the consecutive system produces treated water for vending or bottling where the treatment is designed to produce a product free of chlorine.

(3) through (7) remain as proposed.

3. The following comments were received and appear with the board's responses:

COMMENT NO. 1: One commenter proposed the following clarification to the proposed definition of "main" in ARM 17.38.101: "...any line serving a water hydrant that is designed for fire fighting purposes, ~~and~~ or any line that is designed to water or sewer main specifications." Replacing "and" with "or" clarifies that the various components of the definition are not all required.

RESPONSE: The board agrees with this change and has amended the rule accordingly.

PWS-5 Comments; ARM 17.38.209

COMMENT NO. 2: The department should finish making final determinations in the current round of PWS evaluations before making guidance changes that will likely have a widespread impact on systems already reviewed.

RESPONSE: The proposed changes to Department Circular PWS-5 (PWS-5) "Ground Water Under the Direct Influence of Surface Water" will not have a widespread impact on systems. Most of the changes to PWS-5 clarify the department's existing interpretation and application of the Circular. The department does not consider the preliminary assessment as a final decision. The proposed changes clarify that the department may use any and all test methods to determine whether ground water is at risk of contamination by surface water, and clarify that the department's determination may be changed by new information. The determinations in the current round of PWS evaluations will not be overturned absent new information, but they will be reviewed during each subsequent sanitary survey.

COMMENT NO. 3: Changing a PWS source to "Ground Water Under the Direct Influence of Surface Water" (GWUDISW) will have a significant adverse financial and operational impact on the system. Rather than setting up an evaluation process that over-regulates, the department should be looking to support a way for systems to avoid the surface water treatment rule.

RESPONSE: Under applicable technical literature, the federal Safe Drinking Water Act, and Montana law and rules, ground water is generally considered to be a safer drinking water source than surface water because the soil filters potential



pathogens from ground water. Considering the potential adverse health effects associated with drinking untreated surface water, it is important to have a reliable process for determining whether ground water sources are at risk from surface water contamination. Surface drinking water sources must treat and then monitor to ensure the treatment was effective. Ground water sources are required to monitor, but not treat unless a problem is identified. This process is essential to protect public health and is not over-regulation.

COMMENT NO. 4: Why does Department Circular PWS-5 specify the order in which the evaluation steps proceed? Most systems should be finished after a Preliminary Assessment (PA). Is EPA requiring states to re-evaluate systems with PAs?

RESPONSE: Describing the process of evaluation provides guidance to regulated systems. The department has never viewed a PA as being a final determination. In some cases a PA may be determinative, but in others specific factors may require further evaluation. The Environmental Protection Agency's (EPA's) Surface Water Treatment Rule Guidance document states that any finding, other than a finding that a source is under the direct influence of surface water, should be reviewed no less frequently than during each subsequent sanitary survey. Pursuant to the EPA guidance, the department will review systems with PAs during each subsequent sanitary survey.

COMMENT NO. 5: Section 1 in PWS-5 contains new language to the effect that the department has discretion to require any or all of the listed evaluation steps. What gives the department legal authority to do this? The process appears to be arbitrary.

RESPONSE: The department has never viewed a PA as being a final determination. The proposed changes to PWS-5 clarify that further study after a PA is an option and make minor changes to the PA scoring system. The legal authority for the board's adoption of PWS-5 is in statute at 75-6-103, MCA. EPA drinking water rules, at 40 CFR Part 142, require that Montana have this authority. In addition, ARM 17.38.219, Special Samples, allows the department to require additional samples to determine the adequacy of the source, storage, treatment, or distribution of water to the public. The process is not arbitrary. It is designed to ensure that drinking water quality is protected by allowing the department to evaluate all factors that may contribute to potential contamination. Experience has shown that a one-time test or a single type of test may not be effective in making that determination.

COMMENT NO. 6: In section 2 of Department Circular PWS-5, why are infiltration galleries included in the text listing types of ground water sources but not included on the scoring sheet for PAs?

RESPONSE: The list in section 2 of PWS-5 is not intended to classify each of the listed source types as a ground water source. The intent of PWS-5 is to identify the processes the department will use to make the determination whether a specific source is ground water. The requirements in PWS-5 apply to every source that is not classified as surface water or ground water under the direct influence of

surface water. The term "infiltration gallery" is being replaced on the PA form with the term "horizontal well" due to a conflict in the Safe Drinking Water Information System database that the department uses to maintain system information. In that database, which was created by EPA, a source identified as an infiltration gallery is automatically determined to be surface water and the surface water requirements are applied even though the department may not have made that determination. By changing the term to horizontal well, the department may allow a system to continue as a ground water system until the department makes a determination to the contrary.

COMMENT NO. 7: Section 3 of PWS-5, regarding PAs, is deficient as applied to new sources for which there is no historical data and no violations because the source is new. The design engineer should follow department design standards, and department engineers should work closely with the design engineer in reviewing the system.

RESPONSE: New sources that do not have a history will not be scored under the history sections of the PA. The source will be reviewed for the other components that may place the source at risk. The board and the department agree that design engineers should follow department design standards and that department review engineers will closely examine plans for compliance. Sources that are properly designed and constructed as ground water sources have a greater potential to avoid the surface water requirements. However, many factors can change that may cause that source to come under the direct influence of surface water. For instance, a well casing may fail allowing an upper aquifer that is affected by surface water to enter the well, or geologic processes may change the source water's source.

COMMENT NO. 8: Section 3 of PWS-5, regarding PAs, is modified to say that sources that score less than 40 points on a PA may be classified as ground water "unless other information is available." What constitutes other information? Sources need predictability in their status.

RESPONSE: The purpose of this change is to clarify that the PA is only one assessment tool and not a final department determination. A well may be designed and constructed as a ground water source. That source may pass the PA and be classified as a ground water source, only to have a future failure of the well construction allow the entrance of surface water. Protection of drinking water quality should be a top priority for water supply systems, and the systems should be prepared to address unexpected developments that may impact water quality.

COMMENT NO. 9: A commentor described several ways in which the department's GWUDISW scoring system is different than that used by EPA and one other state.

RESPONSE: As a drinking water primacy agency, Montana is required by EPA to develop a process for determining when ground water is under the direct influence of surface water. EPA does not specify a process to use. In order to assist agencies in developing a process, EPA created a guidance manual entitled "Guidance Manual for Compliance with the Filtration and Disinfection Requirements

for Public Water Systems Using Surface Water Sources (SWTRG)." The introduction to the manual states, "...These recommendations are presented as advisory guidelines only; unlike the provisions of the [surface water treatment rule], these recommendations are not mandatory requirements." The intent is to allow individual primacy agencies to determine the best process for making those determinations.

COMMENT NO. 10: One comment was received pertaining to page 9 of PWS-5, item 4, "Well or horizontal well less than 100 feet from surface water." stating that the board should add the language "Must undergo further GWUDISW analysis."

RESPONSE: The board agrees and has made that change.

COMMENT NO. 11: One commentor stated that the language "Type of Structure" on page 9 of PWS-5, Item A should be changed to "Type of Source."

RESPONSE: The board agrees and has made that change.

COMMENT NO. 12: One commentor submitted a comment asking why the word "will" was changed to "may" in the first paragraph on page 12 of PWS-5, Section 3.1. What circumstances would prevent a source from being classified as ground water?

RESPONSE: This change clarifies that the PA is not a final determination. Although the source may be classified as ground water at the time the PA is completed, the designation may be changed in the future if conditions change that alter that determination.

COMMENT NO. 13: Section 4 of PWS-5 states that the department must review and approve the evaluation methods a system uses to make a GWUDISW determination. A system's input is critically important and should not be summarily rejected.

RESPONSE: The sentence in question is in the current PWS-5 and is not modified in this rulemaking, so the comment is outside the scope of this rulemaking. In any event, the department must have authority to make the final determination regarding evaluation methods. Anything less would not be protective of public health nor would it satisfy EPA requirements for federally-approved drinking water programs. The board agrees that a system's input is important and should not be summarily rejected.

COMMENT NO. 14: Why was Section 3.3 of PWS-5 removed? This section appears to give systems some relief from further monitoring.

RESPONSE: Section 3.3 was removed to clarify that the department may use any information available to make its determination. Please see proposed Figure-1. Proposed Figure-1 also clarifies that a repair made to a source will allow that source to be classified as ground water only if that repair causes the scoring to be reduced below the 40 point level.

COMMENT NO. 15: Figure 4.1 in PWS-5 shows that, to pass as ground water under a preliminary assessment, disinfection may be required due to "vulnerability." Does PWS-5 address vulnerability? Disinfection should be addressed under the ground water rule.

RESPONSE: Montana has not adopted the federal ground water rule. However, ARM 17.38.229, Disinfection, requires mandatory disinfection whenever the source may be exposed to a potential source of contamination through unprotected or poorly protected ground water sources. The department may require a disinfectant that maintains a residual in the distribution system to ensure safe drinking water.

COMMENT NO. 16: One commentor inquired as to whether the subject "Proposed Ground Water Sources," which is addressed at page 16 of PWS-5, is already addressed at page 6 under Section 3.0.

RESPONSE: The paragraph in question is in the current PWS-5 and is only modified in this rulemaking by removing the language "The suitability of new" at the start of the paragraph and replacing it with the word "New." The proposed change clarifies that a proposed new source must be evaluated under the GWUDISW process as opposed to just its suitability.

COMMENT NO. 17: Section 6 of PWS-5 requires water quality monitoring as part of a water quality assessment. A proposed modification to Section 6 would allow the department to impose "other requirements" at the agency's discretion. What are these other requirements? The Section also recommends dedicated data loggers. Who will pay for the equipment?

RESPONSE: The proposed change clarifies that the department may specify what information the system must produce so that the department may make an informed decision as to the source of water. Other requirements may include additional water quality parameters that may allow the department to make a better decision regarding the source of the water and its potential to cause harm to public health. ARM 17.38.219, Special Samples, also allows the department to require additional samples to determine the adequacy of the source, storage, treatment, or distribution of water to the public.

This section indicates that data loggers may assist the system with collecting the required data. Although they are not normally required, the department may require them in order to collect continuous data under certain conditions. For instance, sources may not be accessible at all times due to weather, or sources may have influences that are of short duration. If the department determines that data loggers are necessary, it is the system's responsibility to provide that equipment.

COMMENT NO. 18: Why does Section 6.1 of PWS-5 require sampling for infiltration galleries if they are not listed on the score sheet?

RESPONSE: The term "infiltration gallery" is being replaced on the preliminary assessment form with the term "horizontal well" due to a conflict in the Safe Drinking Water Information System database that the department uses to maintain system information. In that database, which was created by EPA, any source that is identified as an infiltration gallery is automatically determined to be

surface water and the surface water requirements are applied even though the department may not have made that determination. The terms "infiltration gallery" and "horizontal well" are interchangeable for the purposes of PWS-5.

COMMENT NO. 19: A proposed modification to Section 7 of PWS-5 states that a moderate- to high-risk finding from a microscopic particulate analysis (MPA) results in a conclusion that the source is under the influence of surface water unless there are mitigating factors associated with well construction or other human activities. What are these mitigating factors? Why not follow the procedures used by EPA and other states, in which a moderate MPA finding leads to additional testing, not a GWUDISW determination?

RESPONSE: All ground water sources are influenced by surface water. The question is whether there is the potential that surface water pathogens are present. MPAs assign a "risk" value for that potential based on the presence and quantities of specific surface water contaminants. Even a system with low-risk scores has the potential to adversely affect public health. The proposed change to PWS-5 will classify sources with moderate or high risk as GWUDISW and will trigger a source construction investigation. The old language required repair of construction deficiencies and retesting to determine if the risk is lowered due to the repairs, but did not classify the source as GWUDISW while repair and retesting was conducted. The EPA classification procedures are not binding on the states. See Response to Comment No. 9. For the protection of public health, the board and the department believe it is important to require sources that show a moderate or high risk of surface water contamination to treat as surface water until the source can be shown otherwise. The department may change a GWUDISW determination back to "ground water" if there is some human activity that caused the sample result to be swayed; e.g., construction issues, tampering with the sampling equipment or source, or any other issue that would cause the result to not correctly describe the risks associated with the source.

COMMENT NO. 20: One commentor stated that "October" on page 32, PWS-5, should be changed to "December 1, 2009."

RESPONSE: The board agrees and has made the change.

COMMENT NO. 21: Page 33 of PWS-5 addresses inconsistent findings from multiple microscopic particulate analyses. Why is this section revised to delete "moderate" risk results?

RESPONSE: Both moderate- and high-risk results indicate a source that has an unacceptable potential to adversely affect public health. Only when two additional tests show low risk is it appropriate to conduct further testing to determine whether the initial high-risk result was an anomaly.

COMMENT NO. 22: The proposed changes to PWS-5 are unnecessarily more stringent than the comparable federal regulation. The portions of the rule related to GWUDISW should be rejected because the requirements of 75-6-116, MCA, cannot be met. The information available for public comment is also woefully deficient.

RESPONSE: Special findings under 75-6-116, MCA, are not required for the adoption of PWS-5 because there are no comparable federal regulations or guidelines. EPA has promulgated a guidance manual to assist states in complying with the federal requirements regarding determining whether ground water is directly influenced by surface water. However, the EPA Manual is informational only, and EPA encourages states to develop their own procedures for assessing the potential risks from surface water contamination. The forms used by EPA and other states for GWUDISW evaluations are not applicable to systems regulated under Montana's PWS laws.

The board believes that the public notice procedures were adequate for PWS-5. Notice of the proposed rule amendments was sent to all public water supplies in the department's database, all owners of public systems, all certified operators, all parties on the department's interested parties list, and all consulting engineers that have submitted plans and specifications to the Public Water Supply and Subdivisions Bureau in the last five years.

All of the proposed changes to PWS-5 were shown, in underline/strikeout format, on the department web site. The notice of proposed rulemaking provided the public with the web site address.

COMMENT NO. 23: It would be more constructive and serve the systems of Montana and the citizens of Montana better if the board did not adopt the revised PWS-5 guidance document. It should be sent back to the department for further work with stakeholders or a more substantial public comment process that would allow interested parties to understand the changes and make meaningful comments.

RESPONSE: The board does not believe that postponing these changes would better serve the systems or citizens of Montana. The notice procedures in this case were sufficient to allow interested parties to view all of the proposed changes to PWS-5 and to make meaningful comments.

#### ARM 17.38.225

COMMENT NO. 24: One commentor is concerned with the financial impact of requiring consecutive systems to sample for chlorine residual on more than a monthly basis. The commentor proposes a modification to allow monthly sampling.

RESPONSE: Consecutive systems are currently required to comply with the chlorine residual testing requirements in ARM 17.38.225. The amendments simply clarify that requirement and specify the entry point. Consequently, the comment is outside the scope of the current rulemaking. In any event, systems are only required to supply full time disinfection if there is a potential for a health risk to the system. That risk is not diminished by selling the water from one system to another. Testing on a monthly basis is not adequate to determine whether proper disinfection is occurring.

COMMENT NO. 25: The proposed amendment to ARM 17.38.225(2)(c), which requires chlorine residual tests for consecutive systems that receive chlorinated water from a wholesaler, is unworkable for consecutive systems that treat water for vending to produce a product free of chlorine.

RESPONSE: The board agrees and has modified ARM 17.38.225(2)(c) to allow the department to waive the requirement for consecutive systems that treat water for vending where the treatment is designed to produce a product free of chlorine. The same rationale also applies to some consecutive systems that treat water for bottling. The board has modified the rule accordingly, and has also included a waiver for entry point sampling for consecutive systems. This waiver will be applied on a case-by-case basis where there is little potential for a change in chlorine residual level between the entry point sample and the farthest distribution sample.

### New Rule I Comments

COMMENT NO. 26: Systems affected by proposed New Rule I may not know that they are subject to this regulation and their concerns may not have been adequately addressed.

RESPONSE: The board believes that the public notice procedures were adequate for these rules. See Response to Comment No. 22. There may be consecutive systems meeting the definition of a public water supply that are not aware they are subject to the current regulations. As those systems are identified, the department will work with them to come into compliance with the requirements. New Rule I was proposed to give some of those systems the ability to be excluded from the requirements of 40 CFR Part 141.

COMMENT NO. 27: A municipal water supply system commented that New Rule I may impose additional sampling and monitoring requirements on the wholesale system.

RESPONSE: New Rule I does not impose any new requirements on wholesale systems without the agreement of the wholesale system. To allow a consecutive system to be exempt from the requirements of 40 CFR Part 141, the wholesale system must agree to the requirements in New Rule I(1)(e). New Rule I(1)(e) would not necessarily increase the wholesale system's sampling requirements. See Response to Comment No. 28.

COMMENT NO. 28: One commentor requested more specificity regarding the parameters to be used by the department when determining whether an excluded consecutive system is included in the sampling plan of a wholesale system.

RESPONSE: Some sampling requirements are based on the population exposed to a system's water. For instance, the number of total coliform bacteria samples required per period is based on population. If a wholesale system does not consider the population of its consecutive systems, and the consecutive systems are not sampling because they are excluded under New Rule I, the sample count/population ratio requirements could be violated. Some sampling requirements also have criteria to consider when picking a sample location. A wholesale system would not be allowed to sample from less critical sites when there are higher risk sites in an excluded consecutive system.

COMMENT NO. 29: New Rule I regarding consecutive systems could result in adverse economic impacts to regional water systems. Were universities, colleges, and other such facilities notified of the rulemaking process?

RESPONSE: New Rule I is an exemption from 40 CFR Part 141, and so it will reduce, not increase, the regulatory requirements for eligible consecutive systems. New Rule I adopts federal language in 40 CFR 141.3 that exempts certain consecutive systems from the requirements of 40 CFR Part 141. This language previously has not been adopted by Montana and, under current Montana laws and rules, all consecutive systems are required to comply with those requirements. Under 40 CFR 141.3 and Montana law, consecutive systems meeting the exemption still remain public water supplies and will still be subject to certain Montana requirements. Notice of the proposed rule amendments was sent to a broad range of interested parties and stakeholders. See Response to Comment No. 22.

COMMENT NO. 30: A regional water distribution system that will purchase water and resell it to systems that serve the ultimate users commented that New Rule I should be modified to allow the regional water system to qualify for the proposed exemption from the requirements of 40 CFR Part 141.

RESPONSE: The regional water system does not qualify for the exclusion in proposed New Rule I because the system resells water. The commentor's proposed modification to New Rule I would delete the resale prohibition for systems like itself. This would make New Rule I less stringent than the federal exclusion at 40 CFR 141.3. If Montana is to retain primacy under the federal Safe Drinking Water Act, New Rule I cannot be less stringent than the federal exclusion. To preserve the primacy of Montana's drinking water program, the board will not make the proposed change. From a public health point of view, the regional system should not be excluded from the sampling requirements in 40 CFR 141 because of the extent of the system's distribution system.

COMMENT NO. 31: The new rule regarding consecutive systems is more stringent than the federal rule at 40 CFR 141.3, in violation of 75-6-116, MCA.

RESPONSE: The board has addressed the requirements of 75-6-116, MCA. The board has adopted the department's legal analysis, contained in the record, regarding those requirements and has concluded that, although special stringency findings are not required, the requirements in New Rule I do protect public health and the environment, can mitigate harm to the public health and the environment, and are achievable with current technology. An additional reason that special stringency findings are not required is that New Rule I(1)(e)(ii) implements a specific directive in 75-6-103(2)(d), MCA, to the board to adopt rules requiring public notice to all users of a public water supply system when the system is in violation status. A specific statutory requirement to adopt a rule, with no reference to stringency findings, supersedes the general requirements of 75-6-116, MCA.



Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ James M. Madden

JAMES M. MADDEN

Rule Reviewer

By: /s/ Joseph W. Russell

JOSEPH W. RUSSELL, M.P.H.

Chairman

Certified to the Secretary of State, December 15, 2008.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
AND THE HUMAN RIGHTS COMMISSION  
STATE OF MONTANA

In the matter of the amendment of ARM )  
24.8.101, 24.8.103, 24.8.105, 24.8.201, )  
24.8.203, 24.8.205, 24.8.207, 24.8.210, )  
24.8.212, 24.8.216, 24.8.220, 24.8.301, )  
24.8.401, 24.8.403, 24.8.410, 24.9.101, )  
24.9.102, 24.9.103, 24.9.104, 24.9.105, )  
the amendment and transfer of ARM )  
24.9.1701, 24.9.1703, 24.9.1704, )  
24.9.1705, 24.9.1711, 24.9.1712, )  
24.9.1714, 24.9.1717, and 24.9.1718, the )  
adoption of NEW RULES I through XXIII, )  
and the repeal of ARM 24.8.405, 24.9.107, )  
24.9.210, 24.9.212, 24.9.213, 24.9.218, )  
24.9.219, 24.9.220, 24.9.221, 24.9.222, )  
24.9.223, 24.9.224, 24.9.225, 24.9.226, )  
24.9.230, 24.9.231, 24.9.261, 24.9.262A, )  
24.9.263, 24.9.264, 24.9.265, 24.9.301, )  
24.9.302, 24.9.303, 24.9.304, 24.9.305, )  
24.9.306, 24.9.307, 24.9.308, 24.9.309, )  
24.9.310, 24.9.311, 24.9.312, 24.9.314, )  
24.9.316, 24.9.317, 24.9.318, 24.9.319, )  
24.9.320, 24.9.321, 24.9.322, 24.9.323, )  
24.9.324, 24.9.325, 24.9.326, 24.9.327, )  
24.9.328, 24.9.401, 24.9.402, 24.9.403, )  
24.9.404, 24.9.405, 24.9.406, 24.9.407, )  
24.9.409, 24.9.410, 24.9.411, 24.9.412, )  
24.9.414, and 24.9.1719 pertaining to )  
allegations of unlawful discrimination )

NOTICE OF AMENDMENT,  
AMENDMENT AND TRANSFER,  
ADOPTION, AND REPEAL

TO: All Concerned Persons

1. On October 9, 2008, the Department of Labor and Industry (department) published MAR Notice No. 24-8-232 regarding the proposed amendment, amendment and transfer, adoption, and repeal of the above-stated rules at page 2091 of the 2008 Montana Administrative Register, Issue Number 19.

2. On October 30, 2008, the department held a public hearing in Helena at which time members of the public made oral and written comments and submitted documents. Additional comments were received during the comment period.

3. The department has thoroughly considered the comments and testimony received from the public. The following is a summary of the public comments received and the department's response to those comments:

Comment 1: One commenter recommended a clarification to the proposed amendment to Rule 24.8.103(7). It is the commenter's position that the determination is not a final determination and should be defined as a fact-finding proceeding.

Response 1: There is no definition for "contested case" proceeding in the existing administrative rules. The definition has been added to clarify the use of the term "contested case" for the new administrative rules that will govern the processing of a complaint that proceeds to a "contested case" proceeding before the Hearings Bureau. See NEW RULES I through XXIII. The Hearings Bureau's contested case hearing serves a broader purpose than merely "fact-finding". At the contested case hearing the parties develop the record and the decision that is issued does establish the "legal rights, duties and privileges of the parties." The Hearings Bureau's decision is subject to appeal to the Human Rights Commission and ultimately to a District Court on a petition for judicial review. Findings of fact and conclusions of law in the contested case are binding unless a party can establish error via the respective standards of review. See ARM 24.9.1717 and 2-4-702, MCA.

Comment 2: One commenter questioned why the language regarding the "termination of jurisdiction" in proposed amendments to ARM 24.8.103(12) has been deleted.

Response 2: The use of the term jurisdiction in the existing ARM 24.8.103(12) is not accurate. The department has been given statutory jurisdiction over complaints of discrimination that have been filed under Title 49, chapters 2 and 3, MCA, as well as several federal laws pursuant to a work-sharing agreement with the Equal Employment Opportunity Commission. A party's exhaustion of the administrative process does change or alter the department's jurisdiction.

Comment 3: One commenter noted that the proposed amendments to ARM 24.8.205 appear to permit the Human Rights Bureau to advise charging parties generally, when the Human Rights Bureau should be limited to advising charging parties on the filing of a complaint.

Response 3: The department receives approximately over 5,000 phone calls in a year. The bulk of these calls have nothing to do with an actionable claim of discrimination. For example, a person may call wanting to file a complaint of discrimination on the grounds that she was terminated because her supervisor did not like her and she wants to know how to file for Unemployment Insurance benefits. It is the department's position that as a government agency the Human Rights Bureau has an obligation to serve the public. The language of the rule should not limit the department from providing a caller with objective and neutral information on any topic. Of those 5,000 calls, it should be noted that only 500 to 600 result in the filing of a complaint. Further, it should be noted that the department also provides objective and neutral information to persons responding to complaints of discrimination.

Comment 4: One commenter noted that the service by regular mail under proposed ARM 24.8.207(1) is not adequate notice. Further, the commenter noted that if certifying mail is an undue expense then the Human Rights Bureau should provide an acknowledgment form to verify receipt. The commenter suggested that then in the absence of verification, send the complaint by certified mail.

Response 4: The controlling statute only states that the department must notify the Respondent of a complaint. See 49-2-504(3), MCA. It is the department's position that the formality of certified mail or personal service is not necessary at this stage of the proceedings because the complaint is not actually pending before an adjudicative forum. (The function of the informal investigation is to ascertain whether there is "reasonable cause" to believe that a preponderance of the evidence supports the charge.) Since the formal service requirements of the Rules of Civil Procedure do not apply, service by regular mail sufficiently accomplishes the goal of advising the Respondent that a complaint has been filed and that the Human Rights Bureau will begin conducting its informal investigation. During the course of the informal investigation, a Respondent will be given the opportunity (and is expected to) respond to the charges set forth in the complaint.

Comment 5: One commenter stated that neither the existing rule nor the proposed amendments to ARM 24.8.210 provides adequate protection for third-party participants. For example, it is not uncommon for an employer to provide the Human Rights Bureau with comparative information for third-party employees (e.g., counseling reports, disciplinary actions). It is the commenter's position that an informal procedure, short of a hearing, needs to be established for handling this information.

Response 5: The statutory language is clear that if requested, the department shall provide the parties with all other information related to the complaint in the possession of the department that is not currently in the possession of the parties or a party. See 49-2-504(3), MCA. Further, the department shall make known to the parties the fact that information is available upon request. *Id.* Whenever either party provides information to the Human Rights Bureau and wishes to assert a privacy interest in that information, the investigator places this information in a segregated portion of the investigator's file and this information is not released pending exhaustion of the process set forth in ARM 24.8.210. Of course, either party is free to provide the investigator with both a redacted copy and a nonredacted copy of any information the party believes should be held in confidence. If a party does this, the redacted copy of the information will be released (if requested) and may satisfy the request without the need for additional proceedings.

The commenter's point is well taken and it is the intention of the department to continue to refine the process regarding the release of information, including a rule that would allow the Hearings Bureau to issue protective orders.

Comment 6: One commenter noted that the "any and all" and "none" language in the proposed amendments to ARM 24.8.220(1)(a) and (b) needs to be deleted on the grounds that a charging party should be required to prove all of the elements of a claim of a discrimination by a preponderance of the evidence.

Response 6: The language of the controlling statute states that if there is a finding of discrimination, the complaint will be certified for hearing. Since the information gathered by the investigator during the course of the informal investigation is considered hearsay, the only thing that travels up to the Hearings Bureau on a "cause" finding is the complaint itself. At this stage, the parties are afforded the opportunity, under the Rules of Civil Procedure and the Rules of Evidence, to prove and defend all of the allegations in the complaint. Additionally, it would run afoul of notions of judicial economy if the Human Rights Bureau issued both "no cause" and "cause" findings for a single complaint. The charging party would have to pursue - and a respondent would have to defend - in two forums, both a district court and an administrative forum.

Comment 7: One commenter contended that a charging party's failure to cooperate in an investigation, under proposed ARM 24.8.403, should remain grounds for dismissal.

Response 7: This change conforms to amendments to the statute.

4. The department has amended ARM 24.8.101, 24.8.103, 24.8.105, 24.8.201, 24.8.203, 24.8.205, 24.8.207, 24.8.210, 24.8.212, 24.8.216, 24.8.220, 24.8.301, 24.8.401, 24.8.403, 24.8.410, 24.9.101, 24.9.102, 24.9.103, 24.9.104, and 24.9.105 exactly as proposed.

5. The department has amended and transferred ARM 24.9.1701 (24.9.109), 24.9.1703 (24.9.111), 24.9.1704 (24.9.113), 24.9.1705 (24.9.115), 24.9.1711 (24.9.117), 24.9.1712 (24.9.119), 24.9.1714 (24.9.121), 24.9.1717 (24.9.123), and 24.9.1718 (24.9.125) exactly as proposed.

6. The department has adopted NEW RULE I (24.8.701), NEW RULE II (24.8.704), NEW RULE III (24.8.707), NEW RULE IV (24.8.710), NEW RULE V (24.8.713), NEW RULE VI (24.8.716), NEW RULE VII (24.8.719), NEW RULE VIII (24.8.722), NEW RULE IX (24.8.725), NEW RULE X (24.8.728), NEW RULE XI (24.8.731), NEW RULE XII (24.8.734), NEW RULE XIII (24.8.737), NEW RULE XIV (24.8.740), NEW RULE XV (24.8.743), NEW RULE XVI (24.8.746), NEW RULE XVII (24.8.749), NEW RULE XVIII (24.8.752), NEW RULE XIX (24.8.755), NEW RULE XX (24.8.758), NEW RULE XXI (24.8.761), NEW RULE XXII (24.8.764), and NEW RULE XXIII (24.8.767) exactly as proposed.

7. The department has repealed ARM 24.8.405, 24.9.107, 24.9.210, 24.9.212, 24.9.213, 24.9.218, 24.9.219, 24.9.220, 24.9.221, 24.9.222, 24.9.223, 24.9.224, 24.9.225, 24.9.226, 24.9.230, 24.9.231, 24.9.261, 24.9.262A, 24.9.263, 24.9.264, 24.9.265, 24.9.301, 24.9.302, 24.9.303, 24.9.304, 24.9.305, 24.9.306,

24.9.307, 24.9.308, 24.9.309, 24.9.310, 24.9.311, 24.9.312, 24.9.314, 24.9.316, 24.9.317, 24.9.318, 24.9.319, 24.9.320, 24.9.321, 24.9.322, 24.9.323, 24.9.324, 24.9.325, 24.9.326, 24.9.327, 24.9.328, 24.9.401, 24.9.402, 24.9.403, 24.9.404, 24.9.405, 24.9.406, 24.9.407, 24.9.409, 24.9.410, 24.9.411, 24.9.412, 24.9.414, and 24.9.1719 as proposed.

/s/ MARK CADWALLADER  
Mark Cadwallader  
Alternate Rule Reviewer

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

/s/ MARK CADWALLADER  
Mark Cadwallader  
Alternate Rule Reviewer

/s/ RYAN RUSCHE  
Ryan Rusche, Chair  
Human Rights Commission

Certified to the Secretary of State on December 15, 2008.

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

In the matter of the amendment of ) CORRECTED NOTICE OF  
ARM 24.159.301 definitions ) AMENDMENT

TO: All Concerned Persons

1. On February 14, 2008 the Department of Labor and Industry published MAR Notice No. 24-159-70 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 279 of the 2008 Montana Administrative Register, Issue Number 3. On August 14, 2008 the department published the notice of amendment at page 1709 of the 2008 Montana Administrative Register, Issue Number 15. On May 8, 2008 the Department of Labor and Industry published MAR Notice No. 24-159-71 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 875 of the 2008 Montana Administrative Register, Issue Number 9. On November 11, 2008 the department published the notice of amendment at page 2346 of the 2008 Montana Administrative Register, Issue Number 21.

2. MAR Notice No. 24-159-71 was proposed before MAR Notice No. 24-159-70 was adopted. The adoption notice for MAR Notice No. 24-159-71 inadvertently did not reflect the renumbering that took effect with the adoption of MAR Notice No. 24-159-70. The changes are nonsubstantive and are only reconciling numbering between MAR Notice No. 24-159-71 and 24-159-70 for usability. Additionally, this will correct numbering in MAR Notice No. 24-159-70 adoption notice. Section (9) should have been renumbered (4) in the adoption notice when "Nursing assessment" changed to "Comprehensive nursing assessment." The rule, as amended in corrected form, is shown in its entirety as it is now numbered as follows:

24.159.301 DEFINITIONS As used in Title 37, chapter 8, MCA, and this chapter, unless defined specifically in a particular subchapter, the following definitions apply:

(1) "Accrediting organization" means a professional organization, which has been approved by the board, that establishes standards and criteria for continuing education programs in nursing, advanced nursing, medicine, and other health care specialties.

(2) "Advanced practice registered nurse" or "APRN" means a registered nurse licensed by the board to practice as an advanced practice registered nurse pursuant to 37-8-202, MCA, and ARM 24.159.1414. Four types of APRNs are recognized by Montana law:

- (a) nurse practitioner (NP);
  - (b) certified nurse midwife (CNM);
  - (c) certified registered nurse anesthetist (CRNA); and
  - (d) clinical nurse specialist (CNS).
- (3) "Board" means the Montana Board of Nursing.

(4) "Certifying body" means a national certifying organization that has been approved by the board to use psychometrically sound and legally defensible examinations for certification of APRN specialties.

(5) "Charge nurse" means the nurse who is in charge of patient and/or resident care during a nursing shift. An LPN may serve as a charge nurse in the absence of an RN in a long term care facility, pursuant to 37-8-102, MCA.

(6) "Competency" means performing skillfully and proficiently the functions that are within the role of the licensee; and, demonstrating the interrelationship of essential knowledge, judgment, and skills.

(7) "Comprehensive nursing assessment" means a systematic collection of data conducted by an RN to determine the patient's health status and to identify any actual or potential health problems.

(8) "Contact hour" means the time period of instruction determined by the continuing education provider and indicated on the participant's certificate of completion. One academic semester credit equals 15 contact hours; one academic quarter credit equals 12.5 contact hours.

(9) "Continuing education" means a planned learning activity that occurs in a classroom, on-line, audio-conference, video-conference, or as independent study. All continuing education must be approved by an accrediting organization or provided by an academic institution of higher learning, an APRN certifying body, or a continuing education accrediting organization.

(10) "Department" means the Department of Labor and Industry as provided for in Title 2, chapter 15, part 17, MCA.

(11) "Direction" means a communication of a plan of care based upon assessment of a patient by a registered nurse or a licensed independent health care provider pursuant to 37-8-102, MCA, that sets forth the parameters for the provision of care or for the performance of a procedure.

(12) "Direct supervision" means the supervisor is on the premises, and is quickly and easily available.

(13) "Drug" means a substance defined by 37-7-101, MCA.

(14) "Focused nursing assessment" is conducted by a licensed practical nurse and is an appraisal of an individual's status and situation at hand, contributing to the comprehensive assessment by the registered nurse, supporting ongoing data collection, deciding who needs to be informed of the information, and when to inform.

(15) "Health team" means a group of health care providers which may, in addition to health care practitioners, include the client, family, and significant others.

(16) "Immediate supervision" means the supervisor is on the premises and is within audible and visual range of the patient.

(17) "National professional organization" means a board-recognized professional nursing membership organization that delineates scope of practice standards and guidelines for an APRN specialty.

(18) "Nursing procedures" means those nursing actions selected and performed in the delivery of safe and effective patient/client care.

(19) "Nursing process" means the traditional systematic method nurses use when they provide:

(a) nursing care including assessment;



- (b) nursing analysis;
- (c) planning;
- (d) nursing intervention; and
- (e) evaluation.

(20) "Peer review" means the process of evaluating the practice of nursing, conducted by a peer-reviewer.

(21) "Peer-reviewer" means a licensed APRN or physician whose credentials and practice encompass the APRN's scope and type of practice setting. The peer-reviewer may be a consultant working for a professional peer review organization.

(22) "Practical nurse" means the same thing as "licensed practical nurse," "PN," and "LPN" unless the context of the rule dictates otherwise. The practice of practical nursing is defined at 37-8-102, MCA.

(23) "Preceptorship" means practical training in the specialized area of APRN practice for which the applicant seeks licensure by the board.

(24) "Prescribing" means specifying advanced nursing intervention(s) intended to implement the defined strategy of care.

(25) "Prescription" means an order for a drug, as defined by 37-7-101, MCA, or any medicine, devices, or treatments.

(26) "PRN medication" ("pro re nata," Latin for "according as circumstances may require") means medication taken as necessary for the specific reason stated in the medication order, together with specific instructions for its use.

(27) "Registered nurse" means the same thing as "RN" and "professional nurse" unless the context of the rule dictates otherwise. The practice of professional nursing is defined at 37-8-102, MCA.

(28) "Routine medication" means medication taken regularly at the same time each day using the same route, or on the same days of the week, at the same time, using the same route.

(29) "Standard" means an authoritative statement by which the board can judge the quality of nursing education or practice.

(30) "Standardized procedures" means routinely executed nursing actions for which there is an established level of knowledge and skill.

(31) "Strategy of care" means the goal-oriented plan developed to assist individuals or groups to achieve optimum health potential. This includes initiating and maintaining comfort measures, promoting and supporting human functions and responses, establishing an environment conducive to well being, providing health counseling and teaching, and collaborating on certain aspects of the medical regimen including but not limited to the administration of medications and treatments.

(32) "Supervision" or "general supervision" means provision of guidance by a qualified nurse or a person specified in 37-8-102, MCA, for the accomplishment of a nursing task or activity with initial direction of the task or activity and periodic inspection of the actual act of accomplishing the task or activity.

(33) "Supervisor" means the health care professional identified by these rules as the person qualified to supervise another in the performance of nursing procedures and care.

BOARD OF NURSING  
SUSAN RAPH, RN, PRESIDENT

/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 December 15, 2008.

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

In the matter of the adoption of New                    )           NOTICE OF ADOPTION  
Rules I (36.25.901) through XVIII                    )  
(36.25.918) pertaining to the selection,            )  
implementation, and reporting of real             )  
estate projects on state trust lands                )

To: All Concerned Persons

1. On September 11, 2008, the Department of Natural Resources and Conservation published MAR Notice No. 36-22-126 regarding a notice of public hearing on the proposed adoption of the above-stated rules at page 1955 of the 2008 Montana Administrative Register, Issue Number 17.

2. The department has adopted New Rule XV (36.25.915) as proposed.

3. The department has adopted New Rule I (36.25.901) through XIV (36.25.914) and XVI (36.25.916) through XVIII (36.25.918) as proposed but with the following changes from the original proposal, matter to be stricken interlined, new matter underlined:

NEW RULE I (36.25.901) DEFINITIONS As used in this subchapter, the following definitions apply, except where the context clearly indicates otherwise:

(1) through (3) remain as proposed.

(4) "Commercial" means the operation by any for-profit entity of any public parking lot, restaurant, bar, hotel, motel, office space, retail store or sales outlet, storage space, gas station, convenience store, shopping center, ~~industrial enterprise~~, warehouse, hospitality enterprise, or concentrated recreational use, multifamily residential use, or other similar uses.

(5) "Conservation" means a primary land use for open space, preservation of habitat, natural areas, parks, or related public purposes, secured through dedication, lease, license, easement, deed restriction, or other legal instrument consistent with 77-1-203, MCA, for multiple use management.

(6) and (7) remain as proposed.

(8) "Developed" means when a building permit, septic permit, or a permit to connect to a public sewer system, whichever comes first, has been issued for 25 percent or more of the commercial, industrial, or residential lots of a subdivided tract. Developed also means a permit has been issued for the construction of a private sewer system.

(8) remains as proposed but is renumbered (9).

(10) "Easement" means land use authorization as defined in 77-2-101, MCA.

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

(14) "Industrial" means a land use that includes manufacturing, wholesaling, warehousing, utilities, heavy transportation, sanitary landfills, sewage treatment

facilities, wind farms, feedlots, grain storage bins, irrigation facilities, reclamation projects, electrical substations, intermodal shipping facilities, and other uses.

(12) through (18) remain as proposed but are renumbered (15) through (21).

~~(19) "Project" means a proposal to issue a lease or easement for a commercial, residential, or conservation use on a tract where no such lease or easement existed previously, when the one or more of the following are required by a local government in order for the lease or easement to be issued as proposed:~~

~~(a) final subdivision approval;~~

~~(b) annexation; or~~

~~(c) development or amendment of a growth policy or neighborhood plan.~~

~~Project also means the development of entitlements on lands proposed for sale or exchange.~~

(20) through (23) remain as proposed but are renumbered (22) through (25).

(24) through (24)(l) remain as proposed but are renumbered (26) through (26)(l).

(m) ~~environmental review;~~ and

(n) minor repairs, operation or maintenance of existing equipment, improvements, or facilities.

(25) remains as proposed but is renumbered (27).

(28) "Real estate project" means a proposal initiated by the bureau to develop state trust land for a commercial, industrial, residential, or conservation use, or a public facility where no such use existed previously, when one or more of the following are required by a local government:

(a) subdivision approval;

(b) annexation; or

(c) development or amendment of a growth policy or neighborhood plan.

Real estate project also means the development of entitlements on state trust lands proposed for sale or exchange.

(26) remains as proposed but is renumbered (29).

~~(27)~~ (30) "Residential" means single family dwellings, duplexes, condominiums, townhouses, cabins, associated ancillary uses, or other types of residential uses recognized by local zoning regulations.

(28) and (29) remain as proposed but are renumbered (31) and (32).

~~(30)~~ (33) "Subdivision" means a division of land defined by 76-3-103(15), Title 76, MCA.

(31) remains as proposed but is renumbered (34).

~~(32)~~ (35) "Threshold" means a predefined target for number of acres of state trust land acres to be developed for commercial, industrial, or residential uses that, if met before July 18, 2025, may require a programmatic review of the programmatic plan.

~~(33)~~ (36) "Tract" means a parcel of state trust land that can be identified by legal description, independent of any other parcel of land, using documents on file in the records of the county clerk and recorder's office or in the department's records.

(34) through (35)(c) remain as proposed but are renumbered (37) through (38)(c).

(d) within one mile of the boundaries of a public sewer or water district. An entire tract of state trust land is urban if any portion of the tract falls within an area described in ~~(35)~~ (38)(a) through (d).

NEW RULE II (36.25.902) ACCOUNTABLE PARTIES (1) The board adopts the rules in this subchapter to provide the Trust Land Management Division of the Montana Department of Natural Resources and Conservation with consistent policy, direction, and guidance when selecting and implementing ~~Real Estate Management Bureau~~ real estate projects on state trust lands.

NEW RULE III (36.25.903) GENERAL APPLICABILITY

(1) remains as proposed.

~~(2) The department shall exempt projects from [NEW RULE I] through [NEW RULE XVII] that, prior to adoption of the ROD, have been subject to public scoping and environmental review processes under MEPA, section 75-1-201, et seq., MCA; or~~

~~(a) received all local government approvals necessary for the completion of the project.~~

(2) The rules apply to real estate projects, sales, and exchanges administered by the bureau on state trust lands, except for the following:

(a) real estate projects that, prior to July 18, 2005, have been subject to public scoping and environmental review processes under MEPA, section 75-1-201, et seq., MCA;

(b) real estate projects that received all local government approvals necessary for the completion of the real estate project on or before December 15, 2008;

(c) lease lots created prior to July 18, 2005;

(d) land use licenses;

(e) sales and exchanges closed on or before July 18, 2005; and

(f) real estate activities within navigable waterways of the state.

~~(3) The department shall exempt from [NEW RULE I] through [NEW RULE XVII]:~~

~~(a) lease lots created prior to adoption of the ROD; and~~

~~(b) land use licenses.~~

~~(4) These rules shall not apply where it is determined that their application would directly violate the state's fiduciary duty to a trust beneficiary under Article X, Section 4 or 11, of the Montana Constitution, or Section 11 of the Montana Enabling Act.~~

(5) remains as proposed but is renumbered (3).

NEW RULE IV (36.25.904) GENERAL DEVELOPMENT STANDARDS

(1) The department will actively pursue commercial, industrial, residential, and conservation uses to increase revenue on trust lands, through one or more of the following means:

(1)(a) remains as proposed.

(b) improving entitlements on tracts selected for sale or development, when appropriate; ~~and~~ or

(1)(c) remains as proposed.

(2) The department will give priority to urban real estate projects over rural real estate projects using the following criteria:

(a) financial rate of return per acre; ~~and~~

(b) funding availability; ~~and~~

(c) the acres remaining in the development thresholds described in ARM 36.25.911.

~~(3) The department will implement the following standards when selecting, designing, and implementing projects on state trust lands, whenever appropriate and feasible:~~

(3) The department will comply with local and state land use regulations. The department will apply the following development standards in selecting, prioritizing, designing, and implementing real estate projects on state trust lands:

(a) real estate projects should be contiguous to or part of existing or proposed development;

(b) real estate projects in urban locations must connect to existing or planned public infrastructure and be designed to public standards, including alignment to adjoining public and private streets, that are consistent with local land use regulations;

(c) urban real estate projects should achieve urban densities consistent with local land use regulations;

(3)(d) remains as proposed.

~~(e) the department will comply with local land use regulations in developing commercial, residential, and conservation uses on state trust lands;~~

(f) ~~(e)~~ the department will utilize local land use planning and regulatory processes to involve the general public and beneficiaries in developing state trust lands for commercial, industrial, residential, and conservation uses;

(3)(g) remains as proposed but is renumbered (3)(f).

~~(h)~~ (g) the department may use or promote purchase of development rights, transfer of development rights, cluster development, joint ventures, or other measures as provided by law; ~~and~~

~~(i)~~ (h) the department will coordinate with local communities, other state and federal agencies, conservation agencies, and other interest groups to provide for notice and review as necessary; ~~and~~

(i) the department will exclude from consideration, or employ necessary measures to avoid, minimize, or mitigate impacts potentially resulting from commercial, industrial, and residential real estate projects:

(i) on slopes greater than 25 percent;

(ii) in a designated 100-year floodplain or wetland. The department will avoid adverse impacts in the floodplain. Adverse impacts will be determined by the department through an environmental review in compliance with Title 75, chapter 1, MCA;

(iii) that potentially affect federally listed threatened and endangered species or designated critical habitat; and

(iv) in a designated wildland-urban interface or area of high wildfire hazard.

(4) Any commercial, industrial, or residential lease expected to generate annual revenue in excess of \$50,000 may not be issued without the board's prior approval.

(a) The board delegates its authority to the department to issue commercial or industrial leases expected to generate \$50,000 or less annually, but the board reserves the authority to subsequently review the issuance of such leases.

(5) Development in rural areas will include commercial resorts, development for public purposes such as sewer or water, natural resource based development, and conservation opportunities. Other unique development opportunities may be considered when the intended uses:

(a) provide infill opportunities;

(b) are contiguous to existing development;

(c) are or can be located within a sewer or water utility service area;

(d) add value to the existing uses;

(e) demonstrate economic viability and conform to applicable development standards; or

(f) limit development to not more than 25 percent of a tract while the remainder of the tract is designated for conservation through an easement, deed restriction, or dedication at final subdivision approval.

NEW RULE V (36.25.905) PROJECT EVALUATION, REVIEW, AND SELECTION PROCESS (1) ARM 36.25.906 through 36.25.910 describe the evaluation, review, and selection process for real estate projects on state trust lands.

(2) The department will require ARM 36.25.906 through 36.25.910 for real estate projects initiated following ~~[the effective date of these rules]~~ approved by the project identification team after December 25, 2008.

~~(3) The individual real estate activities that together culminate in a lease or easement are cumulatively referred to as a project.~~

~~(a) The department will not require [NEW RULE VI] through [NEW RULE X] for an individual real estate activity that:~~

~~(i) is consistent with a larger project that has undergone project evaluation and review as described in [NEW RULE VI] through [NEW RULE X]; and~~

~~(ii) has been approved by the project identification team described in [NEW RULE VIII].~~

(3) The department will not require ARM 36.25.906 through 36.25.910 for an individual real estate activity that is associated with a previously approved real estate project.

NEW RULE VI (36.25.906) SITE-SPECIFIC EVALUATION (1) The department will conduct a site-specific evaluation to assess the suitability of a tract or portion of a tract proposed for a real estate project. The site-specific evaluation ~~may~~ will include the following factors:

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

(i) the location and quality of infrastructure, such as roads, utilities, power, telephone, public water, or sewer availability;

(1)(j) remains as proposed.

(k) proximity to community infrastructure and utilities; ~~and~~

(l) other nearby residential, industrial, or commercial development, proposed or existing; and

(m) wildland fire hazards and available fire protection.

(2) The department will analyze federal, state, and local land-use regulations, plans, and policies, for their relationship to the proposed real estate project. This analysis must identify existing entitlements and any entitlements that must be acquired for the proposed real estate project to achieve the highest return.

(3) The department may conduct a market analysis for a parcel proposed for commercial, industrial, residential, or conservation use. At minimum, the market analysis must identify:

(a) the size of the current and future residential and commercial market;

(3)(b) and (3)(c) remain as proposed.

~~(4) The department will promote appropriate development on state trust land by generally excluding from consideration:~~

~~(a) residential and commercial uses on slopes greater than 25 percent;~~

~~(b) residential and commercial projects that would be located in a designated 100-year floodplain or wetland; and~~

~~(c) most commercial or residential projects that would adversely affect federally listed threatened and endangered species or critical habitat for threatened and endangered species as designated by the United States Fish and Wildlife Service (USFWS).~~

NEW RULE VII (36.25.907) SITE SELECTION REPORT (1) Field staff will develop a site selection report for each real estate project proposal that will include these elements:

(a) how the proposed real estate project conforms to the standards in ARM 36.25.904;

(b) description of the proposed real estate project, including proposed land use, density, existing and proposed entitlements, required infrastructure improvements, local regulatory approval required, and potential rates of return from the real estate project, if implemented;

(c) how the proposed real estate project relates to ARM 36.25.911 and 36.25.912;

(1)(d) remains as proposed.

(e) estimate of the costs and timeline for the proposed real estate project; and

(f) how the proposed real estate project integrates with other trust land management projects or programs.

NEW RULE VIII (36.25.908) PROJECT IDENTIFICATION TEAM AND PROJECT REVIEW COMMITTEE (1) The department will form a project identification team, comprised of, ~~but not limited to~~ bureau staff and field representatives. The project identification team will meet annually, at minimum. The duties of the project identification team will include:

~~(2) The project identification team will meet annually, at minimum. The duties of the project identification team will include:~~

(a) reviewing and selecting real estate projects proposed by field staff;



- (b) reviewing the status of previously selected real estate projects;
- (c) canceling previously selected real estate projects; and
- (d) assigning resources.

~~(3)~~ (2) The project identification team will select real estate projects based upon review of the site selection reports developed by field staff under ARM 36.25.907, in consideration of the following criteria:

(3)(a) through (3)(g) remain as proposed but are renumbered (2)(a) through (2)(g).

(h) how the proposed real estate project integrates with other trust land management projects or programs.

~~(4)~~ (3) The department will form a project review committee, comprised of bureau staff and planning and land use staff from each area office. The project review committee will meet annually, at minimum. The duties of the project review committee ~~identification team~~ will generally include:

- (a) reviewing the status of previously selected real estate projects;
- (b) assessing resource needs of real estate projects; and
- (c) recommending project proposals to the real estate project identification team.

NEW RULE IX (36.25.909) PROJECT MANAGEMENT LIST ~~(1)~~ The department will provide to the board a list of the projects selected by the project identification team within 30 days, and concurrently send the list to:

- ~~(a) affected lessees and licensees;~~
- ~~(b) local governments having jurisdiction over the area of a selected project;~~
- ~~(c) public and private conservation entities; and~~
- ~~(d) other interested parties.~~

~~(2) The department will post the list on the department's web site.~~

(1) The department will create a project management list of the real estate projects selected by the project identification team. The list will identify new real estate projects, existing or previously approved real estate projects, and canceled real estate projects.

(2) The department will create and maintain a list of persons, conservation entities, and other organizations interested in receiving notice of new real estate projects.

(3) Within 30 days of the project identification team's selection of new real estate projects, the department will:

- (a) provide the project management list to the board;
- (b) provide a list of new real estate projects to interested persons who have made a request to the department to be informed of new real estate projects; and
- (c) post the project management list on the department's web site.

(4) The department will notify affected lessees and licensees and local governments having jurisdiction over the area of a selected real estate project.

NEW RULE X (36.25.910) NOTIFICATION OF CONSERVATION INTEREST

(1) After posting a project management list on the department's web site providing notice of new real estate projects pursuant to [NEW RULE VIII] ARM 36.25.909, the department shall allow conservation entities 60 days in which to

propose a conservation use of those lands by issuing a letter of intent to the department. By such a letter of intent, an entity may seek to secure for conservation uses any tract or portion of a tract proposed by the project identification team for a residential, industrial, or commercial use.

(2) remains as proposed.

(a) Issuance of a conservation lease, license, or easement shall be made pursuant to Article X, section 11 of the Montana Constitution. The department reserves the right to approve or deny a proposal for a conservation use.

(2)(a) remains as proposed but is renumbered (2)(b).

(3) Any real estate project on the project management list may proceed forward if:

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

NEW RULE XI (36.25.911) NEW DEVELOPMENT THRESHOLDS ~~(1) If the aggregate acreage of real estate activities described in (2) exceeds, or is anticipated to exceed during the term of the plan, 30,000 acres, the department will conduct a programmatic review of the plan before any additional projects may be developed.~~

~~(a) The department will also conduct a programmatic review of the plan before any additional projects may be developed, if the aggregate acreage in rural areas exceeds, or is anticipated to exceed during the term of the plan, five percent of the 30,000-acre statewide threshold.~~

~~(2) The following, as a result of new projects developed after July 18, 2005, will count toward the thresholds in (1) and (2):~~

(1) The statewide threshold is 30,000 acres. The department will conduct a review of the plan as specified in ARM 36.25.914(2) if the aggregate acreage of real estate projects, sales, and exchanges meeting the criteria described in ARM 36.25.916(2) exceeds the statewide threshold, or is anticipated to exceed the statewide threshold during the term of the programmatic plan.

(a) Five percent of the statewide threshold, termed the rural threshold, is allocated for rural real estate projects, sales, and exchanges. The rural threshold is 1500 acres. The department will conduct a review of the programmatic plan as specified in ARM 36.25.914(2) if the aggregate acreage of real estate projects, sales, and exchanges in rural areas meeting the criteria described in ARM 36.25.916(2) exceeds the rural threshold or is anticipated to exceed the rural threshold during the term of the programmatic plan.

(2) The following, unless otherwise exempted in ARM 36.25.912, will count toward the applicable thresholds in (1) and (1)(a):

(a) tracts leased or under easement for commercial and industrial uses;

(2)(b) remains as proposed.

(c) tracts disposed of through sale or exchange, and subdivided or developed within five years following sale for a commercial or industrial use within five years following sale; and

(d) tracts disposed of through sale or exchange, and subdivided or developed within five years following sale for residential use where the planned at a density is greater than one residential unit per 25 acres within five years following sale.

NEW RULE XII (36.25.912) NEW DEVELOPMENT THRESHOLD

EXEMPTIONS (1) ~~The following will be exempt from the thresholds in [NEW RULE XI(1)]:~~

(1) An urban tract meeting any one of the following criteria will be exempt from the statewide threshold in ARM 36.25.911(1). A rural tract meeting any one of the following criteria will be exempt from the rural threshold in ARM 36.25.911(1)(a) and the statewide threshold in ARM 36.25.911(1):

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

~~(d) acres secured for conservation use;~~

(d) a tract developed for commercial, residential, or industrial uses through lease or easement or following sale or exchange, whereby such uses are clustered on not more than 25 percent of a tract and the remainder of the tract is designated for conservation in perpetuity through an easement, deed restriction, or dedication upon final subdivision approval;

~~(e) tracts disposed of through sale or exchange with restrictions limiting residential density to one residential unit per 25 acres, or limiting development to not more than 25 percent of the tract and designating the remainder as open space;~~

(e) a tract developed for residential lease or easement, or disposed of through sale or exchange, with restrictions limiting residential density to one residential unit per 25 acres;

(f) a tract sold or exchanged and not developed until after five years following the sale closing date;

(f) (g) an isolated tracts sold or exchanged except in Beaverhead, Broadwater, Carbon, Cascade, Flathead, Gallatin, Lewis and Clark, Lake, Madison, Missoula, Park, Powell, Ravalli, Stillwater, Sweet Grass, Teton, and Yellowstone counties;

~~(g) (h) acres dedicated for conservation upon final as open space during subdivision approval review in excess of minimum state and or local subdivision requirements;~~

~~(h) tracts subdivided for residential lease or easement, limiting density to one residential unit per 25 acres, or limiting development to 25 percent of the tract and designating the remainder as open space;~~

(i) a tracts within a receiving area established by a local jurisdiction as part of a transfer of development rights program, and subdivided developed for commercial, industrial, or residential use using by means of development rights permanently transferred from land in the sending area; and

(j) a tracts subdivided developed for residential development use at a density greater than one unit per 25 acres when the potential density of one or more additional tracts is reduced in perpetuity by an equal or greater amount, such that the combined development density of all tracts is not greater than one unit per 25 acres. using development rights transferred, at a rate of one development right per 25 acres of lands protected, from another tract of state trust land. This exemption applies to lands subdivided for lease, easement, exchange, or sale, and includes lands subdivided receiving final subdivision approval within five years following sale.

(2) A rural tract that is not otherwise exempt from the rural and statewide threshold as provided in (1) will be exempt from the rural threshold but will still count toward the statewide threshold when one of the following criteria are met:

- (a) the tract is developed consistent with zoning adopted by the county's governing body in compliance with Title 76, chapter 2, part 1 or part 2, MCA; or
- (b) the developed use meets all of the following:
  - (i) provides infill opportunities;
  - (ii) is contiguous to existing development;
  - (iii) is or can be located within a sewer or water utility service area;
  - (iv) adds value to existing uses;
  - (v) demonstrates economic viability; and
  - (vi) conforms to the development standards in ARM 36.25.904.

NEW RULE XIII (36.25.913) ACCOUNTING AND REPORTING (1) The department will account for real estate management activities that meet ~~[NEW RULE X]~~ and ~~[NEW RULE XI]~~ ARM 36.25.910 and 36.25.912. In addition, the department will account for the following:

- (a) acres under commercial, industrial, or residential lease where no commercial, industrial, or residential lease existed previously;
- (b) acres under easement for commercial, industrial, or residential use;
- (c) nonisolated tracts sold and subdivided developed for a commercial, industrial, or residential residential or commercial use within five years of sale;
- (d) tracts acquired with existing commercial, industrial, or residential development;
- (1)(e) through (3) remain as proposed.

NEW RULE XIV (36.25.914) MANAGEMENT OF THE REAL ESTATE MANAGEMENT PLAN (1) In July 2010 and every five years thereafter, the Real Estate Management Bureau bureau will issue a report upon the implementation and effectiveness of the plan, including a recommendation on the need for significant changes to the plan.

- (2) Upon review of such reports, the board or the department may consider a ~~programmatic~~ review of the programmatic plan for any of the following reasons:
  - (a) the thresholds in ARM 36.25.911(1) or (1)(a) have been exceeded;
  - (2)(b) through (2)(d) remain as proposed.
- (3) The department may implement and initiate real estate projects during a ~~programmatic~~ review of the programmatic plan pursuant to ARM 36.2.537.
- (4) The department may make minor changes or additions to the plan without a ~~programmatic~~ review of the entire programmatic plan, as long as those changes are compatible with the overall plan, as determined by the department.
  - (a) Cumulative minor changes may result in the department's ~~programmatic~~ review of the programmatic plan.

NEW RULE XVI (36.25.916) SURVEYING AND PLATTING OF LANDS PRIOR TO SALE DELEGATION OF AUTHORITY TO DEPARTMENT FOR SURVEYING, PLATTING, AND EXACTIONS (1) The board delegates to the department, subject to its review, its authority under 77-1-301, 77-2-309, and 77-2-310, MCA, to determine whether it is in the best interest of the trust beneficiaries to survey, plat, or create blocks and lots of state lands prior to sale.

~~(a) State trust lands may be sold under the Land Banking Program without added entitlements where:~~

- ~~(i) it is in the best interest of the trust beneficiaries;~~
- ~~(ii) additional entitlements are not in the interests of a local jurisdiction; or~~
- ~~(iii) staff and budget constraints make it impractical to seek entitlements.~~

(2) The board delegates to the department, consistent with the board's fiduciary duties and subject to the board's review, its authority to agree to exactions, conditions, restrictions, or fees imposed as a result of zoning, annexation, subdivision, or building permit approval processes within Title 7, 50, 67, or 76, MCA, or local land use regulations.

NEW RULE XVII (36.25.917) APPRAISAL OF LAND PRIOR TO LEASE OR EASEMENT ~~(1) Prior to offering a lease for competitive bid or an easement for sale, the department shall appraise the parcel under consideration for lease or issuance of an easement. The department may conduct the appraisal or the department may contract with a Montana-licensed certified general appraiser. The department shall review and approve an appraisal conducted by a contract appraiser.~~

~~(2) The appraisal must:~~

- ~~(a) include state-owned improvements in the valuation; and~~
- ~~(b) use comparable sales for like properties.~~

~~(3) Appraisals must be updated or parcels reappraised:~~

- ~~(a) where issuing a lease, if the appraisal is older than two years; and~~
- ~~(b) where issuing an easement, if the appraisal is older than one year.~~

~~(4) Appraisals may be updated or reappraised earlier than as required in (3)(a) and (b).~~

~~(5) Appraisals for sales, exchanges, and land banking are governed by ARM 36.25.805.~~

(1) The value of a parcel under consideration for lease or issuance of an easement shall be determined through an appraisal or limited valuation.

(2) An appraisal must include state-owned improvements in the valuation and use comparable sales for like-properties. The department may conduct an appraisal or appraisal update; or the department may contract with a Montana-licensed certified general appraiser. The department shall review and approve an appraisal or appraisal update conducted by a contract appraiser.

(3) A limited valuation is an estimation of value through other means which may include:

- (a) the department's fee schedule;
- (b) a survey of real estate appraisers, local tax assessors, or local realtors; or
- (c) an evaluation of local rents or local market fees.

(4) An appraisal or limited valuation must be updated, or the parcel reappraised:

(a) where issuing a lease, if the appraisal or limited valuation is older than two years; and

(b) where issuing an easement, if the appraisal or limited valuation is older than one year. An appraisal or limited valuation may be updated or the parcel reappraised earlier than as required in (4)(a) and this subsection.

NEW RULE XVIII (36.25.918) CATEGORICAL EXCLUSIONS ~~(1) Real estate management activities that are classified as categorical exclusions shall not require an environmental assessment or environmental impact statement.~~

~~(a) Categorical exclusions include activities on state trust lands conducted by others under the authority of the department as well as activities conducted by the department itself.~~

~~(2) Categorical exclusions shall not apply in extraordinary circumstances where the Real Estate Management Bureau is proposing an activity:~~

~~(a) upon sites with high erosion risk;~~

~~(b) where federally listed threatened and endangered species or critical habitat for threatened and endangered species, as designated by the USFWS, may be affected;~~

~~(c) where Native American religious and cultural sites may be affected;~~

~~(d) where archaeological sites may be affected;~~

~~(e) where historic properties and areas may be affected;~~

~~(f) where several related, categorically-excluded individual activities may cumulatively result in significant impacts to the human environment because they will either occur close in time or in the same geographic area. Such related actions may be subject to environmental review even if they are not individually subject to review; or~~

~~(g) where the activity would result in a violation of any applicable state or federal laws or regulations.~~

~~(3) (1) Pursuant to 77-1-121, MCA, and ARM 36.2.523(5), the board adopts the following additional categorical exclusions for real estate management activities conducted upon state trust lands:~~

~~(3)(a) through (3)(c) remain as proposed but are renumbered (1)(a) through (1)(c).~~

~~(d) project planning and design;~~

~~(3)(e) through (3)(i) remain as proposed but are renumbered (1)(e) through (1)(i).~~

~~(j) short-term land use licenses, involving no resource extraction or developed uses, and conforming to local permitting and land use regulations; and~~

~~(k) other real estate management activities administered by the bureau on state trust lands that are not in connection to:~~

~~(i) a department proposal for a sale, exchange, easement, placement of improvement, lease, license, or permit; or~~

~~(ii) a department review of an application for authorization of a sale, exchange, easement, placement of improvement, lease, license, or permit; ;~~

~~(l) department request to amend a local growth policy or zoning regulation;~~

~~(m) department request to amend or develop a neighborhood plan or extension of services plan;~~

~~(n) annexation; and~~

~~(o) land acquisition. Categorical exclusions include activities on state trust lands conducted by others under the authority of the department as well as activities conducted by the department itself.~~

(2) Categorical exclusions shall not apply in extraordinary circumstances where the bureau is proposing an activity:

(a) upon sites with high erosion risk;

(b) where critical habitat for federally listed threatened and endangered species may be affected;

(c) where Native American religious and cultural sites may be affected;

(d) where archaeological sites may be affected;

(e) where historic properties and areas may be affected;

(f) where several related categorically-excluded individual activities may cumulatively result in significant impacts to the human environment because they will either occur closely in time, or in the same geographic area. Such related actions may be subject to environmental review even if they are not individually subject to review; or

(g) where the activity would result in a violation of any applicable local, state, or federal laws or regulations.

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

COMMENT 1

The phrase "programmatic review of the plan" is found throughout the rules. It should be replaced with "review of the programmatic plan."

RESPONSE 1

The department concurs and has made the change.

COMMENT 2

The term "real estate project" should replace the term "project" to make clear that the rules apply to real estate development and not other activities on state trust lands, such as agriculture or oil and gas leasing.

RESPONSE 2

The department concurs and has made the change.

COMMENT 3

Once rules are implemented, develop more user-friendly tools to help provide better explanation of the process.

RESPONSE 3

Following adoption of the rules, the department will develop an implementation guide for these rules. The guide will be made available to the public.

COMMENT 4

Commenter asked the department to clarify where public comment is allowed and/or invited for a proposed real estate management project.

RESPONSE 4

Opportunity for the public to provide comment on a proposed real estate project will occur through one or more of the following: 1) public scoping is an integral component of Montana Environmental Policy Act (MEPA) compliance, and all real estate project proposals on state trust land require compliance with MEPA; 2) public hearings before the Montana Board of Land Commissioners when the board considers a sale or exchange of state trust land, issuance of an easement, and issuance of a lease providing annual income in excess of \$50,000; 3) through meetings with neighborhood councils, public hearings before city or county commissions, planning/zoning boards, or other public bodies having authority over a particular aspect of a real estate project; and 4) per 77-2-306, MCA, the department may not sell a tract of state land in excess 160 acres without first consulting the board of county commissioners of the county or counties in which the lands to be sold are located.

COMMENT 5

Clarify how these rules interact with the land banking program. Commenter believes that these rules should apply to all land banking activities.

RESPONSE 5

The department concurs and has made revisions throughout to clarify how these rules apply to sales and exchanges of state trust land.

COMMENT 6

Consider including an assessment of conservation values as part of the department's site evaluation process.

RESPONSE 6

An assessment of conservation values is an essential component of the site-specific evaluation process defined under ARM 36.25.906(1)(a) through (f). The presence of conservation values on a specific tract will be considered in determining the tract's suitability for development.

COMMENT 7

Develop a rule that would prohibit development in flood-prone areas.

RESPONSE 7

ARM 36.25.904(3)(i)(ii) states that the department will avoid adverse impacts in a floodplain.

COMMENT 8

Include a provision that the agency will notify conservation groups and others, upon request, when projects are approved.

RESPONSE 8

The department concurs and has amended ARM 36.25.909 accordingly. The department will maintain a contact list, and will notify the parties on the contact list when new projects are selected.



COMMENT 9

The review process and notification appear effective. It is unclear how the DNRC will have access to local government input to evaluate the impacts and merits of a proposed sale or lease of property before the property has been transferred to the developer, such as a proposed subdivision. It appears the DNRC, as the property owner, would need to apply jointly with the developer to allow the local review process to determine the impact and suitability of the real estate project. The order in which the government entities, local or state, would give approval is unclear.

RESPONSE 9

See Response 4. The department will comply with the application procedures and subdivision review process prescribed by a local government entity. When the order or timing of local and state approvals is in conflict or incompatible, the department will use its discretion to determine the best course of action.

COMMENT 10

Giving preference to tracts "most suitable for development," "urban over rural," and "consistent with local land use regulations" will support local smart growth planning efforts.

RESPONSE 10

The department concurs.

New Rule I (36.25.901) DEFINITIONS

COMMENT 11

Clarify in ARM 36.25.901(5) what kinds of commercial and residential uses may be allowed in conjunction with conservation uses by defining what the department means by "limited commercial and residential uses."

RESPONSE 11

The department has amended the definition of conservation to eliminate the reference to commercial or residential uses.

COMMENT 12

Consider including a definition of "development rights" in order to clarify that the department can sell development rights for conservation purposes.

RESPONSE 12

The department has amended ARM 36.25.910(1)(a) to clarify that Article X, section 11, of the Montana Constitution provides for the disposal of an estate or interest in state trust land. The amendment further clarifies that department will reserve the right to approve or deny a proposal for a conservation on state trust lands.

COMMENT 13

Industrial uses should be separated from commercial uses in the definitions and throughout the rules.

RESPONSE 13

The department concurs and has made the change.

COMMENT 14

Add to ARM 36.25.901(17) a definition of "limited property interest" and add specific terms in this subsection in order to clarify for the public how licenses will be applied and why they are exempt from these rules under ARM 36.25.903(3).

RESPONSE 14

Land use licenses are temporary and nonconsumptive in nature. Licenses are issued according to ARM 36.25.101, et seq., and the department's land use license policy. Per ARM 36.25.106(2), land use licenses are limited to ten years.

COMMENT 15

Commenter asked if "cluster development" referred to "cluster development" as defined by adopted subdivision regulations in accordance with 76-3-509, MCA, or any development that concentrates building lots on a portion of the tract and conserves the remainder?

RESPONSE 15

The term "cluster development," as it is used in these rules, is defined in ARM 36.25.901.

COMMENT 16

Commenter asked for clarification of the distinction between "residential" and "commercial". A condominium may be a "multi-family residential" with ownership being the only difference.

RESPONSE 16

The department has amended the definition of residential to eliminate the reference to condominium.

COMMENT 17

There are many activities associated with development and developed parcels that are left out of the definition of "developed" in ARM 36.25.901(8). Specifically, the construction of roads is a clear development activity that is overlooked under this proposed definition.

RESPONSE 17

The term "developed" has specific meaning and function in these rules and is not necessarily meant to capture the full scope of what would constitute development on the ground.

COMMENT 18

State lands currently qualifying as "urban" are realistically more suitable for rural (if any) development. Commenter encouraged the DNRC to adopt an approach similar to that as outlined in 76-3-601(2)(b), MCA, to define which state trust lands are "urban."

#### RESPONSE 18

The term "urban" has specific meaning and function in these rules and is consistent with the ROD. The classification of a specific tract of state trust land is not an indicator of its suitability for commercial, industrial, or residential development. Before a tract is developed, it must be found suitable as determined by the department's project evaluation, review, and selection process.

#### New Rule III (36.25.903) GENERAL APPLICABILITY

#### COMMENT 19

Commenter asked that in order to make it clear when the subsection (2)(b) applies, to add language stating that that this subsection only applies to projects that have received all local government approvals prior to December 15, 2008.

#### RESPONSE 19

The department concurs and has made the change.

#### COMMENT 20

The courts would decide this matter (ARM 36.25.903), not department staff. ARM 36.25.903(4) should be clarified to reflect that this decision will be made by courts and not staff.

#### RESPONSE 20

The department has deleted ARM 36.25.903(4).

#### New Rule IV (36.25.904) GENERAL DEVELOPMENT STANDARDS

#### COMMENT 21

Commenter stated that 36.25.904(3) is confusing because it states this is a list of project standards. Yet, they can be applied "whenever appropriate and feasible." That makes the list more like a set of guidelines instead of required standards.

#### RESPONSE 21

The department concurs and has deleted the language "whenever appropriate and feasible" from ARM 36.25.904(3). The department has also made several revisions to clarify the department's intent in complying with the development standards as well as local regulations.

#### COMMENT 22

Clarify what can happen on "urban lands" and what the definition for "urban densities."

RESPONSE 22

The department has amended ARM 36.25.904(3)(c). Lands meeting the definition of "urban" may be developed for all uses consistent with local land use regulations. In addition, ARM 36.25.904 and 36.25.906 provide additional criteria which may impose further restrictions beyond those provided in local land use regulations to determine the specific location, type, and scale of development.

COMMENT 23

ARM 36.25.904(3) states that DNRC will comply with local land use regulations. Commenter asked the department to consider following growth policy designations for those areas without zoning.

RESPONSE 23

The project evaluation and review process (ARM 36.25.905 through 36.25.910) provides for review and consideration of an adopted growth policy. Given that growth policies in themselves are not enforceable without land use regulations such as zoning, the department will use its discretion when approving real estate projects that are inconsistent with growth policy.

COMMENT 24

The rural development standards set forth on pages 6 and 8 of the ROD should be added to the rules.

RESPONSE 24

The department concurs and has made the change.

COMMENT 25

The rules should state what types of improvements will be allowed in a floodplain.

RESPONSE 25

The department concurs. ARM 36.25.904(4) has been amended to clarify the department's intent to limit improvements in the floodplain to those with no adverse impacts.

COMMENT 26

Commenter asked that the following language be added at the beginning of ARM 36.25.904(3): "Subject to constitutionally and statutorily mandated financial fiduciary requirements applicable to trust lands."

RESPONSE 26

Because the application of administrative rules is always subject to constitutional limitations, the department believes inserting such language is unnecessary.

COMMENT 27

The term "generally exclude" in ARM 36.25.906(4) implies that the department will sometimes consider projects on steep slopes, floodplains, etc. Commenter asked

which criteria will be used to determine when projects are appropriate in these areas?

RESPONSE 27

The department concurs with this statement. The department has amended the subsection to clarify that real estate projects will not be considered in these areas unless the department employs necessary measures to avoid, minimize, or mitigate impacts potentially resulting from a commercial, industrial, or residential use. The department has also moved ARM 36.25.906(4) to 36.25.904(3)(i) where the development standards are more appropriate.

COMMENT 28

Given the department's focus on fire hazard issues in the state and the tremendous cost of firefighting, DNRC may want to consider adding high fire hazard areas to the factors listed in ARM 36.25.906(1).

RESPONSE 28

The department concurs and has incorporated this recommendation into ARM 36.25.904.

COMMENT 29

Development with adverse impacts should not be allowed in a floodplain on state trust lands.

RESPONSE 29

The department agrees and has amended ARM 36.25.904(3)(i) to require the department to avoid adverse impacts in the floodplain. Adverse impacts will be determined by the department through an environmental review in compliance with Title 75, chapter 1, MCA.

COMMENT 30

Commenter asked that the department consider adding a subsection which would read: "...amount of state threshold land available", in ARM 36.25.904(2).

RESPONSE 30

The department concurs and has made the change.

COMMENT 31

Commenter asked the department to consider adding the underlined: "...the following standards, when applicable, in selecting, prioritizing, designing and implementing...", to ARM 36.25.904(3).

RESPONSE 31

The department concurs and has made the change.

COMMENT 32

Commenter recommended adding the following language at the end of the sentence in ARM 36.25.904(3)(i)(iii): "...including but not limited to grizzly bear recovery areas and critical habitat for bull trout."

RESPONSE 32

The department disagrees. ARM 36.25.904(3)(i)(iii), as written, is consistent with the ROD.

New Rule VI (36.25.906) SITE-SPECIFIC EVALUATION

COMMENT 33

Remove the phrase "when applicable" before the list of factors. All of the factors should be included in the evaluation, even if the result is that a factor does not apply.

RESPONSE 33

The department concurs and has made the change.

COMMENT 34

Commenter stated that in ARM 36.25.906(1)(i), the quality of infrastructure, not just its location, should be a consideration when evaluating the suitability of a tract for development.

RESPONSE 34

The department concurs and has made the change.

New Rule X (36.25.910) NOTIFICATION OF CONSERVATION INTEREST

COMMENT 35

Commenter stated that it appears conservation interests have the option to intercede and stop a proposed exchange or sale of land or development proposal involving residential, commercial, or industrial uses. It is not clear how the DNRC would weigh the benefits of preserving open space through conservation, versus increasing revenue on trust lands through development, especially in response to the goal of "prioritizing real estate projects with the highest financial rate of return."

RESPONSE 35

A conservation entity does not have the ability to intercede in the actions of the department. The department believes the process described in ARM 36.25.910 is appropriate. Should a conservation entity propose a conservation use, the department will consider the merits of the conservation proposal, including the potential financial return that could result, before making a final determination. The department reserves the right to approve or deny a proposal for a conservation use.

New Rule XI (36.25.911) NEW DEVELOPMENT THRESHOLDS

COMMENT 36

Commenter asked why the 25 percent coverage exemption is limited to only residential development? Commenter stated that it should apply to commercial development as well.

RESPONSE 36

The department has amended ARM 36.25.911 to include commercial and industrial uses in the 25 percent exemption as well.

COMMENT 37

Commenter stated that the most important decision made in the ROD is the five percent cap on development of state lands in rural areas. It would be inappropriate to delete this provision.

RESPONSE 37

The five percent rural threshold is provided in ARM 36.25.911(1)(a).

COMMENT 38

Commenter asked to amend ARM 36.25.911(1)(a) to state that "the department will also undertake a programmatic review of the plan before any additional projects may be developed, if the aggregate acreage in rural areas exceeds, or is anticipated to exceed during the term of the plan, 1500 acres."

RESPONSE 38

The department concurs and has incorporated the recommendation along with several other modifications to the text in ARM 36.25.911(1) in order to make clear the intent of the department in regard to the development thresholds.

New Rule XII (36.25.912) NEW DEVELOPMENT THRESHOLD EXEMPTIONS

COMMENT 39

Commenter asked to add a provision that would exempt a development from the rural development and location standards (under ARM 36.25.904), if the development complies with the provisions that limit development to 25 percent of the tract, and designating the remainder as open space.

RESPONSE 39

The department concurs and has amended the rural development standards in ARM 36.25.906(6) to provide for consideration of other uses when development is limited to 25 percent of a tract and the remainder is designated for conservation through an easement, deed restriction, or dedication at final subdivision approval.

COMMENT 40

Commenter asked to remove ARM 36.25.912(1)(f) since isolated tracts could still be developed if they are sold; and therefore, they should count towards the thresholds.

RESPONSE 40

The department concurs in part. The department has amended the exemption for lands sold or exchanged in the high growth counties of the state, where development during the five years following sale is more likely. Isolated tracts sold or exchanged in all other counties will remain exempt from the thresholds.

COMMENT 41

The exemption for designation of open space under several of the subsections should only apply when the public benefits from open space being protected in perpetuity. Commenter asked that the phrase "in perpetuity" be added to these subsections.

RESPONSE 41

The department concurs and has made the change.

COMMENT 42

Commenter asked that the exemption for a locally-adopted transfer-of-development-rights (TDR) program be removed in ARM 36.25.912(1)(i) because it does not set forth any standard that the department will use to determine if a TDR can be used for a project to receive an exemption from the threshold. Commenter says that DNRC should only allow a TDR to be used as an exemption if it follows the standard of one development right per 25 acres protected.

RESPONSE 42

The department disagrees. An exemption for locally-adopted TDR programs is appropriate, and recognizes the extensive planning analysis and public participation made by local jurisdiction in developing a TDR program. It would not be appropriate to further restrict density on state trust lands in a TDR receiving area (which is where the jurisdiction has determined higher density to be appropriate) to anything less than the density determined by the local jurisdiction. The department desires to assist a local jurisdiction to meet the goals of its TDR program by utilizing all the mechanisms the TDR program provided.

COMMENT 43

Rural projects subject to zoning should be exempt from the thresholds.

RESPONSE 43

The department agrees and has incorporated this concept. Two exemptions from the rural threshold have been added. Rural projects, sales, and exchanges that are developed consistently with county zoning will be exempt from the rural threshold. Also, an exemption from the rural threshold is provided for projects, sales, and exchanges that meet all of the standards of ARM 36.25.912(2)(b). A rural project, sale, or exchange meeting one of these two exemptions will also be exempt from the statewide threshold if it meets an exemption under ARM 36.25.912(1).

COMMENT 44

Commenter urged the department to remove the term "public benefit" because it is too vague to use in an exemption from the thresholds ARM 36.25.911(1)(a).



RESPONSE 44

The department concurs and has made the change.

COMMENT 45

ARM 36.25.912(1) makes provisions for a number of exemptions from the development thresholds. Depending on the number of roads or other types of infrastructure that may require easements/rights-of-way, this exemption could conceivably increase the number of overall developable acres.

RESPONSE 45

A large majority of the road or right-of-way easements issued by the department upon, or across state trust land, are for existing or proposed development on adjacent land under other ownership. When a commercial, industrial, or residential real estate project is developed on a tract of state trust land, the project will be counted toward the thresholds in ARM 36.25.911.

COMMENT 46

As proposed, a rural tract meeting both ARM 36.25.912(2)(a) or (b) and an exemption under ARM 36.25.912(1) would be exempt from meeting the statewide rural threshold. However, ARM 36.25.912(1) indicates that certain development activities would be exempt from the rural threshold if they meet one of the ten criteria; however, the rule does not mention that criteria ARM 36.25.912(2)(a) or (b) must also be met. Commenter recommended that the text "and (1)(a)" be removed from ARM 36.25.912(1).

RESPONSE 46

The department has amended ARM 36.25.911 and 36.25.912 to clarify the application of the statewide and rural thresholds.

New Rule XIV (36.25.914) MANAGEMENT OF THE REAL ESTATE  
MANAGEMENT PLAN

COMMENT 47

Commenter stated ARM 36.25.914(3) seems to conflict with the language under ARM 36.25.911. Commenter would like to see the language added "except as provided for under 36.25.911."

RESPONSE 47

The department concurs and has made several revisions to clarify this rule and department intent when conducting a review of the programmatic plan.

New Rule XVI (36.25.916) DELEGATION OF AUTHORITY TO DEPARTMENT  
FOR SURVEYING, PLATTING, AND EXACTIONS

COMMENT 48

The board should delegate to the department the authority to approve fees, dedications, and other exactions on state trust lands that result from zoning, annexation, subdivision, or building permit approval.

RESPONSE 48

The department agrees and has amended ARM 36.25.916 to incorporate this recommendation.

New Rule XVIII (36.25.918) CATEGORICAL EXCLUSIONS

COMMENT 49

The categorical exclusions should apply to all administrative activities, including management of existing leases and licenses.

RESPONSE 49

The department has amended ARM 36.25.918 to clarify the application of categorical exclusions. The administration and management of existing leases and licenses are administrative activities consistent with the categorical exclusions provided in ARM 36.2.523(5)(b) through (f). New real estate projects, sales, and exchanges could conceivably affect threatened and endangered species and critical habitat. These actions are not categorically excluded and require environmental review.

COMMENT 50

Commenter asked about categorical exclusions for department actions toward amendment of a growth policy or zoning regulation, amendment or development of a neighborhood plan, or extension of services plan, annexation, and land acquisition.

RESPONSE 50

The department agrees and has amended ARM 36.25.918 to incorporate this recommendation.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

/s/ Mary Sexton

MARY SEXTON

Director

Natural Resources and Conservation

/s/ Tommy H. Butler

TOMMY H. BUTLER

Rule Reviewer

Certified to the Secretary of State on December 15, 2008.

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

In the matter of the adoption of New ) NOTICE OF ADOPTION AND  
Rule I and the amendment of ARM ) AMENDMENT  
37.5.117, 37.5.304, 37.5.325, )  
37.86.1101, and 37.86.1102 )  
pertaining to establishing hearings for )  
disputes related to the Medicaid Drug )  
Rebate program )

TO: All Concerned Persons

1. On November 6, 2008 the Department of Public Health and Human Services published MAR Notice No. 37-458 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 2338 of the 2008 Montana Administrative Register, Issue Number 21.

2. The department has adopted New Rule I (37.86.1111) as proposed. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

4. The department intends for the adoption and amendment of the rules to be effective January 1, 2009.

/s/ John Koch  
Rule Reviewer

/s/ Anna Whiting Sorrell  
Anna Whiting Sorrell, Acting Director  
Public Health and Human Services

Certified to the Secretary of State December 15, 2008.

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

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 37.81.304 pertaining to )  
Pharmacy Access Prescription Drug )  
Benefit Program (Big Sky Rx) )

TO: All Concerned Persons

1. On November 6, 2008 the Department of Public Health and Human Services published MAR Notice No. 37-456 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 2330 of the 2008 Montana Administrative Register, Issue Number 21.

2. The department has amended the above-stated rule as proposed.

3. No comments or testimony were received.

4. The department intends for the amendment of the rule to be effective January 1, 2009.

/s/ John Koch  
Rule Reviewer

/s/ Anna Whiting Sorrell  
Anna Whiting Sorrell, Acting Director  
Public Health and Human Services

Certified to the Secretary of State December 15, 2008.

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

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 37.85.903 and 37.85.905 )  
pertaining to general Medicaid )  
services, physician-administered )  
drugs )

TO: All Concerned Persons

1. On October 9, 2008 the Department of Public Health and Human Services published MAR Notice No. 37-453 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 2129 of the 2008 Montana Administrative Register, Issue Number 19.
2. The department has amended the above-stated rules as proposed.
3. No comments or testimony were received.

/s/ John Koch  
Rule Reviewer

/s/ Anna Whiting Sorrell  
Anna Whiting Sorrell, Acting Director  
Public Health and Human Services

Certified to the Secretary of State December 15, 2008.

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

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 37.86.1801, 37.86.1802, and )  
37.86.1807 pertaining to durable )  
medical equipment (DME) )

TO: All Concerned Persons

1. On November 6, 2008 the Department of Public Health and Human Services published MAR Notice No. 37-457 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 2334 of the 2008 Montana Administrative Register, Issue Number 21.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

4. The department intends for the amendment of the rules to be effective January 1, 2009.

/s/ Geralyn Driscoll  
Rule Reviewer

/s/ Anna Whiting Sorrell  
Anna Whiting Sorrell, Acting Director  
Public Health and Human Services

Certified to the Secretary of State December 15, 2008.

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

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 37.86.2207, 37.86.2230, and )  
37.86.5110 pertaining to Medicaid )  
school-based health services )

TO: All Concerned Persons

1. On October 23, 2008 the Department of Public Health and Human Services published MAR Notice No. 37-454 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 2251 of the 2008 Montana Administrative Register, Issue Number 20.
2. The department has amended the above-stated rules as proposed.
3. No comments or testimony were received.
4. The department intends for the amendment of these rules to be applied retroactively to October 1, 2008.

/s/ John Koch  
Rule Reviewer

/s/ Anna Whiting Sorrell  
Anna Whiting Sorrell, Acting Director  
Public Health and Human Services

Certified to the Secretary of State December 15, 2008.

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

In the matter of the adoption of New Rules I through XIII, the amendment of ARM 37.86.2207, 37.86.2219, and 37.86.2221, and the repeal of ARM 37.88.1101 through 37.88.1137 pertaining to Medicaid and MHSP reimbursement for youth mental health services ) CORRECTED NOTICE OF ADOPTION, AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On July 31, 2008, the Department of Public Health and Human Services published MAR Notice No. 37-448 pertaining to the proposed adoption, amendment, and repeal of the above-stated rules at page 1536 of the 2008 Montana Administrative Register, Issue Number 14. On November 6, 2008, the department published the notice of adoption, amendment, and repeal at page 2360 of the 2008 Montana Administrative Register, Issue Number 21.

2. This corrected notice is to correct an error in ARM 37.88.1222(3)(c) as published in the department's adopted notice. The language "related to the youth's psychiatric condition" should not have been deleted. The department is correcting this error and reinserting the language as originally proposed.

3. The rule is corrected as follows, new matter underlined, deleted matter interlined:

RULE IX (37.87.1222) PSYCHIATRIC RESIDENTIAL TREATMENT FACILITY SERVICES, INTERIM RATE AND COST SETTLEMENT PROCESS

(1) through (3)(b)(iii) remain as amended.

(3) The psychiatric service rate is an all-inclusive bundled per diem rate, and includes:

(a) and (b) remain as amended.

(c) lab and pharmacy costs related to the youth's psychiatric condition with the exception noted in (4)(r) pharmacy for post-discharge medication.

(4) through (9) remain as amended.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, MCA

4. The department intends for the adoption of Rule IX (37.87.1222) to be effective January 1, 2009. All other provisions of the notice of adoption, amendment, and repeal remain as adopted.



/s/ John Koch  
Rule Reviewer

/s/ Anna Whiting Sorrell  
Anna Whiting Sorrell, Acting Director  
Public Health and Human Services

Certified to the Secretary of State December 15, 2008.

## **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 P.O. 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.<br>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, 2008. This table includes those rules adopted during the period September 1, 2008, through December 31, 2008, 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, 2008, 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 2008 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.

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## BOARD APPOINTEES AND VACANCIES

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

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

In this issue, appointments effective in November 2008 appear. Vacancies scheduled to appear from January 1, 2009, through March 31, 2009, 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 December 1, 2008.

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 NOVEMBER 2008**

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Board of Livestock</b> (Livestock)			
Mr. Brett DeBruycker Dutton Qualifications (if required): cattle producer	Governor	Hammond	11/13/2008 3/1/2009
<b>Board of Outfitters</b> (Labor and Industry)			
Rep. Carol Gibson Billings Qualifications (if required): sportsperson	Governor	reappointed	11/18/2008 10/1/2011
Mr. Tim Linehan Troy Qualifications (if required): big game outfitter	Governor	reappointed	11/18/2008 10/1/2011
Mr. John R. Redman Sidney Qualifications (if required): public representative	Governor	reappointed	11/18/2008 10/1/2011
Mr. Thomas Sather Bozeman Qualifications (if required): sportsperson	Governor	reappointed	11/18/2008 10/1/2011
<b>Board of Private Security</b> (Labor and Industry)			
Ms. Holly Dershem-Bruce Glendive Qualifications (if required): public representative	Governor	reappointed	11/18/2008 8/1/2011



**BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2008**

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Board of Private Security</b> (Labor and Industry) cont.			
Mr. Raymond Murray Missoula	Governor	reappointed	11/18/2008 8/1/2011
Qualifications (if required): representative of the Public Safety Officer Standards and Training Council			
<b>Board of Psychologists</b> (Labor and Industry)			
Dr. Susan Mattocks Miles City	Governor	Trontel	11/13/2008 9/1/2013
Qualifications (if required): private practice psychologist			
<b>Department of Fish, Wildlife and Parks Acting Director</b> (Fish, Wildlife and Parks)			
Mr. Joe Maurier Helena	Governor	Hagener	11/18/2008 0/0/0
Qualifications (if required): none specified			
<b>Department of Public Health and Human Services Acting Director</b> (Public Health and Human Services)			
Ms. Anna Whiting-Sorrell Helena	Governor	Miles	11/18/2008 0/0/0
Qualifications (if required): none specified			
<b>Montana Wheat and Barley Committee</b> (Agriculture)			
Mr. Leonard Schock Vida	Governor	Chaffee	11/18/2008 8/20/2011
Qualifications (if required): wheat and barley grower and resident of District 7			
Mr. Frank Schoonover Dutton	Governor	reappointed	11/18/2008 8/20/2011
Qualifications (if required): wheat or barley grower and resident of District 4			

## BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2008

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Public Employees' Retirement Board (Administration)</b>			
Mr. Loren Bough Big Sky	Governor	Klawon	11/13/2008 4/1/2009
Qualifications (if required): experience in investment management			
<b>State-Tribal Economic Development Commission (Commerce)</b>			
Mr. Ronald (Smiley) Kittson Browning	Governor	Wippert	11/18/2008 6/30/2010
Qualifications (if required): representative of the Blackfeet Tribe			
<b>Trauma Care Committee (Public Health and Human Services)</b>			
Dr. Fred Bartoletti Anaconda	Governor	Swannack	11/2/2008 11/2/2012
Qualifications (if required): representative of the Montana Medical Association			
Mr. Justin Grohs Great Falls	Governor	McGree	11/2/2008 11/2/2011
Qualifications (if required): representative of private ambulances			
Mr. Joseph D. Hansen Big Timber	Governor	reappointed	11/2/2008 11/2/2011
Qualifications (if required): representative of the Eastern Region Trauma Advisory Council			
Ms. Lauri Jackson Great Falls	Governor	Kussman	11/2/2008 11/2/2012
Qualifications (if required): representative of the Central Region Trauma Care Advisory Committee			

## BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2008

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Trauma Care Committee</b> (Public Health and Human Services) cont.			
Dr. Andrew Michel	Governor	Bentler	11/2/2008
East Helena			11/2/2011
Qualifications (if required): representative of the American College of Emergency Physicians			
Ms. Jennifer Thuesen	Governor	Sund	11/2/2008
Polson			11/2/2011
Qualifications (if required): representative of the Western Region Trauma Advisory Council			
Mr. Bradley Von Bergen	Governor	Peden	11/2/2008
Billings			11/2/2012
Qualifications (if required): representative of the Eastern Region Trauma Advisory Council			
<b>Traumatic Brain Injury Advisory Council</b> (Public Health and Human Services)			
Mr. James Hunt	Governor	reappointed	11/18/2008
Helena			1/1/2010
Qualifications (if required): advocate for brain injured			
<b>UM-Western Local Executive Board</b> (University System)			
Ms. Mary Ann Nicholas	Governor	reappointed	11/13/2008
Dillon			4/15/2011
Qualifications (if required): public representative			

**VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2009 THROUGH MARCH 31, 2009**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Alternative Livestock Advisory Council</b> (Governor) Ms. Linda Nielsen, Nashua Qualifications (if required): Board of Livestock representative	Governor	1/1/2009
Mr. Victor Workman, Whitefish Qualifications (if required): Fish, Wildlife and Parks Commission representative	Governor	1/1/2009
<b>Board of Architects</b> (Labor and Industry) Mr. James G. Shepard, Billings Qualifications (if required): registered architect with three years continuous practice	Governor	3/27/2009
<b>Board of Chiropractors</b> (Labor and Industry) Dr. John Sando, Butte Qualifications (if required): practicing chiropractor	Governor	1/1/2009
Ms. Lucy Heger, Livingston Qualifications (if required): public representative	Governor	1/1/2009
<b>Board of Crime Control</b> (Justice) Mr. Steve McArthur, Butte Qualifications (if required): community corrections representative	Governor	1/1/2009
Mayor Pam Kennedy, Kalispell Qualifications (if required): representative of both local government and the Youth Justice Council	Governor	1/1/2009
Mr. Nickolas C. Murnion, Jordan Qualifications (if required): local law enforcement representative	Governor	1/1/2009

**VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2009 THROUGH MARCH 31, 2009**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Board of Dentistry</b> (Labor and Industry) Ms. Jennifer Porter, Bozeman Qualifications (if required): dental hygienist with at least five years experience	Governor	3/29/2009
<b>Board of Environmental Review</b> (Environmental Quality) Mr. Don Marble, Chester Qualifications (if required): having expertise or background in local government planning	Governor	1/1/2009
Ms. Robin Shropshire, Helena Qualifications (if required): having expertise or background in hydrology	Governor	1/1/2009
Ms. Gayle Skunk Cap, Browning Qualifications (if required): having expertise or background in environmental science	Governor	1/1/2009
<b>Board of Horse Racing</b> (Livestock) Mr. Mike Tatsey, Valier Qualifications (if required): resident of District 3	Governor	1/20/2009
Ms. Mary Ogdahl, Miles City Qualifications (if required): resident of District 1	Governor	1/20/2009
<b>Board of Investments</b> (Governor) Mr. James Turcotte, Helena Qualifications (if required): TRS representative	Governor	1/1/2009
<b>Board of Livestock</b> (Livestock) Ms. Meg Smith, Divide Qualifications (if required): cattle producer	Governor	3/1/2009

**VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2009 THROUGH MARCH 31, 2009**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Board of Livestock</b> (Livestock) cont. Mr. George Hammond, Hardin Qualifications (if required): cattle producer	Governor	3/1/2009
Mr. Brett DeBruycker, Dutton Qualifications (if required): cattle producer	Governor	3/1/2009
<b>Board of Oil and Gas Conservation</b> (Natural Resources and Conservation) Sen. Linda J. Nelson, Medicine Lake Qualifications (if required): landowner with minerals	Governor	1/1/2009
Commissioner Joan Stahl, Forsyth Qualifications (if required): public member	Governor	1/1/2009
Mr. Donald D. Bradshaw, Fort Benton Qualifications (if required): representative of the oil and gas industry	Governor	1/1/2009
Mr. Wayne Smith, Valier Qualifications (if required): representative of the oil and gas industry	Governor	1/1/2009
<b>Board of Personnel Appeals</b> (Labor and Industry) Ms. Alice Whiteman, Bonner Qualifications (if required): full time management employee in an organization with a collective bargaining unit	Governor	1/1/2009
Mr. Quinton Nyman, Helena Qualifications (if required): full-time employee of a labor union	Governor	1/1/2009

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<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Board of Public Education</b> (Education) Mr. Kirk J. Miller, Havre Qualifications (if required): representative of District 3 and a Republican	Governor	2/1/2009
<b>Capital Investment Board</b> (Commerce) Ms. Ellen Feaver, Helena Qualifications (if required): having expertise and competence in investment and/or tax credit administration management	Governor	1/1/2009
Mr. Robert Pancich, Great Falls Qualifications (if required): having expertise and competence in investment and/or tax credit administration management	Governor	1/1/2009
Mr. Lawrence A. Anderson, Great Falls Qualifications (if required): having expertise and competence in investment and/or tax credit administration management	Governor	1/1/2009
<b>Children's Trust Fund</b> (Governor) Ms. Nancy Anderson, Great Falls Qualifications (if required): public representative	Governor	1/1/2009
Ms. Mylene M. Widner, Billings Qualifications (if required): public representative	Governor	1/1/2009
<b>Coal Board</b> (Commerce) Mayor John Williams, Colstrip Qualifications (if required): resident of an impact area/District 2	Governor	1/1/2009

**VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2009 THROUGH MARCH 31, 2009**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Coal Board</b> (Commerce) cont. Mr. Dan Dutton, Belfry Qualifications (if required): resident of District 1	Governor	1/1/2009
Mr. Gerald Navratil, Sidney Qualifications (if required): resident of District 2	Governor	1/1/2009
Mr. Chad Fenner, Hardin Qualifications (if required): resident of an impact area/District 2	Governor	1/1/2009
<b>Family Health Advisory Council</b> (Public Health and Human Services) Ms. Jill Baker, Great Falls Qualifications (if required): public representative	Governor	3/22/2009
Ms. Linda Best, Deer Lodge Qualifications (if required): public representative	Governor	3/22/2009
Ms. Peggy Cochran, Missoula Qualifications (if required): public representative	Governor	3/22/2009
Ms. Debra Donovan, Billings Qualifications (if required): public representative	Governor	3/22/2009
Dr. Jane Gillette, Bozeman Qualifications (if required): public representative	Governor	3/22/2009
Ms. Betty Hall-Munger, Helena Qualifications (if required): public representative	Governor	3/22/2009



**VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2009 THROUGH MARCH 31, 2009**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Family Health Advisory Council</b> (Public Health and Human Services) cont.		
Ms. Rhonda Howlett, Arlee Qualifications (if required): public representative	Governor	3/22/2009
Ms. Carol Keaster, Belt Qualifications (if required): public representative	Governor	3/22/2009
Ms. Janet Runnion, Box Elder Qualifications (if required): public representative	Governor	3/22/2009
Ms. Jeanne Seifert, Glendive Qualifications (if required): public representative	Governor	3/22/2009
<b>Fetal Alcohol Spectrum Disorder Advisory Council</b> (Public Health and Human Services)		
Mr. Thomas Price, Eureka Qualifications (if required): parent	Governor	2/22/2009
Ms. Mary Behrendt, Whitefish Qualifications (if required): educator	Governor	2/22/2009
Ms. Allison Failing, Poplar Qualifications (if required): tribal community representative	Governor	2/22/2009
Dr. John Johnson, Helena Qualifications (if required): medical geneticist	Governor	2/22/2009
Dr. Ted Laine, Missoula Qualifications (if required): neonatologist	Governor	2/22/2009

**VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2009 THROUGH MARCH 31, 2009**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Fetal Alcohol Spectrum Disorder Advisory Council</b> (Public Health and Human Services) cont.		
Ms. Irene Lake, Saint Ignatius Qualifications (if required): prevention program representative	Governor	2/22/2009
Ms. Linda Tarinelli, Bozeman Qualifications (if required): educator	Governor	2/22/2009
Ms. Margaret Ann Yellow Kidney, Browning Qualifications (if required): tribal community representative	Governor	2/22/2009
Ms. Cheryl Jill Plumage, Harlem Qualifications (if required): tribal community representative	Governor	2/22/2009
Ms. Kay Flinn, Helena Qualifications (if required): family and addiction specialist	Governor	2/22/2009
Ms. Bonnie Stout, Kalispell Qualifications (if required): prevention program representative	Governor	2/22/2009
<b>Governor's Advisory Council on Economic Security for Montana Families</b> (Governor)		
Ms. Sheila Hogan, Butte Qualifications (if required): public representative	Governor	2/22/2009
Ms. Minkie Medora, Missoula Qualifications (if required): public representative	Governor	2/22/2009
Rep. Shannon Augare, Browning Qualifications (if required): public representative	Governor	2/22/2009

**VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2009 THROUGH MARCH 31, 2009**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Governor's Advisory Council on Economic Security for Montana Families</b> Ms. Lori Brengle, Glendive Qualifications (if required): public representative	(Governor) cont. Governor	2/22/2009
Ms. Mary Danford, Bigfork Qualifications (if required): public representative	Governor	2/22/2009
Ms. Bethany Letiecq, Bozeman Qualifications (if required): public representative	Governor	2/22/2009
Mr. Everall Fox, Billings Qualifications (if required): public representative	Governor	2/22/2009
Ms. Elaine Topsky, Box Elder Qualifications (if required): public representative	Governor	2/22/2009
Ms. Barb Stiffarm, Havre Qualifications (if required): public representative	Governor	2/22/2009
Mr. Robert Young, Bozeman Qualifications (if required): public representative	Governor	2/22/2009
Ms. Angie Wasia, Bozeman Qualifications (if required): public representative	Governor	2/22/2009
<b>Human Rights Commission</b> (Labor and Industry) Ms. Emorie Davis-Bird, Browning Qualifications (if required): public representative	Governor	1/1/2009

**VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2009 THROUGH MARCH 31, 2009**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p><b>Human Rights Commission</b> (Labor and Industry) cont.                      Ms. Maria E. Beltran, Worden                      Qualifications (if required): public representative</p>	Governor	1/1/2009
<p><b>Livestock Loss Reduction and Mitigation Board</b> (Livestock)                      Mr. James Cross, Kalispell                      Qualifications (if required): wildlife conservation representative</p>	Governor	1/1/2009
<p>Ms. Janelle Holden, Livingston                      Qualifications (if required): wildlife conservation representative</p>	Governor	1/1/2009
<p>Mr. Brad Radtke, Drummond                      Qualifications (if required): livestock industry representative</p>	Governor	1/1/2009
<p>Ms. Whitney Wankel, Bozeman                      Qualifications (if required): livestock industry representative</p>	Governor	1/1/2009
<p><b>Montana Council on Developmental Disabilities</b> (Commerce)                      Rep. Carol Lambert, Broadus                      Qualifications (if required): legislator</p>	Governor	1/1/2009
<p>Director Joan Miles, Helena                      Qualifications (if required): agency representative</p>	Governor	1/1/2009
<p>Ms. Sarah Casey, Helena                      Qualifications (if required): agency representative</p>	Governor	1/1/2009

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<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p><b>Montana Council on Developmental Disabilities</b> (Commerce) cont.            Sen. Carol Williams, Missoula            Qualifications (if required): legislator</p>	Governor	1/1/2009
<p>Mr. Roger Holt, Billings            Qualifications (if required): advocacy representative</p>	Governor	1/1/2009
<p>Mr. Don Berryman, Anaconda            Qualifications (if required): secondary consumer representative</p>	Governor	1/1/2009
<p><b>Montana Grass Conservation Commission</b> (Natural Resources and Conservation)            Mr. Leo Solf, Winnett            Qualifications (if required): grazing district director</p>	Governor	1/1/2009
<p>Mr. Alvin Windy Boy Sr., Box Elder            Qualifications (if required): public representative</p>	Governor	1/1/2009
<p><b>Montana Pulse Crop Advisory Committee</b> (Agriculture)            Ms. Kim Murray, Froid            Qualifications (if required): producer</p>	Director	2/14/2009
<p>Mr. Michael Ehlers, Oilmont            Qualifications (if required): producer</p>	Director	2/14/2009
<p>Mr. Perry Miller, Bozeman            Qualifications (if required): research</p>	Director	2/14/2009

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<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p><b>Public Safety Officer Standards and Training Council</b> (Justice)                      Sheriff Tony Harbaugh, Miles City                      Qualifications (if required): sheriff</p>	Governor	1/1/2009
<p>Captain Dennis McCave, Billings                      Qualifications (if required): detention center representative</p>	Governor	1/1/2009
<p>Mr. Steve Barry, Helena                      Qualifications (if required): Department of Corrections representative</p>	Governor	1/1/2009
<p>Mr. Raymond Murray, Missoula                      Qualifications (if required): public member</p>	Governor	1/1/2009
<p>Ms. Bonnie Wallem, Kalispell                      Qualifications (if required): Board of Crime Control representative</p>	Governor	1/1/2009
<p>Sergeant Mike Reddick, Helena                      Qualifications (if required): state government law enforcement representative</p>	Governor	1/1/2009
<p>Ms. Hannah Tillman, Crow Agency                      Qualifications (if required): public member</p>	Governor	1/1/2009
<p><b>Publishing Policy Committee</b> (Administration)                      Director Jim Lynch, Helena                      Qualifications (if required): department director</p>	Governor	1/1/2009

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<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Rail Service Competition Council</b> (Transportation)		
Mr. William Fogarty, Anaconda	Governor	1/1/2009
Qualifications (if required): knowledgeable of class I railroads		
Mr. Michael O'Hara, Fort Benton	Governor	1/1/2009
Qualifications (if required): farm commodity producer		
Mr. Doug Miller, Troy	Governor	1/1/2009
Qualifications (if required): knowledgeable of transportation for the mineral industry		
Mr. John DeMichiei, Billings	Governor	1/1/2009
Qualifications (if required): knowledgeable of transportation for the coal industry		
<b>Small Business Health Insurance Pool Board</b> (State Auditor)		
Ms. Connie Welsh, Helena	Governor	1/1/2009
Qualifications (if required): management level individual with knowledge of state employee health benefit plans		
<b>State Employee Charitable Giving Campaign Advisory Council</b> (Administration)		
Ms. Joy McGrath, Helena	Director	2/14/2009
Qualifications (if required): federation/independent representative		
Mr. Matthew Dale, Helena	Director	2/14/2009
Qualifications (if required): employee representative		
Ms. Mary Wright, Helena	Director	2/14/2009
Qualifications (if required): employee representative		

**VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2009 THROUGH MARCH 31, 2009**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>State Employee Charitable Giving Campaign Advisory Council</b> (Administration) cont. Ms. Marcia Armstrong, Helena Qualifications (if required): employee representative	Director	2/14/2009
Ms. Kathy Miller, Helena Qualifications (if required): Independent Charities representative	Director	2/14/2009
Mr. Gary Owen, Great Falls Qualifications (if required): federation/independent representative	Director	2/14/2009
Mr. Jack Lynch, Helena Qualifications (if required): employee representative	Director	2/14/2009
Mr. Rick Bush, Helena Qualifications (if required): employee representative	Director	2/14/2009
Mr. Marty Roos, Helena Qualifications (if required): employee representative	Director	2/14/2009
Mr. Rob Mayer, Helena Qualifications (if required): employee representative	Director	2/14/2009
Ms. Candy Kirby, Helena Qualifications (if required): employee representative	Director	2/14/2009
Ms. Marie Matthews, Helena Qualifications (if required): employee representative	Director	2/14/2009



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<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p><b>State Tax Appeal Board</b> (Administration)                      Ms. Karen Powell, Helena                      Qualifications (if required): public representative</p>	Governor	1/1/2009
<p><b>Transportation Commission</b> (Transportation)                      Ms. Barb Skelton, Billings                      Qualifications (if required): resident of District 5</p>	Governor	1/1/2009
<p>Ms. Diann Seymour-Winterburn, Helena                      Qualifications (if required): resident of District 3 and an Independent</p>	Governor	1/1/2009
<p><b>Traumatic Brain Injury Advisory Council</b> (Public Health and Human Services)                      Ms. Julia Hammerquist, Kalispell                      Qualifications (if required): traumatic brain injury survivor</p>	Governor	1/1/2009
<p>Mr. Lucas Foust, Bozeman                      Qualifications (if required): representative of Injury Control or Prevention Programs</p>	Governor	1/1/2009