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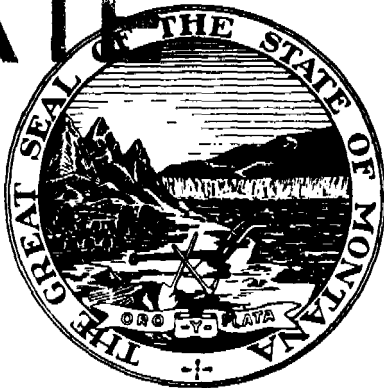
**MONTANA
ADMINISTRATIVE
REGISTER**

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INDEX COPY



MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 13

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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

TABLE OF CONTENTS

	<u>Page Number</u>
<u>NOTICE SECTION</u>	
<u>FISH, WILDLIFE AND PARKS, Department of, Title 12</u>	
12-2-127 Notice of Proposed Amendment - Establishment of Priority for Landowners in Issuance of Antelope or Deer Hunting Licenses. No Public Hearing Contemplated.	1021-1022
12-2-128 Notice of Proposed Repeal - Field Trial Regulations. No Public Hearing Contemplated.	1023
<u>RULE SECTION</u>	
<u>ADMINISTRATION, Department of, Title 2</u>	
AMD Incorporation by Reference - Uniform Building Code.	1024
REP Review of School Plans.	1024
AMD Incorporation by Reference - National. Electrical Code.	1024
AMD Incorporation by Reference - Standard for Recreational Vehicles.	1025
<u>COMMERCE, Department of, Title 8</u>	
NEW Incorporation by Reference - Montana Environmental Policy Act.	1026
-i-	13-7/12/84

COMMERCIAL, Department of, continued

AMI (Montana Economic Development Board)
Definitions - Eligibility - Criteria. 1026

HEALTH AND ENVIRONMENTAL SCIENCES, Department of, Title 16

REP Sanitary Approval of subdivisions
AMD
NEW 1027-1039

JUSTICE, Department of, Title 23

NEW Child Safety Restraint Systems. 1040-1041

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

NEW (Board of Oil and Gas Conservation) Burning of
Waste Gas and Workable Ignitor Systems on Wells
Producing H₂S Gas. 1042-1043

INTERPRETATION SECTION

Opinions of the Attorney General

- 55 County Commissioners - Discretion to set compensatory
time policies; County Officers - Deputy sheriffs and
undersheriffs; Hours of Work - Salaries. 1044-1047
- 56 Workers' Compensation - Water commissioner. 1048-1050
- 57 Subdivision and Platting Act - Applicability
of subdivision laws to planned apartment
building construction project on tract of land
owned by developer. 1051-1056

SPECIAL NOTICE AND TABLE SECTION

Functions of the Administrative Code Committee 1057

How to Use ARM and MAR 1058

Accumulative Table 1059-1067

Cross Reference Index - January-June 1984 1068-1081

BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the)	NOTICE OF PROPOSED AMENDMENT
amendment of Rule 12.3.104)	OF RULE 12.3.104 -
relating to the establish-)	ESTABLISHMENT OF PRIORITY
ment of priority for land-)	FOR LANDOWNERS IN ISSUANCE
owners in issuance of)	OF ANTELOPE OR DEER HUNTING
antelope or deer hunting)	LICENSES
licenses)	

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On August 30, 1984, the Fish and Game Commission proposes to amend Rule 12.3.104 regarding the establishment of priority for landowners in issuance of antelope or deer hunting licenses.

2. The proposed amendment provides as follows:

(1) Subject to the provisions hereinafter stated, in the establishing of special seasons or areas for the hunting of antelope or in the establishing of permit seasons or areas for the hunting of deer, and in the issuance of permits or licenses to landowners as hereinafter defined, before conducting any drawing for eligibility for issuance of same in accordance with the following:

(a) Each landowner shall be issued such license or permit upon application therefor; provided that ~~net-to-exceed-15% of the number of licenses or permits established for any hunting district will be made available to eligible landowners owning land within the district.~~ the number of licenses available to eligible landowners shall not exceed the percentage set by the commission annually of the total permits established for any hunting district. If applications from such landowners exceed ~~said-15%~~ the percentage set by the commission, the said limited number of landowner licenses or permits will be issued by a drawing system. Priority will be given to applicants who did not receive a permit the immediate preceding year. When the ~~15% quota~~ percentage set by the commission has been filled, the remaining applicants will participate in the drawing established for the general public.

(b) For purpose of this regulation, a landowner shall be deemed to be the owner of record of 160 acres or more of real property which is primarily for agricultural purposes. Lessees shall not qualify as landowners. Where the real property is held jointly or in common by several persons, only one of said joint or common owners shall be entitled to the preference herein established or said owners may designate any other person as entitled to their preference if such other person is a member of their immediate family or is employed by such owner or owners as a ranch manager or in a similar capacity. No preference may be granted to a landowner if the hunting area is totally within the prescribed boundaries of public land.

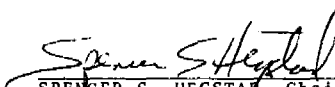
AUTH: 87-1-304 MCA; IMP: 87-1-304 MCA.

3. This amendment is proposed to provide flexibility to the Fish and Game Commission in order to allow them to change the percentage of licenses available to landowners according to current antelope and deer populations. When antelope and deer populations are very high the commission will be able to provide for a larger percentage of preferences to landowners and when it is low they will be able to reduce the percentage.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to Stan Bradshaw, Department of Fish, Wildlife and Parks, 1426 East Sixth Avenue, Helena, Montana 59620, no later than August 10, 1984.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Mr. Bradshaw no later than August 10, 1984.

6. If the department receives requests for a public hearing on this proposed amendment from either 10% or 25, whichever is less, of the persons directly affected; from the Administrative Code 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.


SPENCER S. HEGSTAD, Chairman
Montana Fish and Game Commission

Certified to the Secretary of State July 2, 1984

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

In the matter of the)
REPEAL OF RULES)
regarding field)
trials)

NOTICE OF THE REPEAL OF
ARM 12.6.201 - 12.6.204 -
FIELD TRIAL REGULATIONS

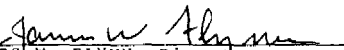
NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On August 12, 1984, the Department of Fish, Wildlife and Parks proposes to repeal Rules 12.6.201 - 12.6.204 which establish field trial regulations.

2. The rules to be repealed are on pages 12-308.1 - 12-310 of the Administrative Rules of Montana.

3. The department is repealing these rules because they have been replaced by 87-4-915, MCA.



JAMES W. FLYNN, Director
Department of Fish, Wildlife and
Parks

Certified to the Secretary of State July 2, 1984

BEFORE THE DEPARTMENT OF ADMINISTRATION
BUILDING CODES DIVISION
OF THE STATE OF MONTANA

In the matter of the amendment) NOTICE OF THE AMEND-
of rule ARM 2.32.101 concern-) MENT OF ARM 2.32.101
ing the adoption of the Uniform)
Building Code by reference)

TO: All Interested Persons:

1. On April 26, 1984, the Department of Administration published a notice of the proposed amendment to the above rule concerning the adoption by reference of the Uniform Building Code at pages 622-623 of the 1984 Montana Administrative Register, issue number 8.

2. The agency has amended the rule as proposed.
3. No comments or testimony were received.

In the matter of the repeal) NOTICE OF REPEAL OF
of rule ARM 2.32.210 concern-) ARM 2.32.210
ing the review of school plans)
by the Division)

TO: All Interested Persons:

1. On April 26, 1984, the Department of Administration published a notice of proposed repeal to the above rule concerning the review of school plans by the Division at pages 624-625 of the 1984 Montana Administrative Register, issue number 8.

2. The agency has repealed the rule as proposed.
3. No comment or testimony were received.

In the matter of the amendment) NOTICE OF THE AMENDMENT
of rule ARM 2.32.401 concern-) OF ARM 2.32.401
ing the adoption of the)
National Electrical Code by)
reference)

TO: All Interested Persons:

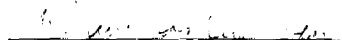
1. On April 26, 1984, the Department of Administration published a notice of the proposed amendment to the above rule concerning the adoption by reference of the National Code at pages 626-627 of the 1984 Montana Administrative Register, issue number 8.

2. The agency has amended the rule as proposed.
3. No comments or testimony were received.

In the matter of the amendment) NOTICE OF THE AMENDMENT
of rule ARM 2.32.501 concern-) OF ARM 2.32.501
ing the adoption of the Stand-)
ard For Recreational Vehicles,)
NEPA 501C/ANSI A119.2 by)
reference

TO: All Interested Persons:

1. On April 26, 1984, the Department of Administration published a notice of the proposed amendment to the above rule concerning the adoption by reference of the Standard for Recreational Vehicles, NEPA 501C/ANSI A119.2 at pages 628-629 of the 1984 Montana Administrative Register, issue number 1.
2. The agency has adopted the rule as proposed.
3. No comments or testimony were received.


Morris Brusett, Director
Department of Administration

Certified to the Secretary of State _____ June 27 _____, 1984

STATE OF MONTANA
BEFORE THE DEPARTMENT OF COMMERCE

In the matter of the adop-) NOTICE OF ADOPTION BY
tion by reference of a new) REFERENCE OF RULES FOR THE
rule implementing the) IMPLEMENTATION OF THE MONTANA
Montana environmental policy) ENVIRONMENTAL POLICY ACT,
act.) 8.2.301

TO: All Interested Persons:

1. On May 31, 1984, the Department of Commerce published a notice of adoption of the above-stated rule at pages 859 and 860, 1984 Montana Administrative Register, issue number 10.
2. The department has adopted the rule exactly as proposed.
3. No comments or testimony were received.

DEPARTMENT OF COMMERCE
BEFORE THE MONTANA ECONOMIC DEVELOPMENT BOARD

In the matter of the amendments) NOTICE OF AMENDMENTS OF ARM
of ARM 8.97.301 concerning) 8.97.301 DEFINITIONS and
definitions and 8.97.402 con-) 8.97.402 CRITERIA FOR
cerning the criteria for) DETERMINING ELIGIBILITY
determining eligibility)

TO: All Interested Persons:

1. On May 31, 1984, the Montana Economic Development Board published a notice of amendments of the above-stated rules at pages 869 through 870, 1984 Montana Administrative Register, issue number 10.
2. The board has amended the rules exactly as proposed.
3. No comments or testimony were received.

DEPARTMENT OF COMMERCE
GARY BUCHANAN, DIRECTOR

BY: 
ROBERT WOOD, ATTORNEY

Certified to the Secretary of State, July 2, 1984.

BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA

In the matter of the amendment	)	NOTICE OF THE
of rules 16.16.101, 16.16.103	)	REPEAL OF RULES
through 16.16.110,	)	ARM 16.16.115, 16.16.311,
16.16.301 through 16.16.310,	)	AND 16.16.802
16.16.603 through 16.16.606,	)	AND THE AMENDMENT OF
16.16.803 through 16.16.805,	)	RULES 16.16.101,
and the repeal of 16.16.115,	)	16.16.103 THROUGH 16.16.110,
16.16.311, and 16.16.802,	)	16.16.301 THROUGH 16.16.310,
and the adoption of RULES I, II,	)	16.16.603 THROUGH 16.16.606,
and III, concerning all aspects	)	16.16.803 THROUGH 16.16.805,
of the application for and	)	AND THE ADOPTION OF 16.16.111,
granting of sanitary approvals	)	16.16.312 and 16.16.313 RELATING
of subdivisions	)	TO SANITARY APPROVAL OF
)	)	SUBDIVISIONS
)	)	(Sanitation in
)	)	Subdivisions)

TO: All Interested Persons

1. On May 17, 1984, the Department of Health and Environmental Sciences ("Department") published notice of the proposed repeal and amendment of certain existing rules and the adoption of three new rules, concerning all aspects of the Department's review and approval of applications under the Sanitation and Subdivisions Act, Title 76, Chapter 4, MCA. The notice of proposed action appeared at pages 764-789 of the 1984 Montana Administrative Register, issue number 9.

2. The Department has repealed ARM rules 16.16.115, 16.16.311, and 16.16.802 as proposed.

3. The Department has amended and adopted the rules with the following changes:

16.16.101 DEFINITIONS

(1) through (9) Same as proposed rule.

(10) "Multiple family sewage system" means a non-public sanitary sewage system which serves or is intended to serve two through nine living units. The total people served shall not exceed 24.

(11) "Multiple family water supply system" means a non-public water supply system designed to provide water for human consumption to serve two through nine living units. The total people served shall not exceed 24.

(12) through (16) Same as proposed rule.

(17) "Seasonal high groundwater level" is the vertical distance from the natural ground surface to the groundwater surface as observed as a free water surface in an unlined hole during the time of the year when the groundwater is the highest, ~~or has been saturated as may be indicated by mottling (soil color patterns)-~~ When observed, mottling (soil color patterns) shall be reported as one indicator of previous saturation levels.

(18) through (22) Same as proposed rule.
AUTHORITY: Sec. 76-4-104 MCA
IMPLEMENTING: Sec. 76-4-104 MCA

16.16.103 APPLICATION FORMS Same as proposed rule.
AUTHORITY: Sec. 76-4-104 MCA
IMPLEMENTING: Sec. 76-4-104, 76-4-125 MCA

16.16.104 INFORMATION SUBMITTED WITH APPLICATION
Same as proposed rule.
AUTHORITY: Sec. 76-4-104 MCA
IMPLEMENTING: Sec. 76-4-104, 76-4-125 MCA

16.16.105 SUBDIVISION AND PLATTING ACT EXCLUSIONS
SUBJECT TO DEPARTMENT REVIEW Same as proposed rule.
AUTHORITY: Sec. 76-4-104 MCA
IMPLEMENTING: Sec. 76-4-125 MCA

16.16.106 REVIEW PROCEDURES (1) Upon receipt of a subdivision application or a resubmittal, the department will have 60 days for final action. If an environmental impact statement is required, final action must be taken within 120 days.

(a) If the application is incomplete, the department or local review agent shall deny the application, set forth the deficiencies to the applicant or his representative and shall review such additional information when resubmitted.

(b) When an application for a subdivision is resubmitted and there are changes in the resubmittal which substantially modify the design or operation of the water supply or sewage systems, the department may request an additional review fee.

(2) ~~Any undeveloped subdivision lot (a lot without a structure requiring water supply or sewage disposal) submitted for review which was Subdivision lots recorded with sanitary restrictions prior to July 1, 1973, shall be reviewed in accordance with requirements set forth in this chapter. In cases where any requirements of this chapter would preclude the use for which each lot was originally intended, then the applicable requirements (including the absence thereof) in effect at the time such lot was recorded shall govern except that sanitary restrictions in no case shall be lifted from any such undeveloped lot which cannot satisfy any of the following requirements:~~

(a) Where a subsurface sewage treatment system is utilized, at least 4 feet from the natural ground surface to the seasonal high groundwater;

(b) The site for any subsurface sewage treatment system may not exceed 25% in slope;

(c) No part of the lot utilized for the subsurface sewage treatment system may be located in a 100 year floodplain.

(d) Where a subsurface sewage treatment system is utilized, soil conditions demonstrating a capacity for safe treatment and disposal of sewage effluent.

(3) Same as proposed rule.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-104, 76-4-125 MCA

16.16.108 LOCAL REVIEW Same as proposed rule.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-104, 76-4-125 MCA

16.16.110 CERTIFICATION OF APPROVAL Same as proposed rule.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-104, 76-4-125 MCA

16.16.111 (RULE I) MOBILE HOMES AND RECREATIONAL VEHICLES Same as proposed rule.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-104, 76-4-125 MCA

16.16.301 LOT SIZES

(1) and (2) Same as proposed rule.

(3) Lot sizes larger than those set forth in subsections (1) and (2) above may be required where individual sewage treatment or multiple systems are proposed and the concentration of living units may cause pollution or contamination of state waters or where an adequate water supply cannot be developed for the proposed number of living units.

(4) Same as proposed rule.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-104 MCA

16.16.302 PUBLIC WATER AND SEWER Same as proposed rule.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-104, 76-4-125 MCA

16.16.303 INDIVIDUAL WATER SUPPLY SYSTEMS

(1) through (8) Same as proposed rule.

(9) Where an existing system is present in a proposed subdivision, the evaluation of the existing system by the department may be based on information submitted by the applicant on the adequacy to the existing or prior user of the system and the capability of the system to provide an adequate water supply. However, as a minimum, a coliform analysis will be required.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-104, 76-4-125 MCA

16.16.304 INDIVIDUAL SEWAGE TREATMENT SYSTEMS

(1) through (8) Same as proposed rule.

(9) if the applicant or the department has reason to believe groundwater will be within 6 feet of the surface at any time of the year, groundwater monitoring holes shall be provided to a depth of at least ~~10~~ 8 feet to determine seasonal high groundwater level.

(10) through (14) Same as proposed rule.

(15) No individual sewage treatment system shall be located within 100 feet horizontal distance from the a 100-year flood level of any river, lake, stream, pond or watercourse and from any swamp or seep unless a waiver has been provided by the department. A waiver may only be provided if:

(a) The watercourse is an irrigation ditch and the groundwater flow at the drainfield site will not enter the irrigation ditch, or

(b) The river or stream average yearly highwater mark is a minimum of 100 feet from the drainfield and the bottom of the drainfield will be at least four feet above the 100 year flood elevation.

(c) In cases where the floodplain level has not been designated or determined by the federal or state government and floodplain level is in question with respect to a proposed subdivision, delineation of the floodplain will be referred to the Department of Natural Resources and Conservation for its determination. Additional information such as elevations at specific locations may need to be provided by the applicant.

(16) through (19) Same as proposed rule.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-104, 76-4-125 MCA

16.16.305 MULTIPLE FAMILY SYSTEMS

(1) Same as proposed rule.

(2) Multiple family sewage systems shall be designed in accordance with Department Circular 84-10 and ARM 16.16.304 except subsections (6) and ~~(7)~~ (8).

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-104, 76-4-125 MCA

16.16.309 SOLID WASTES Same as proposed rule.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-104, MCA

16.16.310 STORM DRAINAGE Same as proposed rule.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-104, 76-4-125 MCA

16.16.312 SUBDIVISIONS ADJACENT TO STATE WATERS Same as proposed rule.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-104, 76-4-125 MCA

16.16.313 CONDOMINIUM CONVERSIONS Same as proposed

rule.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-111, 76-4-125 MCA

16.16.603 SUBDIVISIONS IN MASTER PLANNED AREA Same as proposed rule.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-125 MCA

16.16.605 EXCLUSIONS Same as proposed rule.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-125 MCA

16.16.606 EXCLUSIONS -- COMPLIANCE WITH PUBLIC WATER
Same as proposed rule.

AUTHORITY: Sec. 76-4-104 MCA

IMPLEMENTING: Sec. 76-4-125 MCA

16.16.803 FEE SCHEDULES Same as proposed rule.

AUTHORITY: Sec. 76-4-105 MCA

IMPLEMENTING: Sec. 76-4-105, 76-4-128 MCA

16.16.804 DISPOSITION OF FEES Same as proposed rule.

AUTHORITY: Sec. 76-4-105 MCA

IMPLEMENTING: Sec. 76-4-105, 76-4-128 MCA

16.16.805 CHANGES IN SUBDIVISION Same as proposed rule.

AUTHORITY: Sec. 76-4-105 MCA

IMPLEMENTING: Sec. 76-4-105 MCA

4. Summaries of comments on the proposed rules as well as the Department's responses are as follows:

Comment Montana Association of Realtors. Under ARM 16.16.106(2) lots recorded prior to 1973 are to be reviewed in accordance with current requirements. This proposal should be stricken in its entirety since it does away with the grandfather clause and therefore is the passing of legislation.

Response The proposed rule attempts to strike a balance among the expectations of owners of lots filed prior to 1973, the concerns of owners of lots adjacent to lots where water and sewage disposal systems are being installed under old (and more relaxed) health standards, and the advances in the sanitation sciences underlying current requirements.

DHES will still grandfather pre-1973 lots from current requirements that physically cannot be met by such lots. In some cases fundamental site constraints may necessitate some additional costs to the applicant (e.g. alternative on-site systems) but will not extinguish the use of such lots.

Comment Montana Association of Realtors. Proposed Section 16.16.303(6) should be clarified to show that any one

of the three sources of information is adequate to demonstrate adequate flows.

Response On most smaller subdivisions usually only one source of information will be needed. However, in some areas the amount of available information is very limited and more than one source may be needed.

Comment Montana Association of Realtors. Proposed Section 16.16.105 is another instance of DHES attempting to pass a law.

Response ARM Section 16.16.105 merely recites by rule the statutory provision found in Section 76-4-125(2).

Comment Montana Association of Realtors. Proposed rule 16.16.303(8)(b) is unclear as to whether a three-filter system will be required for lakes.

Response A filtration and disinfection system will generally provide the needed treatment. However, there may be instances where greater treatment will be needed because of the quality of the untreated water.

Comment Montana Association of Realtors. The replacement area requirement in 16.16.304(3) is not necessary. Allowance should be made for excavating an old drainfield and replacing it with new soil rather than having to have a new site available or a replacement.

Response Additional drainfield area provides the greatest assurance of long term acceptable sewage treatment. If a drainfield has failed in a specific location, chances are, it will fail again. Also, a failed drainfield may recover some of its lost capacity by resting over a period of months and may be used as a backup for the new system.

Comment Montana Association of Realtors. Proposed rule 16.16.304(15) is silent as to cases where a particular county does not have a 100-year flood plain map.

Response A new paragraph (c) is now added to 16.16.304 which states: "In cases where the floodplain level has not been designated or determined by federal or state government and the floodplain is in question with respect to the proposed subdivision, delineation of the floodplain will be referred to the Department of Natural Resources and Conservation for its determination. Additional information such as elevations at specific locations may need to be provided by the applicant."

Comment Montana Association of Realtors. In rule 16.16.304, the phrase "natural ground surface" operates too strictly in limiting the number of sites suitable for subsurface drainfields. The word "natural" should be deleted from such phrase in order to allow applicants to fill low areas to meet the six foot separation between ground surface and seasonal high groundwater.

Response The term natural is used with respect to conventional subsurface sewage treatment system. Subsection 16.16.304(14) allows waivers for alternative systems such as systems where the six feet distance between the natural ground

surface and the seasonal high groundwater table cannot be maintained.

Comment Casne and Associates. The new definition of seasonal high groundwater in 16.16.101(17) includes mottling as a criterion for determining high groundwater levels. Since irrigation practices, which often cause mottling, are subject to changes, high groundwater levels may not correspond to observed mottling. Therefore, mottling should be used only as an indicator of seasonal high groundwater levels.

Response DHES agrees with this comment and has changed the definition of seasonal high groundwater in 16.16.304(17).

Comment Casne and Associates. Proposed rule 16.16.303 on individual wells should require analysis for coliform bacteria.

Response Typically, a well is not drilled at each proposed home site before a subdivision is submitted for approval. A coliform bacteria test is not usually indicative of the bacteriological quality of a water at another location. Subsection 16.16.303(2)(a) allows the Department to require other parameters and, if an area was known to contain water of poor bacteriological quality specific testing could be required. However, coliform testing should be required for all existing systems and a sentence to that effect has been added to subsection 16.16.303(9).

Comment Casne and Associates. An applicant proposing an individual well with less than the minimum flows listed in 16.16.303(5) should have to demonstrate that the new well would not significantly deplete water supplies for wells on adjacent properties.

Response Through 16.16.301, which permits the Department to require larger lot sizes and 85-2-506 MCA, which permits establishment of controlled groundwater areas by the Board of Natural Resources and Conservation, depletion of adjacent supplies should be avoided.

Comment Casne and Associates. Under the new language of 16.16.304(15)(b), developers will be demanding that they be allowed to use fill to meet the highwater and groundwater separations in the 100-year flood level of rivers, lakes etc. This is not an advisable practice and the language should be clear that fill will not be allowed to comply with these separation requirements.

Response Fill systems are alternative systems pursuant to 16.16.304(14) and are therefore subject to the requirements of DHES and Circular 84-12, including the criteria in Section 37 of Circular 84-12. Under Section 37.201, the siting criteria for fill systems are found in Section 31.2 of Circular 84-12 which prohibits the use of elevated sand mounds within 100 feet of the 100 year floodplain.

Therefore, in cases of 100 year floodplains, fill will not be allowed to achieve the four foot separation between the bottom of the drainfield and the 100 year flood elevation.

Comment Casne and Associates. Rule 16.16.106 is unclear whether upon denial by the Department of initial application, the 60 day period mentioned in 16.16.106(1) is reset again. In other words, how much time does the Department have to review a resubmitted application.

Response The way 16.16.106(1) was previously written the Department was under no time constraint for review of resubmittals. The first sentence of 16.16.106(1) has now been reworded to "Upon receipt of a subdivision application or resubmittal the department will have 60 days for final action . . ."

Comment Dan McGee. In Circular 84-12, Item 10.406 recites that at least one percolation test per site is required. On the next page Table 10-406, Section 1, recites that a minimum of three percolation tests are performed on area proposed for the absorption site. What is the number of percolation tests required per site?

Response Table 10-406 has been revised to require only one percolation test in the area of the proposed absorption system.

Comment Casne and Associates. In Circular 84-12, a pressure distribution system should not be classified as "experimental" but rather is properly an "alternative" system.

Response The first paragraph in Chapter 30 states "This category of alternative individual on-site sewage treatment systems includes those systems which have been used successfully in various applications. They are placed in this category either due to their complexity of design or due to limited experience with their effectiveness in the State of Montana." Pressure distribution systems are placed in this category because of complexity of design.

Comment Casne and Associates. In order to avoid confusion, item 60.202 in Circular 84-10 should include criteria to govern the use of fill to meet the 100 foot separation between the drainfield and the fill systems

Response See answer above to Comment by Casne and Associates concerning 16.16.304(15)(b).

Comment Rod Fink, R.S. Rule 16.16.108 should limit local review agreements to local governments that have in effect standards not inconsistent with those of DHES.

Response Subsection 16.16.108(1)(b) states that local governments shall agree to review water supply, sewage and solid waste disposal systems according to provisions of this chapter.

Comment Rod Fink, R.S. The first sentence of Rule 16.16.106(2) should refer to "undeveloped or unreviewed" lots since many pre-1973 lots filed with sanitary restrictions have residences illegally built on them. These residences should be reviewed under the criteria of 16.16.106(2).

Response The comment is accurate and the section has been clarified to include such lots.

Comment Rod Fink, R.S. Developers wishing to build within an area that has no delineated floodplain should be required to determine it themselves. In this way lot buyers will be assured their future homes won't be in the floodplain.

Response The Department of Natural Resources and Conservation has personnel with expertise for determining floodplain boundaries. However, before they can make this determination, additional data must usually be submitted by the applicant. See Response above to floodplain Comment by Montana Realtors.

Comment Northwest Montana Sanitarians' Association (NMSA). Rule 16.16.301 should be changed to allow lot size reductions only in cases of public water and/or sewer systems.

Response The minimum distances set forth in 16.16.304(17) are still required for both individual and multiple systems and larger lot sizes could be required through 16.16.301(3). However, 16.16.301(3) only relates to individual sewage treatment units. The phrase, "or multiple" has now been placed after "treatment" in this paragraph to make it more inclusive.

Comment NMSA. The prohibition in 16.16.106(2)(c) against the use on pre-1973 lots of subsurface septic systems in 100-year flood plains should be removed. Also the meaning of the phrase "soil condition" in 16.16.106(2)(d) should be made clear.

Response While owners of pre-1973 lots may incur increased costs for installing alternative systems, the use of subsurface septic systems in floodplains violates basic principles of environmentally sound sewage disposal. "Soil conditions" refer to too slow or too fast percolation rates.

Comment NMSA. Prior to their implementation all policies of the State Department of Health should be written, circulated, and then adopted under the Administrative Procedure Act.

Response Rules cannot address every possible set of facts and some interpretation of requirements will always be needed. The current rule revision includes all major policies DHES uses in applying requirements. Changes in such policies will be through formalized rulemaking.

Comment Beckman Engineering. The additional fees for reviewing "substantial modifications" and submittals of additional information called for by DHES (16.16.106(b)) should be eliminated as this may increase costs to land owners.

Response DHES will use 16.16.106(b) only where the initial submittal is grossly inadequate and substantial review time is needed for both the initial review and the resubmittal or where the applicant decides to change his plans substantially due to new data being acquired. This subsection provides minimum compensation to DHES for its work.

Comment Beckman Engineering. The references in 16.16.304(10) to "someone knowledgeable in the field of soil science" and in 16.16.304(8) to "persons with soil science

qualifications acceptable to the Department" should be eliminated as the Department could arbitrarily limit the number of people who can perform percolation tests, etc.

Response During public meetings on the proposed rule changes, DHES was criticized for not including surveyors, sanitarians, and others as being qualified in 16.16.304(8) and (10). Many but not all of the personnel in these classifications are qualified. It was for this reason that (8) and (10) were changed.

Comment Beckman Engineering. What happened to the idea of a simplified checklist that would end DHES' repeated calls for "more information".

Response DHES has a check list for individual systems which can be obtained from DHES and from most county sanitarians.

Comment Beckman Engineering. In the case of minor subdivisions the criteria in Circular 84-12 should only be reference guides because the unqualified personnel at the Water Quality Bureau should not be involved in the design of sewage disposal systems but should only be interested in the performance of such systems. The State's involvement in design makes it vulnerable to law suits. The rules should still be simplified so that the average landowner can avoid having an engineer and go through the subdivision review process himself.

Response The purpose of Circular 84-12 is to provide criteria for alternative systems where conventional systems cannot be utilized. Many of the requirements in the circulars are listed as guidelines rather than standards. Without this circular or other approved references DHES would be faced with the review of many unacceptable systems which would be a time loss to both DHES and applicant. DHES has had considerable advice from qualified individuals within and outside DHES on this circular.

Comment Dan McGee, P.E. For clarity, the reference in 16.16.101(10) and (11) to "the total people served shall not exceed 24" should be retained.

Response In response to the comment, DHES has changed the rule to retain the language.

Comment Dan McGee, P.E. In cases of minor subdivisions, occasional sales, etc. the requirement in 16.16.104(d) for storm drainage plans should be optional or required on a case-by-case basis. Similarly, for minor subdivisions reviewed locally, the local approval should be final and a second review by State isn't necessary.

Response The requirements for storm drainage submittals are further outlined in 16.16.310. The information needed for subdivisions with five or fewer lots is usually relatively small but is needed to protect present and future homeowners in the area. Oversight is generally needed by the State because of the many different local governments involved.

Comment Dan McGee, P.E. In 16.16.304(9) the 10 foot depth of required test holes ignores the fact that standard PVC pipe is only 10 feet long. A depth of 7 or 8 feet would allow for both a sound evaluation of groundwater levels and easy location and monitoring of the test hole.

Response DHES concurs that 16.16.304(9) should be re-written and has replaced ten feet with eight feet.

Comment Dan McGee, P.E. Many of the phrases in the rules are conceptually proper but use vague language such as "may cause pollution" (16.16.301(3)) or "appear to be inadequate" (16.16.303(10)). The Department should spell out as clearly as possible the criteria that will be applied under each rule to minimize the guesswork over requirements.

Response The comment is well taken. However, since engineers (and applicants in general) vary greatly in their perceptions of what constitutes an "adequate" submittal, etc., a slight degree of flexibility is needed to respond to specific cases and applicants. The current rule revision, particularly the Circulars, try to spell out as precisely as possible all procedures and information necessary to obtain approval.

Comment Dan McGee, P.E. In Circular 84-12, the elevated sand mound system (Wisconsin Mound) should be classified as a "standard" alternative system since there is now ample evidence to show that such mounds are no longer "experimental".

Response The first paragraph in Chapter 30 states, "This category of alternative individual on-site sewage treatment systems includes those systems which have been used successfully in various applications. They are placed in this category either due to their complexity of design or due to limited experience with their effectiveness in the State of Montana." Wisconsin Mounds are placed in this category because of complexity of design.

Comment Bruce J. Bauman. Allowing alternate systems will place a greater workload on personnel involved with their regulation. Training and educational programs for sanitarians, engineers, and installers would be helpful so that systems are designed and installed properly.

Response The department recognizes that the more complex systems will probably have a higher rate of failure due to more difficult design and installation. For this reason the systems that are more complex have been placed in the experimental category in Circular No. 84-12. All designers of experimental systems will be requested to submit a resume of their education and experience directly related to the design proposed. Upon completion of the project, the designers must submit written certification to DHES that construction was in accordance with plans and specifications. In the future DHES hopes to provide or encourage educational programs for design of systems.

Comment Bruce J. Bauman. It is important to look at

the long term, cumulative impact of septic systems on local groundwater resources.

Response DHES agrees.

Comment Bruce J. Bauman. In regard to 16.16.301, higher density developments with septic systems and a central water system may cause contamination of groundwater.

Response Section 16.16.301(4) requires suitable land area to be available for adequate water supply and sewage treatment systems. DHES reviews these on a case-by-case basis and larger lot sizes may be required to avoid pollution or contamination of state waters per subsection 16.16.301(3).

Comment Bruce J. Bauman. The definition of bedrock in Circular 84-12, subsection 10.402(a), is inadequate as bedrock may be highly fractured which would allow it to be excavated by power machinery. Fractured bedrock also allows extremely rapid percolation with minimum potential for treatment. Only soils where greater than 50% of the material excavated by the power equipment passes through a 2mm sieve (i.e. it is smaller than gravel) should be utilized for a drainfield.

Response The requirements set forth for percolation tests and soil descriptions in Section 16.16.304 will provide the information needed for identifying bedrock as well as porous formations. Limiting drainfields only to areas where greater than 50% of the material passes a 2mm sieve would be too restrictive in some instances such as areas where there is a great depth of material between the ground surface and groundwater.

Comment Bruce J. Bauman. In reference to Circular 84-12, 31.407, 31.408 and 31.409, the percolation rate is a poor way to size an expensive alternative like a mound. Soil textural data should be given as much or more weight as a perc test.

Response DHES intends to use both the percolation test and required soils information in its evaluation. Both are required to be provided by Section 16.16.304 and Circular 84-12, 10.4.

Comment Bruce J. Bauman. In reference to Circular 84-10, 60.302, the hydraulics of larger systems are significantly different than individual systems and will usually need a smaller application rate. DHES should require 3 absorption fields, each 50% of the area needed for the design flow.

Response One of the reasons DHES decided to utilize its own circular rather than numerous references is that some of the references allowed a larger application rate than DHES required for individual systems. Circular 84-12 should equalize the larger and individual systems. Also DHES through 84-12, 60.7 requires a dosing system to provide better sewage distribution for larger systems. The three fields each 50% of the area needed for the design flow is set forth as a substitute for dosing systems in Circular 84-12, 60.8. DHES has determined that this additional requirement of dosing general-

ly will allow the larger systems to function adequately.

Comment Bruce J. Bauman With reference to Circular 84-12, 37.404, one percolation test is never sufficient and a minimum of three tests are needed.

Response DHES agrees that three tests would provide better information than one, particularly if other soil information was not provided. However DHES requires soil information to a seven foot depth to also be provided [16.16.304(10)]. The combination of the percolation test and other soil information should provide adequate information in virtually every case.

Comment Bruce J. Bauman. With reference to Circular 84-10, 10.101 and 40.5 more detail is needed for larger systems such as depth to groundwater and soil textural changes in the profile to 10 feet since groundwater mounding may occur. Also, at least 2 to 3 test pits per acre should be required.

Response DHES will change Circular 84-10, 10.101(b) to read "Depth to seasonal high groundwater and potential for groundwater mounding and how this information was obtained". DHES also will change the second sentence in the first paragraph of 84-10, 40.5 to read "It is recommended that the minimum depth of soil profile observations be at least seven feet except that at least 10 feet should be profiled where design flow is greater than 1,000 gallons per day and that a minimum of 1 test pit per 1/3 acre of drainfield be provided."

DON WILLEMS, Environmental
Sciences Division

Certified to the Secretary of State July 2, 1984

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the adoption)
of rules establishing)
standards for child safety)
restraint systems and)
providing exemptions for)
certain persons.)

NOTICE OF ADOPTION OF
RULES 23.3.418 AND
23.3.419 CHILD SAFETY
RESTRAINT SYSTEMS

TO: ALL INTERESTED PERSONS:

1. On April 2, 1984, the Department of Justice published notice of proposed adoption of rules establishing standards for child safety restraint systems and providing exemptions for certain persons, at pages 571 and 572 of the 1984 Montana Administrative Register, Issue No. 7.

2. No comments or testimony were received.

3. The agency has adopted two of the proposed rules, with the following changes and explanation:

Rule-I- 23.3.418. STANDARDS FOR CHILD SAFETY RESTRAINT SYSTEMS All child safety restraint systems purchased after January 1, 1984, for use in motor vehicles to comply with the provisions of sections 61-9-419 through 61-9-423, MCA, must conform to federal standards outlined in Federal Motor Vehicle Safety Standard No. 213, ~~and any subsequent amendments to that standard.~~ The Division of Motor Vehicles, Department of Justice, hereby adopts and incorporates by reference Federal Motor Vehicle Safety Standard No. 213, in 49 C.F.R. part 571, which sets forth requirements and standards for child safety restraint systems. A copy of Federal Motor Vehicle Safety Standard No. 213, in 49 C.F.R. part 571 may be obtained from the Division of Motor Vehicles, Department of Justice, 303 Roberts, Helena, Montana 59620.

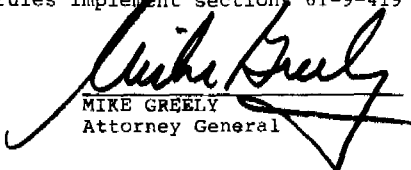
The change was made because, under section 2-4-307(3), MCA, later amendments to rules originally adopted by reference may only be adopted by following the rulemaking procedure of the Montana Administrative Procedure Act.

Rule II. Deleted.

The agency decided not to adopt this proposed rule because it was determined to be unnecessary under the law.

Rule III- 23.3.419. The agency adopts this rule exactly as proposed.

4. The authority for the rules is section 61-9-420, MCA, and the rules implement sections 61-9-419 to 423, MCA.



MIKE GREELY
Attorney General

Certified to the Secretary of State, June 29,
1984.

BEFORE THE BOARD OF OIL
AND GAS CONSERVATION

In the matter of the adoption)	NOTICE OF ADOPTION OF
of a permanent rule requiring)	NEW RULE 36.22.1221
burning of waste gas and)	BURNING OF WASTE GAS
workable ignitor systems on)	REQUIRED
wells producing H ₂ S gas.)	

TO: All Interested Persons

1. On May 21, 1984, the Board of Oil and Gas Conservation (Board) published notice of a proposed new rule requiring workable ignitor systems on wells producing H₂S gas and requiring that all gas vented to the atmosphere at a rate exceeding 20 MCF per day shall be burned. The notice was published at page 877 of the 1984 Montana Administrative Register, issue number 10.

2. The Board adopted the new rule with the following changes:

NEW RULE I (36.22.1221) BURNING OF WASTE GAS REQUIRED

(1) All gas vented to the atmosphere at a rate exceeding 20 MCF per day for a period in excess of 72 hours shall be burned. All operators of wells venting any quantity of gas containing 20 parts per million or more of H₂S shall insure that workable ignitor systems are installed on such wells and take whatever other steps that may be necessary to insure that all such waste gas is burned and not vented to the atmosphere. ~~All operators shall insure that tank vapors are kept to a minimum. A vapor recovery system may be required.~~ No variance from this rule is allowed without written authorization of the Board.

(2) Any operator seeking a variance from this rule must submit a production test and a statement justifying the need for a variance. The statement should include such information as potential human exposure; relative isolation of location; restriction of access to location such as fence, warning signs, etc.; low gas volume; and low BTU content.

(3) The Board staff will review the justification statement with the Board at its next regularly scheduled hearing. The Board may elect to grant or deny the application or schedule a hearing thereon. An operator whose application for variance is denied without a hearing may request a hearing.

3. No requests for a public hearing were received. The Montana Petroleum Association and Conoco Inc. filed written statements objecting to the requirement that a vapor recovery system may be required. This specific provision was deleted as redundant of the earlier language requiring operators to "take whatever other steps that may be necessary to insure that all such waste gas is burned and not vented to the atmosphere". The phrase "for a period in excess of 72 hours" in paragraph (1) of the rule was inserted to allow necessary testing of wells. Senator Larry Tveit expressed concern that the rule did not provide that operators in violation would have their wells shut in. Senator Tveit was assured that that would be done and that such language is not necessary in the rule.

4. The authority of the Board to adopt the proposed new rule is based on Section 82-11-111, MCA, and the rule implements Section 82-11-123, MCA.

Richard A. Campbell
Richard A. Campbell, Chairman
Board of Oil and Gas Conservation

BY: Dee Rickman
Dee Rickman
Assistant Administrator
Oil and Gas Conservation Division

Certified to the Secretary of State July 2, 1984.

VOLUME NO. 40

OPINION NO. 55

COUNTY COMMISSIONERS - Discretion to set compensatory time policies;
COUNTY OFFICERS AND EMPLOYEES - Deputy sheriffs and undersheriffs, compensatory time;
EMPLOYEES, PUBLIC - Deputy sheriffs and undersheriffs, compensatory time;
HOURS OF WORK - Deputy sheriffs and undersheriffs, compensatory time;
SALARIES - Deputy sheriffs and undersheriffs, compensatory time;
SHERIFFS - Deputy sheriffs and undersheriffs, compensatory time;
ADMINISTRATIVE RULES OF MONTANA - Section 2.21.1513;
MONTANA CODE ANNOTATED - Sections 1-2-109, 7-4-2509(2), Title 39, chapter 3, part 4;
OPINIONS OF THE ATTORNEY GENERAL - 36 Op. Att'y Gen. No. 63 (1976); 39 Op. Att'y Gen. No. 21 (1981).

HELD: Deputy sheriffs and undersheriffs may not receive cash payments in lieu of compensatory time off for overtime hours worked prior to July 1, 1981.

25 June 1984

William A. Douglas, Esq.
Lincoln County Attorney
P.O. Box 795
Libby MT 59923

Dear Mr. Douglas:

You have requested my opinion concerning whether deputy sheriffs and undersheriffs who have accumulated compensatory time prior to July 1, 1981, may now be given either a cash payment or time off equivalent to these accumulated hours.

Prior to the enactment in 1981 of section 7-4-2509(2), MCA, there was no statutory authorization for payment for overtime hours worked by deputy sheriffs and undersheriffs. As noted in 39 Op. Att'y Gen. No. 21 (1981), deputy sheriffs and undersheriffs are exempt from the provisions of the Minimum Wage and Overtime

Act, Title 39, ch. 3, pt. 4, MCA. City of Billings v. Smith, 158 Mont. 197, 490 P.2d 221 (1971). Former Attorney General Woodahl held that while a deputy county officer could not receive additional compensation for overtime hours worked, the county commissioners have the inherent discretionary power to grant equivalent time off for overtime hours worked. 36 Op. Att'y Gen. No. 63 (1976).

According to your letter, there has existed the practice in Lincoln County whereby deputy sheriffs and undersheriffs recorded and reported their overtime hours with the understanding that they would receive compensatory time off at a later time to be designated by their supervisor. Lincoln County has no ordinances or resolutions with regard to overtime or compensatory time. Due to a heavy workload, the employees have been unable to use most of their compensatory time earned prior to 1981.

The first issue presented by your question is whether the employees may be given a cash payment for pre-1981 overtime hours in lieu of compensatory time off, either at the time of their retirement or separation from service or while they continue to work regular hours. It has long been the rule in Montana that public officers and employees can only claim compensation for services where such compensation is provided by law, and that where no compensation is so provided the rendition of services is deemed to be gratuitous. State ex rel. Matson v. O'Hern, 104 Mont. 126, 65 P.2d 619 (1937). It is presumed that all extra services similar in nature to the employee's regular duties are compensated by the employee's salary. Keith v. Kottas, 119 Mont. 98, 172 P.2d 306 (1946); Doane v. Marquisee, 63 Mont. 166, 206 P. 426 (1922). To overcome this presumption, the public employee must point to specific statutory authorization. No such statutory authorization existed prior to 1981.

In 1981, the Legislature enacted section 7-4-2509(2), MCA, which provides:

The board of county commissioners may by resolution establish that any undersheriff or deputy sheriff who works in excess of his regularly scheduled work period will be

compensated for the hours worked in excess of the work period at a rate to be determined by that board of county commissioners.

Interpreting this subsection, I have previously held that the Legislature intended to leave any action regarding possible overtime payment to the discretion of the individual boards of county commissioners. 39 Op. Att'y Gen. No. 21 (1981). However, the new subsection does not grant retroactive authority to the county commissioners to make payments for overtime earned prior to July 1, 1981. No statute is retroactive unless expressly made so. § 1-2-109, MCA. An employee's rights to compensation are set by the law applicable at the time the services are rendered. Longshore v. County of Ventura, 598 P.2d 866 (Cal. 1979). Since no statutory right to compensation for overtime for deputy sheriffs and undersheriffs existed prior to 1981, I conclude they cannot now be given a cash payment for such overtime.

Other jurisdictions which have considered the question of cash payments in lieu of compensatory time off have reached the same conclusion. In the leading case of Martin v. Henderson, 255 P.2d 416, 420 (Cal. 1953), the California Supreme Court rejected state employees' claims for payment for overtime, stating:

Obviously, efficient management and satisfactory employment relations require the state to fix reasonable work hours. In the absence of a statutory provision therefor, time off granted for work done in excess of those hours is not granted as of right, but is allowed in accordance with the necessities of the duties to be performed. [Citation omitted.] The fact that normal hours of work are established and compensating time off is provided for work beyond those hours does not, of itself, give the employee a right to payment for overtime.

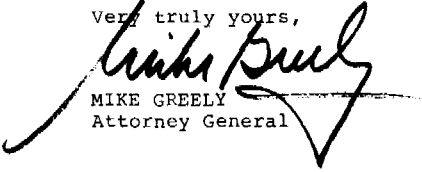
See also Longshore v. County of Ventura, *supra*. Accord, Weber v. City of Atlanta, 231 S.E.2d 100 (Ga. App. 1976); State v. Bogenrife, 513 P.2d 13 (Alaska 1973); State ex rel. Beck v. Carter, 471 P.2d 127 (Wash. App. 1970).

Your second question is whether the undersheriffs and deputy sheriffs may now be granted time off equivalent to the pre-1981 overtime hours accrued. The answer to this question is dependent upon the various policies, agreements, ordinances or resolutions in effect within each individual county. Compensatory time off is generally conditioned upon the mutual agreement of the employee and the employer. See § 2.21.1513, ARM (compensatory time and overtime rule governing state employees). The use of compensatory time is therefore inherently limited by the scheduling problems faced by each supervisor. Unused compensatory time is lost upon separation from service, and may be further limited by policies, agreements, ordinances or resolutions in each individual county. The county commissioners have the discretion to set policies regarding the use of compensatory time. Compensatory time may also be a subject of collective bargaining and may be controlled by provisions of collective bargaining agreements in the counties. Due to the numerous possible factual situations in the individual counties, your second question is inappropriate for an Attorney General's opinion.

THEREFORE, IT IS MY OPINION:

Deputy sheriffs and undersheriffs may not receive cash payments in lieu of compensatory time off for overtime hours worked prior to July 1, 1981.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 40

OPINION NO. 56

WORKERS' COMPENSATION - Water commissioner;
MONTANA CODE ANNOTATED - Sections 39-71-116, 39-71-117,
39-71-118, 39-71-401, Title 85, chapter 5, 85-5-301.

HELD: When a district court judge appoints a water commissioner pursuant to Title 85, chapter 5, MCA, the district court judge is considered the employer for the purpose of payment of workers' compensation.

26 June 1984

Donald D. MacIntyre
Chief Legal Counsel
Department of Natural Resources
and Conservation
32 South Ewing
Helena MT 59620

Dear Mr. MacIntyre:

You have requested my opinion on the following question:

When a district court judge appoints a water commissioner pursuant to Title 85, chapter 5, MCA, is the district court judge considered the employer of the water commissioner or are the users considered the employer of the water commissioner and therefore liable for payment of workers' compensation?

Before I address the specifics of your question, I will say a word about the general applicability of Montana's Workers' Compensation Act to this situation. Your opinion request and the accompanying legal research assume that a water commissioner is covered by workers' compensation if he or she has been appointed pursuant to Title 85, chapter 5, MCA. That is correct. The Workers' Compensation Act applies to all employers and employees, with specific exceptions. § 39-71-401, MCA. Questions might arise about the applicability to water commissioners of the "casual employee" or "independent contractor" exceptions. However, the detailed statutory basis of the position of water commissioner (Title 85, chapter 5, MCA) rules out the application of either of those two exceptions. §§ 39-71-116(3), 39-71-120, MCA.

Therefore, as you have properly recognized, the only question is: Who is the "employer" for purposes of workers' compensation?

The Montana Supreme Court has addressed the question of the existence of the employer-employee relationship many times:

"The test to determine whether or not an employer-employee relationship exists...is the so called control test. Under that test an individual is in the service of another when that other has the right to control the details of the individual's work." State ex rel. Ferguson v. District Court (1974), 164 Mont. 84, 88, 519 P.2d 151, 153.

Carlson v. Cain, 40 St. Rptr. 865 at 872, 664 P.2d 913 (1981). See also Sharp v. Hoerner Waldorf Corporation, 178 Mont. 419, 424, 584 P.2d 1298, 1301 (1974); Kimball v. Industrial Accident Board, 138 Mont. 445, 449, 357 P.2d 688, 691 (1960). The Court usually employs the control test to determine if the employment relationship exists with a known employer; but the Court has also spoken in cases analogous to this one:

[W]hile this test [the control test] has most often been used to determine whether or not an individual was an independent contractor or an employee, it may also be used to determine who the employer is, in a given situation. Biggart v. Texas Eastern Transmission Corp. (Miss. 1970), 235 So.2d 443. Under this test an employee will have been transferred from one employer to another when the right to control the details of his work has passed from one to another.

State ex rel. Ferguson v. District Court, 164 Mont. 84, 88, 519 P.2d 151 (1974).

Thus, we must apply the control test in this situation. Montana statutes clearly establish that the district judge has the right to control the details of the water commissioner's work:

Upon the determination of the hearing [upon the complaint of dissatisfied water user], the

judge shall make such findings and order as he considers just and proper. If it appears to the judge that the water commissioner or water commissioners have not properly distributed the water according to the provisions of the decree, the judge shall give the proper instructions for such distribution. The judge may remove any water commissioner and appoint some other person in his stead if he considers that the interests of the parties in the waters mentioned in the decree will be best subserved thereby, and if it appears to the judge that the water commissioner has willfully failed to perform his duties, he may be proceeded against for contempt of court, as provided in contempt cases. The judge shall make such order as to the payment of costs of the hearing as appears to him to be just and proper.

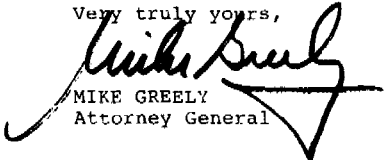
§ 85-5-301(2), MCA.

I conclude that although the affected water users have the duty to pay a water commissioner's compensation and expenses as authorized by law, for the purposes of the Montana Workers' Compensation Act, the district court judge is the water commissioner's employer.

THEREFORE, IT IS MY OPINION:

When a district court judge appoints a water commissioner pursuant to Title 85, chapter 5, MCA, the district court judge is considered the employer for the purpose of payment of workers' compensation.

Very truly yours,


MIKE GREELY
Attorney General

VOLUME NO. 40

OPINION NO. 57

SUBDIVISION AND PLATTING ACT - Applicability of subdivision laws to planned apartment building construction project on tract of land owned by developer;

MONTANA CODE ANNOTATED - Sections 76-3-102, 76-3-103(3), 76-3-103(15), 76-3-204, 76-3-208, 76-3-601;

OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 14 (1981); 39 Op. Att'y Gen. No. 74 (1982).

HELD: A developer's construction of 48 four-plexes, to be used as rental occupancy buildings, on a tract of land owned by the developer is a "subdivision," and consequently must be submitted for local review under the Subdivision and Platting Act.

27 June 1984

Jim Nugent
Missoula City Attorney
201 West Spruce
Missoula MT 59802-4297

Dear Mr. Nugent:

You have requested my opinion on the following question:

Whether a developer's proposal to construct 48 four-plexes, to be used as rental occupancy buildings, on a tract of land owned by the developer must go through local subdivision review.

Your question arises from the following facts. A corporation has submitted a request for building permits for construction of 48 four-plexes, which will result in 192 dwelling units. The entire tract of land upon which the construction is planned is owned by the corporation. The tract is less than 20 acres in size, and the corporation has indicated that it will retain ownership of all the four-plexes, as well as the land upon which they are constructed, upon completion of the project. Your question is whether the corporation may proceed with the project without submitting it to local review under the Subdivision and Platting Act (the Act). I

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Montana Administrative Register

conclude that it may not, as the proposed development constitutes a "subdivision" under the Act, and subdivisions must be submitted to the local governing body for review. § 76-3-601, MCA.

Section 76-3-103(15), MCA, provides:

"Subdivision" means a division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and shall include any resubdivision and shall further include any condominium or area, regardless of its size, which provides or will provide multiple space for recreational camping vehicles, or mobile homes.

In 39 Op. Att'y Gen. No. 14 (1981), I construed this section and determined that the following activities constitute subdivisions:

1. A division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed.
2. Any resubdivision.
3. Any condominium.
4. Any area, regardless of size, which provides or will provide multiple space for recreational camping vehicles.
5. Any area, regardless of size, which provides or will provide multiple space for mobile homes.

The proposed construction project in this case clearly will not result in any of the subdivision activities listed in categories 2 through 5 above. Further analysis, however, reveals that it will result in the type of activity described in category 1 above.

Under category 1, regulated subdivision activity results only when there has first been a "division of land...which creates one or more parcels containing less than 20 acres." § 76-3-103(15), MCA. A "division of land" is defined as:

[t]he segregation of one or more parcels of land from a larger tract held in single or undivided ownership by transferring or contracting to transfer title to or possession of a portion of the tract or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to this chapter.

§ 76-3-103(3), MCA. A division of land thus occurs when one or more "parcels" of land have been segregated from a larger tract held in single or undivided ownership. While the term is not defined in the Act, Black's Law Dictionary generally defines "parcel" as "[a] part or portion of land." This definition appears consistent with the intended meaning of the term in section 76-3-103(3), MCA, which states that the segregation of a parcel of land from a larger tract may come about by transferring possession of a portion of the tract. A "parcel" may therefore be thought of as a part or portion of land, or, in the context of the present analysis, as a "portion of the tract."

In the present circumstances, the developer has expressed an intention to construct a number of four-plexes which will be used as rental occupancy buildings. Possession of each individual dwelling unit within the four-plexes will eventually be transferred to tenants. Generally, when a portion of a building is leased, the tenant acquires, in addition to an interest in the individual dwelling unit, an interest in only that portion of the land necessary to enjoyment of the demised premises. 49 Am. Jur. 2d Landlord and Tenant § 195 (1970). At the very least, the tenants in this case will enjoy possession of that portion of the tract, or "parcel," upon which the four-plex which contains their dwelling unit is constructed. The end result of this construction project will therefore be a "division of land," as a number of parcels will be segregated from the larger tract by means of transference of possession of those parcels to the tenants occupying the four-plexes.

I am aware of the exemption contained in section 76-3-204, MCA, which provides:

Exemption for conveyances of one or more parts of a structure or improvement. The sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement situated on one or more parcels of land is not a division of land, as that term is defined in this chapter, and is not subject to the requirements of this chapter.

In 39 Op. Att'y Gen. No. 74 (1982), in considering the exemption provided by this statute, I stated:

The word "situated" indicates that the Legislature was referring to an existing building, built and utilized prior to the time the division occurs. This would be the situation where a developer converts an existing apartment or office building used for rental purposes to condominiums. [Emphasis added.]

In view of my prior construction of this statute, which I adhere to, I conclude that the exemption provided by section 76-3-204, MCA, would not apply to the initial rental or lease of portions of the four-plexes in the instant case. This construction project will not result in the rental or lease of portions of buildings "situated" on one or more parcels of land, because these will not be "existing building[s], built and utilized prior to the time the division occurs." (Emphasis supplied.) The exemption provided by section 76-3-204, MCA, does not apply to this construction project since it will result in a "division of land."

A division of land that "creates one or more parcels containing less than 20 acres...in order that title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed" is a "subdivision." § 76-3-103(15), MCA. The division of land in the instant case will create at least 48 parcels, in order that possession of the parcels may be rented, leased, or conveyed to individual tenants, or groups of tenants. Therefore, it constitutes a subdivision, and must be submitted to the governing body for local review.

I have applied a liberal construction of the statutes, but I believe this is consonant with the expressed purposes of the Act as articulated by the Legislature and the Montana Supreme Court. Section 76-3-102, MCA, provides:

It is the purpose of this chapter to promote the public health, safety, and general welfare by regulating the subdivision of land; to prevent overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements; to require development in harmony with the natural environment; to require that whenever necessary, the appropriate approval of subdivisions be contingent upon a written finding of public interest by the governing body; and to require uniform monumentation of land subdivisions and transferring interests in real property by reference to plat or certificate of survey.

Commenting on this legislative statement expressing the objectives of the Act, the Supreme Court, in State ex rel. Florence-Carlton School District v. Board of County Commissioners of Ravalli County, 180 Mont. 285, 291, 590 P.2d 602, 605 (1978), noted:

Legislation enacted for the promotion of public health, safety, and general welfare, is entitled to "liberal construction with a view towards the accomplishment of its highly beneficent objectives."

A housing development such as the one proposed in this case will inevitably result in various social and economic impacts on the community. I find that this is the precise type of development which the Legislature intended should be submitted for local review under the Act.

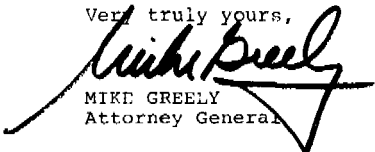
Further support for the construction that I have applied is found in the express language of the Act itself. The definition of "division of land" in section 76-3-103(3), MCA, includes the segregation of parcels through the transference of either title to or possession of a

portion of the tract. Similarly, in section 76-3-103(15), MCA, the definition of "subdivision" speaks in terms of sale, rental, lease, or other conveyance of parcels. When construing a statute, effect must given to every word, phrase, clause, or sentence therein, and none shall be held meaningless if it is possible to give effect to it. Fletcher v. Paige, 124 Mont. 114, 220 P.2d 484 (1950); Campbell v. City of Helena, 92 Mont. 366, 16 P.2d 1 (1932). The use of these terms in the definitional sections of the Act reveals that the Legislature anticipated the creation of subdivisions by methods other than the outright sale of parcels of land, and intended that such subdivisions must similarly be submitted for local review. See also § 76-3-208, MCA.

THEREFORE, IT IS MY OPINION:

A developer's construction of 48 four-plexes, to be used as rental occupancy buildings, on a tract of land owned by the developer is a "subdivision," and consequently must be submitted for local review under the Subdivision and Platting Act.

Very truly yours,



MIKE GREELY
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules or amendment or repeal of existing rules filed with the Secretary of State. Proposals of the Department of Revenue are reviewed only in regard to the procedural requirements of the Montana Administrative Procedure Act. The Committee has 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. In addition, the Committee 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 or amend a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with existing or proposed rules. The address is Room 138, Montana State Capitol, Helena, Montana 59620.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE
MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statute 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
Matter | 1. Consult ARM topical index, volume 16. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued. |
| Statute
Number and
Department | 2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers. |

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 1984. This table includes those rules adopted during the period April 1, 1984 through June 30, 1984, and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 1984, 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 1983 and 1984 Montana Administrative Registers.

ADMINISTRATION, Department of, Title 2

I	State Plan of Operation for Distribution of Federal Surplus Property, p. 746, 956
I-IV	and other rules - Moving and Relocation Expenses, p. 735, 957
I-VII	Discipline Handling Policy, p. 740, 958
I-XIX	Veteran's and Handicapped Person's Employment Preference, p. 425, 425
I-XXII	Purchasing Rules, p. 1564, 1918
2.21.6402	and other rules - Minimum Standards for Performance Appraisal, p. 905
2.23.101	and other rules - Operation of a Merit System, p. 858
2.31.101	ANSI Standards for Aerial Passenger Tramways, p. 350, 409, 811
2.32.101	Uniform Building Code - Doors - Health Care Facilities, p. 622, 744
2.32.210	Review of School Plans in Areas Where There is a Local Government Code Enforcement Program, p. 624
2.32.401	National Electrical Code - Minimum Standards and Requirements for Electrical Installations, p. 626
2.32.501	Standard for Recreational Vehicles - Construction, p. 628

AGRICULTURE, Department of, Title 4

- I Restricting the Sale and Use of Endrin, p. 468, 812
- I-XXI Montana Agricultural Loan Authority Rules - Sale of Tax-exempt Bonds to Provide Agricultural Loans to Beginning Farmers/Ranchers, p. 1683, 363
- 4.12.3402 Seed Laboratory Reports - Enforcement, p. 1489, 1920

STATE AUDITOR, Title 6

- I Exemption from the Registration Provisions of the Securities Act of Montana - The Montana Venture Capital Exemption, p. 352, 588
- I-IV Registration Exemption for Regulation D Securities Offerings and Creating Examination, Reporting and Record Keeping Requirements for Investment Advisors, 1582, 19

COMMERCE, Department of, Title 8

- I Incorporation By Reference of Rules for the Implementation of the Montana Environmental Policy Act, p. 859
- (Board of Athletics)
- I-XL Professional or Semiprofessional Wrestling or Boxing Matches or Exhibitions Which Involve a Prize or Purse, p. 108, 437
- (Board of Architects)
- 8.6.410 Renewals, p. 355
- 8.6.413 Fee Schedule, p. 283, 499
- (Board of Barbers)
- I-II Public Participation - Qualifications for Examination for Out-of-State Applicants, p. 475
- 8.10.405 and other rules - Fee Schedule - Qualifications - Teaching Staff - Curriculum - Course Completion Procedures, p. 471, 813
- (Board of Chiropractors)
- 8.12.601 and other rules - Applications, Educational Requirements - Renewals - Continuing Education Requirements, p. 285, 499
- (Board of Cosmetologists)
- 8.14.814 and other rules - General, Initial, Renewal and Late Fees - Fee Schedule p. 548, 861
- 8.14.816 and other rules - Salons - Examination - Fee Schedule - Electrology Schools - Sanitary Rules, p. 1225, 1815
- 8.14.1002 Applications for Electrolysis - Examiners - Student Examinations, p. 1766, 245
- (Board of Dentistry)
- I-XIX Standards for Dentists Administering Anesthesia, p. 1768, 1861, 912
- 8.16.602 Allowable Functions for Dental Auxiliaries, p. 1693, 552, 921

- (Board of Horse Racing)
- 8.22.303 and other rules - Petition Proceedings - Filing of Pari-mutuel Events and Financial Obligations of Pari-Mutuel Licensees - Fines Levied by Stewards - Unclaimed Tickets, p. 1775, 320
- 8.22.502 Licenses Issued for Conducting Pari-Mutuel Wagering on Horse Race Meetings, p. 287, 813
- 8.22.612 Veterinarian: Official or Track, p. 287
- 8.22.801 General Requirements Concerning Preference, p. 290, 499
- (Board of Landscape Architects)
- 8.24.405 and other rules - Examinations - Fee Schedules, p. 1695, 24
- (Board of Morticians)
- 8.30.402 and other rules - Applications - Fee Schedule, p. 477, 815
- (Board of Optometrists)
- I Disciplinary Actions, p. 2, 369
- 8.36.407 Unprofessional Conduct - Violations, p. 1, 369
- (Pharmacy)
- 8.40.405 and other rules - Explosive Chemicals - Additions, Deletions & Rescheduling of Dangerous Drugs, p. 357, 589
- (Plumbers)
- 8.44.403 and other rules - Applications - Examinations - Renewals - Duplicate and Lost Licenses - Fee Schedule, p. 748, 948
- (Polygraph Examiners)
- I-VI Licensure, p. 1589, 1921
- (Professional Engineers and Land Surveyors)
- 8.48.1105 Fee Schedule, p. 630, 922
- (Private Investigators and Patrolmen)
- I-XXVI Public Participation - Definitions - Employment - Applications - Experience Requirements - Examinations - Identification - Insurance - Uniforms License Renewal - Code of Ethics - Complaint Procedures, p. 1863, 589
- 8.50.101 Organization, p. 1862, 589
- 8.50.201 Procedural Rules, p. 1863, 589
- 8.50.401 and other rules- Rules Governing the Board of Private Security Patrolmen and Investigators, p. 1863, 589
- 8.50.431 Insurance Requirements, p. 1862, 815
- (Board of Psychologists)
- 8.52.616 Fee Schedule, p. 1497, 1816
- (Board of Public Accountants)
- 8.54.401 and other rules - Definitions - Professional Conduct - Positive Enforcement - Examinations - Licenses - Fees - Records, p. 632, 961
- (Radiologic Technologists)
- 8.56.402 and other Rule - Applications - Fee Schedule, p. 1284, 1923
- 8.56.407 Renewals, p. 1588, 1922
- 8.56.409 Fee Schedule, p. 1592, 1923

(Renewals)

- I Renewal Date for All Barber Licenses, p. 1764, 245
- 8.44.405 and other rules - License Renewal Dates for Plumbers, Professional Engineers and Land Surveyors, Optometrists, p. 1412, 1717
- (Board of Social Work Examiners)
- I-VI Board Organization - Procedural Rules - Definitions - Licensure Requirements - Application Procedure - Fee Schedule, p. 131, 440
- (Board of Weights and Measures)
- 8.77.102 Fees for Testing and Certification, p. 1698, 24
- (Milk Control Bureau)
- 8.79.101 Transactions Involving the Purchase and Resale of Milk Within the State, Rule Definitions, p. 752, 969
- 8.79.101 and other rule - Transactions Involving the Purchase and Resale of Milk Within the State, p. 1140, 1817
- 8.79.301 License Assessments, p. 292, 501
- (Financial Bureau)
- I Retention of Bank Records, p. 1458
- I Semi-Annual Assessment for State Banks, Trusts and Investment Companies, p. 1783, 134, 440
- I Amount to Which Finance Charges are Applied by a Licensed Consumer Loan Company, p. 665, 922
- (Board of Milk Control)
- 8.86.301 Pricing Rules, Class I Price Formula, p. 411, 969
- (County Printing)
- 8.91.303 and other rule - Official Publications and Legal Advertising - Schedule of Prices, p. 795, 1924
- (Montana Economic Development Board)
- I-IX General Provisions and Application Procedures - Approval of Financial Institutions - Confidentiality - False or Misleading Statements - Service Charge - Fee Schedule - Non-Discrimination, p. 1880, 370
- X-XXIII Montana In-State Investment Fund - Policy - Eligibility Criteria - Preferences - Application Procedures - Fees - Loans - Commitment of Funds, p. 1888, 379
- I-X Rules Pertaining to Montana Economic Development Board, p. 1509, 1820
- I-XII Municipal Finance Consolidation Act Program, p. 862
- 8.97.301 and other rules - Definitions - Rates, Service Charges and Fee Schedules - Board In-State Investment Policy - Eligibility Criteria - Economic Development Linked Deposit Program - Loan Participation - Montana Economic Development Bond Program, p. 667, 869, 922
- (Coal Board)
- 8.101.301 and other rules - Policy Statement - Preapplication Form - Agreement Form - Submittal Deadlines - Water

- and/or Sewer Systems Provided by Districts, p. 1416, 1826
(Health Facility Authority)
I-VIII Montana Health Facility Authority Rules, p. 1288, 1719
8.120.206 Fees - Initial and Annual Planning Service, p. 418, 696

EDUCATION, Title 10

- (Superintendent of Public Instruction)
I State Special Education Complaint Procedures, p. 479, 817
I Obligation of Debts Incurred for the Purchase of Property, p. 754, 972
10.41.101 and other rules - Vocational Education - General Rules - Postsecondary Vocational Education - Vocational Education in Secondary Schools, p. 135, 818
(Board of Public Education)
I Gifted and Talented Children, p. 756
I-IV School for Deaf and Blind Foundation, p. 1517, 1926
10.55.101 and other rules - Accreditation Standards of the Board of Education, p. 5, 827
10.55.210 School Morale, p. 4
10.55.302 Certificates - First Aid Training for Personnel Coaching Athletics, p. 871
10.55.402 Minimum Units Required for Graduation, p. 758
10.58.101 and other rules - Standards for State Approval of Teacher Education Programs Leading to Interstate Reciprocity of Teacher Certification, p. 176, 831
10.62.101 and other rules - Certification of Fire Services Training Schools, p. 760
(Montana Arts Council and Montana Historical Society)
I Cultural and Aesthetic Project Grant Evaluation, p. 553
(Montana Historical Society)
10.121.801 and other rules - Criteria for Grants Evaluations, p. 680

FISH, WILDLIFE AND PARKS, Department of, Title 12

- I Outfitters and Professional Guides, p. 1785, 246
I Disabled Persons, p. 236, 441
I Acceptable License Agent Security, p. 237, 441
I-IV Game Bird Farms, p. 1428, 247
I-IV Fur Farms, p. 1426, 247
I-VIII Game Farms, p. 1422, 247
I-IX Captive Breeding of Raptors, p. 1430, 1829
12.3.202 Classes of License Agents, p. 236, 441
12.5.401 Oil and Gas Leasing Policy for Department-Controlled Lands, p. 1594, 762
12.6.801 Boating Closures, p. 1597, 502

- 12.6.901 Water Safety Regulations, p. 1597, 502
- 12.7.101 Commercial Fishing Permits, p. 1420, 1927
- 12.9.202 Brinkman Game Preserve, p. 1602, 256

HEALTH AND ENVIRONMENTAL SCIENCES, Department of, Title 16

- I Certificate of Need - Psychiatric Hospital Services, p. 1895
- I-VII Standards for Intermediate Developmental Disability Care Facilities - Adult Day Care Centers, General Services/Administration and Food Service Requirements - Personal Care Homes, Residency Application Procedures, Screening Requirements and Appeal Procedures, p. 556
- I-VIII Cesspool, Septic Tank and Privy Cleaners, p. 1611, 258
- I-XIV End-Stage Renal Disease Program, p. 1603, 41
- 16.8.1102 Air Quality Permit Requirements, p. 239, 503
- 16.10.305 Sale of Milk and Milk Products in Food Processing Establishments, p. 1701, 26
- 16.14.801 and other rules - Cleaning of Cesspools, Septic Tanks and Privies, p. 241, 504
- 16.16.101 and other rules - Sanitation in Subdivisions, p. 765
- 16.32.103 and other rules - Certificate of Need Application Forms and Annual Reporting Forms for Health Care Facilities, p. 1610, 27
- 16.32.301 and other rules - Health Care Facilities - Adult Day Care Centers - Personal Care Facilities, p.556, 973
- 16.32.302 and other rules - Chemical Dependency Treatment Centers - Minimum Construction Standards - Licensing and Certification, p. 558, 918, 929, 973
- 16.32.373 Standards for Licensure of Hospice Programs, p. 570, 879
- 16.38.301 and other rules - Fees Charged by the Department's Chemical Laboratory for the Performance of Laboratory Analyses, p. 873
- 16.44.104 and other rules - Hazardous Waste Management - Permitting Requirements - Applications - Conditions - Financial Test, p. 1703, 265

HIGHWAYS, Department of, Title 18

- 18.5.106 Design Requirements for Access Driveways, p. 1618, 47
- 18.7.241 Forms for Utility Occupancy of Highway Right-of-Way, p. 1897
- 18.8.502 and other rules - Trip Permits - Insurance Requirements - Regulations Covering Movement of Oversize Homes and Buildings, p. 11, 389
- 18.8.516 Haystack Movers - Commercial Self-Propelled, p. 11, 389

18.8.1001 Mobile Home - Oversize Permits, p. 11

INSTITUTIONS, Department of, Title 20

- 20.3.415 Definitions - Certification System for Chemical Dependency Personnel, p. 681, 930
20.7.102 Emergency Rule - Prisoner Application Procedure, General Statute Requirements, p. 1084, 1899, 390
20.11.108 and other rules - Reimbursement Policies, p. 790

JUSTICE, Department of, Title 23

- I Instructor Certification Requirements, p. 582
I-III Child Safety Restraint System Standards and Exemptions, p. 571
(Board of Crime Control)
23.14.401 and other rules - Peace Officer Standards and Training, Employment and Requirements, p. 573, 880
23.14.412 and other rules - Qualifications for Certification of Academy and Training Courses - Certification Requirements for Trainee Attendance and Performance, p. 576, 881

LABOR AND INDUSTRY, Department of, Title 24

- (Human Rights Commission)
I-VII Maternity Leave, p. 482, 949
24.9.226 Prehearing; Conciliation, p. 1014, 1833
(Board of Personnel Appeals)
I-II Disqualification of Hearing Examiners - Dismissal of Complaint, p. 1708, 599
24.26.102 and other rules - Freedom from Interference, Restraint, Coercion, Retaliation - Employer Counter Petition - Petition for Decertification - Complaint - Answer - Exceptions - Petitions, p. 1708, 599
(Workers' Compensation Division)
I-VIII Employer's Insurance Requirements - Independent Contractor Exemption Procedures, p. 486, 983
24.29.3201 Corporate Officers - Election Not to be Bound, p. 488

STATE LANDS, Department of, Title 26

- I-II Assessment and Waiver of Civil Penalties, p. 1905, 442
I-IV Certification of Coal or Uranium Mine Blasters, p. 1901, 420
26.4.1206 Notices and Cessation Orders: Service, p. 1908
26.4.1207 and other rules - Notices of Noncompliance and Cessation Orders: Informal Hearings - Effect of Inability to Comply - Continuation of Health and Safety Related Activities, p. 1908

LIVESTOCK, Department of, Title 32

- I-VI Brucellosis Testing of Animals, p. 1790, 268
- 32.3.203 and other rules - Importation of Animals and Biologics, p. 1787, 267
- 32.2.401 Livestock License, Permit and Miscellaneous Fees, p. 1795, 266
- 32.3.406 Emergency Rule - Testing of Animals, p. 1540

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

(Board of Oil and Gas Conservation)

- I Emergency Rule - Workable Ignitor Systems on Wells Producing Hydrogen Sulfide Gas, p. 324, 932
- I Burning of Waste Gas and Ignitor Systems on Wells Producing Hydrogen Sulfide Gas, p. 877
- I-XXXIII Procedural Rules, p. 1620, 697
- 36.12.102 and other rules - Forms - Application and Special Fees, p. 494, 882
- 36.22.307 and other rules - Forms - Submittal Date of Reports, p. 683, 931

PUBLIC SERVICE REGULATION, Department of, Title 38

- I-V Electric and Gas Line Extensions, p. 1309, 1910
- I-VII Charges Related to Utility Line Moves Associated with Movement of Structures, p. 360
- 38.3.202 and other rules - Motor Carrier, Railroad and Utility Fees, p. 950

REVENUE, Department of, Title 42

- I Determination of License Quota Areas, p. 1655, 1928
- I Deduction of Windfall Profits Tax From Net Proceeds, p. 1326, 242, 243, 505
- I Deduction from Corporation License Tax for Sale of Land to Beginning Farmers, p. 1796, 392
- I Deduction from Individual Income Tax for Sale of Land to Beginning Farmers, p. 1798, 391
- I Imputed Value of Coal, p. 1329, 1834
- I Deduction for Insurance, Welfare, Retirement, Mineral Testing, Security and Engineering, p. 1039, 1835
- I-III Wholesale Distributors, Obligations, Collection of Annual License Fee, p. 1521, 1929
- 42.11.111 State Liquor Identification Stamp, p. 1649, 1928
- 42.12.129 Determination of Proximity to a Place of Worship or School, p. 1653, 1914, 325
- 42.12.203 Inter-Quota Area Transfers of All-Beverage Licenses, p. 1650, 1915, 326
- 42.12.321 and other rule - Special Permits, p. 1657, 1913, 325

- 42.13.302 Brewer Storage Depots, p. 1648, 1928
42.22.101 and other rule - Assessment of Centrally Assessed
Property, p. 1658, 1930

SECRETARY OF STATE, Title 44

- I-VI Absentee Ballot Envelopes, p. 1660, 1802, 18, 394
1.2.217 Rule History Notes, p. 586, 883
1.2.419 Filing, Compiling, Printer Pickup and Publication
Schedule for the Montana Administrative Register,
p. 1523, 1837

SOCIAL AND REHABILITATION SERVICES, Department of, Title 46

- I-IV Participation of Rural Hospitals in the Medicaid
Program as Swing-Bed Facilities, p. 798, 996
I-IV Child Care Agency Treatment Program, p. 1804
46.5.116 Protective Services, Information System Operator,
p. 1525, 1838
46.5.612 and other rules - Licensing of Child Care Agencies,
p. 1804, 327
46.5.801 and other rules - Licensing of Community Homes for
Persons who are Developmentally Disabled, p. 1442,
1839
46.6.102 and other rules - Rehabilitative and Visual
Services, p. 296, 511
46.6.2510 and other rules - Blind Vendors Program -
Certification - Transfer and Termination - Vendor
Responsibilities - Set Aside Funds - Contracts with
Vending Companies - Vendor Rights and
Responsibilities, p. 691, 991
46.11.101 Food Stamp Program, p. 1713, 294
46.11.111 and other rules - Food Stamps, Determining
Eligibility For the Food Stamp Program - Reporting
Requirements - Determining Benefits - Certification
Periods, p. 687, 993
46.12.3803 Medically Needy Income Standards, p. 1916, 1933,
328, 998
46.25.712 and other rules - State General and Medical Relief
Assistance, p. 1810, 802

CROSS REFERENCE TABLE
 Montana Code Annotated
 to
 Administrative Rules of Montana
 January - June, 1984, Registers

<u>MCA</u>	<u>Rule or A.G.'s Opinion</u>	<u>Register Page No.</u>
1-2-101	Opinion No. 29	56
1-2-101	Opinion No. 39	522
1-2-106	Opinion No. 42	533
1-2-107	Opinion No. 35	448
1-2-202	Opinion No. 28	48
1-2-207	Opinion No. 40	525
Title 2, Ch. 15	Opinion No. 52	890
Title 2, Ch. 18, Pt. 7, 8	Opinion No. 52	890
2-2-102	Opinion No. 28	48
2-2-121	Opinion No. 28	48
2-2-121	10.58.101 - 104, 201 - 209, 301-303, 401 - 408, 501 - 527, 601, 602, 701 - 703, 707, 801, 802, 901	176
2-2-125	Opinion No. 28	48
2-2-125	Opinion No. 32	333
2-2-131	Opinion No. 28	48
2-2-201	Opinion No. 28	48
2-2-201	Opinion No. 32	333
2-2-302, 303	Opinion No. 40	525
2-3-103	Rule I (Commerce-Barbers)	475
2-3-103	Rule III (Commerce-Athletics)	108
2-4-201	Rule I (Commerce)	859
2-4-201	Rules I, II (Commerce-Athletics)	108
2-4-201	Rules I, II (Commerce- Social Work Examiners)	131
2-4-201	16.32.106, 136, 137, 138 - 142	28
2-4-201	36.22.307, 1217	683
2-4-302	Rule I (L&I-Workers' Compensation)	486
2-4-305	Opinion No. 50	843
2-4-306	1.2.217	586, 883
2-4-307	Rule I (Commerce)	859
2-4-308	1.2.217	586, 883
2-4-704	Opinion No. 47	832
2-6-102	8.6.413	283
2-15-1521	Rule I (Education-Montana Arts Council & Historical Society)	553
2-18-102	Rules I, II (Administration)	905
2-18-102	Rules I - IV (Administration)	735
2-18-102	Rules I - VII (Administration)	740
2-18-102	2.21.4911, 4914	737
2-18-102	2.21.6402, 6411 - 6413, 6414, 6415	905
2-18-105	Title 2, Chapter 23 (Merit System)	858

<u>MCA</u>	<u>Rule or A.G.'s Opinion</u>	<u>Register Page No.</u>
2-18-601	Opinion No. 52	890
2-18-701, 702	Opinion No. 52	890
2-18-702	Opinion No. 37	513
2-18-712	Opinion No. 52	890
2-18-809	Opinion No. 52	890
5-2-104	Opinion No. 46	715
Title 7, Ch. 34		
Pt. 24	Opinion No. 29	56
7-1-2013	Opinion No. 33	338
7-1-4124	Opinion No. 31	329
7-3-103	Opinion No. 30	269
7-3-171 - 193	Opinion No. 30	269
7-3-401	Opinion No. 51	884
7-3-414, 417	Opinion No. 51	884
7-3-431	Opinion No. 51	884
7-3-442	Opinion No. 52	884
7-3-1215	Opinion No. 46	715
7-3-4256	Opinion No. 28	48
7-3-4367	Opinion No. 28	48
7-4-2203	Opinion No. 52	890
7-4-2502	Opinion No. 52	890
7-4-2701 - 2717	Opinion No. 52	890
7-5-109	Opinion No. 51	884
7-5-2101	Opinion No. 33	338
7-5-2106	Opinion No. 28	48
7-5-4109	Opinion No. 28	48
7-5-4109	Opinion No. 32	333
7-5-4207	Opinion No. 31	329
7-5-4302	Opinion No. 32	333
7-6-204, 2311-2321	Opinion No. 49	838
7-6-2326	Opinion No. 29	56
7-6-2341 - 2345	Opinion No. 39	522
7-6-2352	Opinion No. 39	522
7-6-2501	Opinion No. 49	838
7-6-2511, 2512	Opinion No. 49	838
7-6-2512	Opinion No. 29	56
7-8-2201	Opinion No. 33	338
7-8-2231, 2232	Opinion No. 33	338
7-12-2102, 2103	Opinion No. 44	607
7-12-2105, 2106	Opinion No. 44	607
7-12-2111	Opinion No. 44	607
7-12-2113	Opinion No. 44	607
7-12-2151	Opinion No. 44	607
7-12-2161	Opinion No. 44	607
7-13-201, 202, 204	Opinion No. 36	453
7-13-206, 208	Opinion No. 36	453
7-13-209, 211	Opinion No. 36	453
7-13-231, 233	Opinion No. 36	453
7-13-231, 233	Opinion No. 45	711
7-16-2102	Opinion No. 49	838
7-16-2108	Opinion No. 49	838

<u>MCA</u>	<u>Rule or A.G.'s Opinions</u>	<u>Register Page No.</u>
7-16-2205	Opinion No. 49	838
7-16-2301, 2302	Opinion No. 49	838
7-16-2324	Opinion No. 49	838
7-16-2327 - 2329	Opinion No. 49	838
7-32-303	23.14.401 - 403	573
8-8-105	Rule I (Agriculture)	468
8-8-105	4.10.901	468
8-8-201	Rule I (Agriculture)	468
8-8-201	4.10.901	468
15-1-201	42.15.415	391
15-1-201	42.23.424	392
15-8-701, 705	Opinion No. 36	453
15-16-101	Opinion No. 45	711
15-16-104	Opinion No. 45	711
15-17-101	Opinion No. 45	711
15-23-108	Rule I (Revenue)	243
15-23-108	42.22.1208	505
15-23-603	Rule I (Revenue)	243
15-23-603, 605	42.22.1208	505
15-23-605	Rule I (Revenue)	243
15-23-615, 616	Rule I (Revenue)	243
15-23-615, 616	42.22.1208	505
16-1-102	Opinion No. 48	836
16-1-303	42.12.129, 203, 321, 322	325
16-3-306	42.12.129	325
16-4-201, 204	42.12.203	326
16-4-301	42.12.321, 322	325
16-4-502	42.12.203	326
17-5-1504	Rules II - V, VII (Commerce-Mt. Economic Development Bd)	672
17-5-1504	8.97.306 - 308	376
17-5-1505	Rule III (Commerce-Mt. Economic Development Bd)	672
17-5-1505	8.97.306, 307	376
17-5-1506	Rules IV, XII (Commerce-Mt. Economic Development Bd)	672
17-5-1521	Rules I, II, V - IX (Commerce-Mt. Economic Development Bd)	671
17-5-1521	8.97.301	667
17-5-1521	8.97.306 - 308	376
17-5-1526, 1527	Rules III, V, VII (Commerce-Mt. Economic Development Bd)	672
17-5-1526, 1527	8.97.301	667
17-5-1602	Rule III (Commerce-Mt. Economic Development Bd)	862
17-5-1605	Rules I - XII (Commerce-Mt. Economic Development Bd)	862
17-5-1606	Rule III (Commerce - Mt. Economic Development Bd)	862

<u>MCA</u>	<u>Rule or A.G.'s Opinion</u>	<u>Register Page No.</u>
17-5-1608	Rule IV (Commerce- Mt. Economic Development Bd)	863
17-5-1609	Rule VII (Commerce- Mt. Economic Development Bd)	864
17-5-1611	Rules I -III, V - XII (Commerce- Mt. Economic Development Bd)	862
17-5-1643	Rules VIII, XI (Commerce- Mt. Economic Development Bd)	864
17-6-302	8.97.301	869
17-6-303	8.97.402	869
17-6-304, 305	8.97.401	668
17-6-308	8.97.402, 406	668
17-6-308	8.97.411	384
17-6-310	8.97.301	667
17-6-310	8.97.306	376
17-6-314	8.97.401	668
17-6-315	8.97.307	376
17-6-324	8.97.301, 308, 401, 402, 406, 409, 410	667
17-6-324	8.97.301, 402	869
17-6-324	8.97.306 - 308, 411	376
17-8-103	Rules I, II (SRS)	802
18-4-123, 124	Opinion No. 37	513
18-5-202	Rule I (Administration)	746
18-5-202	2.5.801	956
18-5-403	46.6.2510, 2515	691
18-5-404, 405	46.6.2570	695
18-5-406	46.6.2535	694
18-5-411	46.6.2515	692
18-5-414	46.6.2510, 2515, 2525, 2535, 2560	691
18-5-415	46.6.2515, 2525	692
18-5-416	46.6.2560	694
20-2-112	10.58.516	208
20-2-113	10.58.524	225
20-2-114	10.58.101 - 104, 201 - 209, 301 - 303, 401 - 408, 501 - 515, 517 - 523, 525 - 527, 601, 602, 701-703 707, 801, 802, 901	176
20-2-121	Rule I (Public Education)	756
20-2-121	10.55.101, 202, 204, 207, 302, 402, 404, 502 - 504	827
20-2-121	10.55.302	871
20-2-121	10.55.402	758
20-2-121	10.57.405	828
20-2-121	10.58.101 - 105, 201 - 209, 301 - 303, 401 - 408, 501 - 527, 601, 602, 701 - 707, 801, 802, 901	176, 831
20-4-101	10.57.302	174
20-4-102	10.57.405	174
20-4-106	10.57.405	174, 828

<u>MCA</u>	<u>Rule or A.G.'s Opinion</u>	<u>Register Page No.</u>
20-4-108	10.57.405	174
20-4-121	10.58.101 - 105, 201 - 209 301 - 303, 401 - 408, 501 - 527, 601, 602, 701 - 707, 801, 802, 901	831
20-4-202	10.57.302	174
20-4-402	Opinion No. 41	529
20-5-303, 305	Opinion No. 42	533
20-6-622	2.32.210	624
20-7-101	Rule I (Public Education)	756
20-7-101	10.55.101, 202, 204, 207, 210, 302, 402, 404, 502 - 504	5
20-7-101	10.55.302	871
20-7-101	10.55.402	758
20-7-101	10.57.302	174
20-7-111	10.55.402	758
20-7-121	10.55.101, 202, 204, 207, 302, 402, 404, 502 - 504	827
20-7-301	10.41.101 - 109, 111 - 122, 124 - 131	135
20-7-301	10.43.101, 201, 301, 401 - 403	153
20-7-301	10.44.103 - 106, 201 - 210	153
20-7-302.1	10.41.101, 103, 104, 106 - 108, 114, 118, 120, 128	135
20-7-302.1	10.43.101	153
20-7-303	10.41.109	146
20-7-303	10.43.401 - 403	156
20-7-303	10.44.103 - 106, 201 - 210	156
20-7-312	10.41.112, 119, 121, 122	146
20-7-312	10.43.301	156
20-7-403	Rule I (Education)	479
20-7-903	Rule I (Public Education)	756
20-9-102	Rule I (Education)	754
20-9-204	Opinion No. 37	513
20-9-204	Opinion No. 41	529
20-9-209	Rule I (Education)	754
20-9-213	Opinion No. 41	529
20-11-101(3)	Opinion No. 53	934
20-31-102	10.62.101 - 103	760
20-31-201	10.62.101 - 103	760
22-2-303	Rule I (Education-Montana Arts Council & Historical Society)	553
22-2-303	10.121.801 - 804	680
22-3-107	10.121.801 - 804	680
23-1-102	12.5.401	762
23-1-106	12.5.401	762
23-1-106	12.6.801, 901	502
23-2-721	2.31.101	350
23-2-721	2.31.101	409, 811
23-3-402	Rule XXXII (Commerce-Athletics)	124

<u>MCA</u>	<u>Rule or A.G.'s Opinion</u>	<u>Register Page No.</u>
23-3-404, 405	Rules IV - VIII, X, XXV - XXIX, XXXIII, XXXIV (Commerce-Athletics)	109
23-3-405	Rules I - III, XI - XXIV, XXX - XXXII, XXXV - XL (Commerce-Athletics)	108
23-3-501	Rules IX, XXV - XXIX, XXXI, XXXIII (Commerce-Athletics)	111
23-3-501, 502	Rules VII (Commerce-Athletics)	110
23-3-601	Rule XXV (Commerce-Athletics)	120
23-3-603	Rule VIII, X, XXVIII, XXXIII (Commerce-Athletics)	110
23-4-104	8.22.801	290
23-4-104, 106	8.22.502, 612	287
23-4-201	8.22.502, 612	287
23-4-201	8.22.801	290
30-10-105	Rule I (Auditor)	352
32-5-104	Rule I (Commerce-Financial Bureau)	665
32-5-201	Rule I (Commerce-Financial Bureau)	665
32-5-301, 302,	Rule I (Commerce-Financial Bureau)	665
32-5-306	Rule I (Commerce-Financial Bureau)	665
35-1-510	Opinion No. 42	533
35-4-209	8.54.410	637
Title 37, Ch. 41	16.14.807	258
37-1-131	Rules I - XII (Commerce-Dentistry)	912
37-1-131	8.22.801	290
37-1-131	8.36.407	1
37-1-134	Rule I (Commerce-Plumbers)	750
37-1-134	Rule VI (Commerce-Social Work Examiners)	132
37-1-134	Rule IX (Commerce-Athletics)	111
37-1-134	8.6.413	283
37-1-134	8.10.405	471
37-1-134	8.14.814, 1010	548
37-1-134	8.30.407	477
37-1-134	8.44.403 - 406	948
37-1-134	8.44.406	750
37-1-134	8.48.1105	630
37-1-134	8.54.410	637
37-1-136	Rule I (Commerce-Optometrists)	2
37-1-136	Rules IV - VIII (Commerce-Public Accountants)	660
37-4-101	Rules I - XII (Commerce-Dentistry)	912
37-4-205	Rules I - XII (Commerce-Dentistry)	912
37-4-205	8.16.602	552
37-4-408	8.16.602	552
37-7-201	8.40.405	357
37-10-202	Rule I (Commerce-Optometrists)	2
37-10-202	8.36.407	1
37-10-311	8.36.407	1
37-12-201	8.12.601, 606	285

<u>MCA</u>	<u>Rule or A.G.'s Opinion</u>	<u>Register Page No.</u>
37-12-304	8.12.601	499
37-12-307	8.12.606	285
37-14-102	Opinion No. 50	843
37-14-202	Opinion No. 50	843
37-14-303	Opinion No. 50	843
37-14-305, 306	Opinion No. 50	843
37-19-202	8.30.402, 407	477
37-19-301	8.30.407	477
37-19-303	8.30.402, 407	477
37-19-304	8.30.407	477
37-19-306	8.30.407	477
37-19-403	8.30.407	477
37-22-102	Rule III (Commerce- Social Work Examiners	131
37-22-201	Rules I - VI (Commerce- Social Work Examiners)	131
37-22-301	Rules IV, V (Commerce- Social Work Examiners)	131
37-22-302	Rule VI (Commerce- Social Work Examiners)	132
37-30-203	Rules I, II (Commerce-Barbers)	475
37-30-203	8.10.405, 610	471
37-30-203	8.10.1002 - 1004, 1006	472
37-30-303	8.10.405	471
37-30-307	8.10.405	471
37-30-309	Rule II (Commerce-Barbers)	475
37-30-310	8.10.405, 1002	471
37-30-402	8.10.405	471
37-30-404	8.10.405, 1002, 1003	471
37-30-406	8.10.601, 1003, 1004, 1006	472
37-30-423, 424	8.10.405	471
37-31-203	8.14.814	548
37-31-302 - 304	8.14.814	548
37-31-306, 307	8.14.814	548
37-31-312	8.14.814	548
37-31-321 - 323	8.14.814	548
37-32-201	8.14.1002	245
37-32-201	8.14.1010	550
37-32-302, 303	8.14.909	245
37-32-305	8.14.1010	550
37-41-103	16.14.801 - 805	241
37-41-103	16.14.807, 808, 811, 812	258
37-41-201, 202	16.14.808	259
37-50-201	Rule IV (Commerce-Public Accountants)	660
37-50-201	8.54.401, 804 - 806, 808 - 812, 816 - 818, 820 - 822	632
37-50-203	Rules I - III, V - VIII (Commerce-Public Accountants)	658
37-50-203	8.54.402, 403, 405, 406, 408 - 411, 415, 601, 603 - 616, 801 - 806, 808 - 812, 816 - 818, 820 - 822	633

<u>MCA</u>	<u>Rule or A.G.'s Opinion</u>	<u>Register Page No.</u>
37-50-204	8.54.405	634
37-50-302	8.54.408	635
37-50-303	8.54.407	635
37-50-305	8.54.408	635
37-50-308	8.54.402, 403, 405	633
37-50-309	8.54.415	639
37-50-311 - 313	8.54.415	639
37-50-314	8.54.411, 803 - 806, 808 - 812, 816 - 818, 820 - 822	638
37-50-317	8.54.410, 411, 415	637
37-50-321	Rules IV - VIII (Commerce-Public Accountants)	660
37-50-322	8.54.810	653
37-51-102	Opinion No. 54	1005
37-51-202	Opinion No. 54	1005
37-60-202	8.50.426	591
37-60-202	8.50.434	592
37-60-404	8.50.434	592
37-65-204	8.6.410	355
37-65-204	8.6.413	283
37-65-305, 306	8.6.413	283
37-65-306	8.6.410	355
37-67-202	8.48.1105	630
37-67-303	8.48.1105	630
37-67-311	8.48.1105	630
37-67-319	8.48.1105	630
37-69-202	Rule I (Commerce-Plumbers)	750
37-69-202	8.44.403 - 406	748, 948
37-69-303 - 305	8.44.403, 404	748
37-69-303 - 307	8.44.403 - 406	948
37-69-307	8.44.405	750
39-30-101	Rules I, II (Administration)	93
39-30-103	Rules IV - X, XIII, XIV (Administration)	93
39-30-106	Rules I - XIX (Administration)	93
39-30-107	Rule XIV (Administration)	102
39-30-108	Rule XIX (Administration)	106
39-30-201	Rule X (Administration)	97
39-30-202	Rule III (Administration)	94
39-30-206	Rule XI (Administration)	99
39-30-206, 207	Rules XV - XVIII (Administration)	105
39-31-104	24.26.680B	599
39-31-405	24.26.680B	599
39-71-116	Opinion No. 38	517
39-71-203	Rules I - VIII (L&I-Workers Compensation)	486
39-71-401	Rules IV, VI, VIII (L&I-Workers Compensation)	488
39-71-408	Rule VII (L&I-Workers Compensation)	490
39-71-410	Rule V (L&I-Workers Compensation)	488

<u>MCA</u>	<u>Rule of A.G.'s Opinion</u>	<u>Register Page No.</u>
39-71-504	Rule VII (L&I-Workers Compensation)	490
39-71-507	Rule VII (L&I-Workers Compensation)	490
39-71-701 - 703	Opinion No. 38	517
39-71-2102 - 2104	Rule II (L&I-Workers Compensation)	487
39-71-2201	Rule III (L&I-Workers Compensation)	488
39-71-2301	Rule III (L&I-Workers Compensation)	488
40-6-102, 103	Opinion No. 42	533
41-5-203	Opinion No. 43	602
41-5-303 - 307	Opinion No. 43	602
41-5-402	Opinion No. 43	602
41-5-501	Opinion No. 43	602
41-5-511	Opinion No. 43	602
41-5-601, 602	Opinion No. 43	602
41-5-604	Opinion No. 43	602
44-3-101	Opinion No. 35	448
44-4-301	Rule I (Justice)	582
44-4-301	23.14.401 - 403	573
44-4-301	23.14.412, 413	576
44-5-103	Opinion No. 35	448
44-5-301	Opinion No. 35	448
45-2-101	Opinion No. 34	395
45-5-624	Opinion No. 43	602
45-7-401	Opinion No. 32	333
46-6-301	Opinion No. 43	602
46-8-111	Opinion No. 43	602
46-23-405	20.7.102	390
49-2-101 - 601	Opinion No. 40	525
49-2-204	Rules I - VII (L&I-Human Rights Commission)	949
49-2-206	Rules I - VII (L&I-Human Rights Commission)	482
49-2-303	Opinion No. 40	525
49-2-310, 311	Rules I - VII (L&I-Human Rights Commission)	482, 949
49-3-101 - 312	Opinion No. 40	525
49-4-301, 302	Opinion No. 34	395
49-4-307	Opinion No. 34	395
Title 50, Ch. 5, Pts. 1, 2	16.32.301	557, 974
50-1-202	Rules I, II (Health)	875
50-1-202	16.38.301	873
50-5-103	Rule I (Health)	918
50-5-103	Rules I - VII (Health)	560
50-5-103	16.32.106, 138 - 142	28
50-5-103	16.32.301, 302, 306, 309, 310	557
50-5-103	16.32.302, 346	918

<u>MCA</u>	<u>Rule or A.G.'s Opinion</u>	<u>Register Page No.</u>
50-5-103	16.32.301, 306, 309, 310, 313, 347, 356, 357, 380, 382, 385 - 388	974
50-5-103	16.32.373	570
50-5-103	16.32.380, 382, 385	563
50-5-106	16.32.138 - 142	34
50-5-201	Rule I (Health)	918
50-5-201	Rules II - IV (Health)	560
50-5-201	16.32.302	557
50-5-201	16.32.302, 346	918
50-5-201	16.32.347, 356, 357	975
50-5-204	Rules I - IV, VI, VII (Health)	560
50-5-204	16.32.302, 306, 309, 310	558
50-5-204	16.32.306, 309, 310, 313, 356, 357, 380, 382, 385, 387, 388	974
50-5-204	16.32.373	570
50-5-204	16.32.380, 382, 385	563
50-5-225	16.32.382	564, 976
50-5-226	Rules V - VII (Health)	566
50-5-226	16.32.386 - 388	977
50-5-227	16.32.382	564
50-5-227	16.32.382, 386, 388	976
50-5-302	16.32.103, 106, 136, 137	27
50-5-404	Rule I (Health)	560
50-5-404	16.32.306, 309, 310	558
50-5-404	16.32.306, 309, 310, 313	974
50-32-103	8.40.1215	357
50-32-232	8.40.1215	357
50-60-103, 104	2.32.101	622, 744
50-60-203	2.32.101	622
50-60-203	2.32.401	626
50-60-203	2.32.501	628
50-60-203, 205	2.32.101	744
50-60-302	2.32.210	624
50-60-401	2.32.501	628
50-60-603	2.32.401	626
Title 53, Ch. 2, Pt. 3	Opinion No. 29	56
53-1-106	20.11.109	791
53-1-401	20.11.108	790
53-1-403	20.11.108, 109, 113 - 115, 118	790
53-1-405	20.11.112 - 114	793
53-1-407	20.11.115	795
53-1-408	20.11.114, 115	794
53-1-411	20.11.118	796
53-2-101	Opinion No. 29	56
53-2-201	Rule I (SRS)	689
53-2-201	46.11.101	294
53-2-201	46.11.116, 120, 125	687
53-2-201	46.25.720	999
53-2-201	46.25.720, 721	807
53-2-306	Rule I (SRS)	689

<u>MCA</u>	<u>Rule or A.G.'s Opinion</u>	<u>Register Page No.</u>
53-2-306	46.11.101	294
53-2-306	46.11.116, 120, 125	687
53-2-602	46.25.712	803, 999
53-2-801, 802	Opinion No. 29	56
53-2-803	Rules I, II (SRS)	802
53-2-803	46.25.712, 720, 721, 723, 732, 738, 739	803
53-2-803	46.25.712, 723, 732, 739	999
53-2-811, 812	Opinion No. 29	56
53-2-812	Rules I, II (SRS)	802
53-2-822	46.25.732	808
53-2-833	46.25.732	999
53-3-102	46.25.723	807, 999
53-3-103	46.25.738, 739	808
53-3-103	46.25.739	1000
53-3-204	Rules I, II (SRS)	802
53-3-204	46.25.723	807, 999
53-3-301	46.25.720, 721	807
53-3-301	46.25.720	999
53-3-305	46.25.732	808, 999
53-3-504	46.25.732	808, 999
53-6-111, 113	Rules I - IV (SRS)	798
53-6-141	Rules I - IV (SRS)	798
53-6-201	Rules I - IV (SRS)	798
53-7-101 - 107	46.6.102, 302, 304, 305	299
53-7-102	Rules III, IV (SRS)	297
53-7-102	Rules III, IV (SRS)	299
53-7-102	46.6.306, 517, 602, 605, 606, 701, 801, 901, 903, 906, 907, 1101, 1201, 1302, 1304 - 1306, 1309	303
53-7-102, 103	Rules I, II (SRS)	297
53-7-102, 103	46.6.605, 606, 701, 801, 901, 903, 906, 907	305
53-7-105	46.6.306, 517	303
53-7-201 - 203	46.6.102, 302, 304, 305	299
53-7-203	Rules I - IV (SRS)	297
53-7-203	46.6.306, 517, 602, 605, 606, 701, 801, 901, 903, 906, 907, 1101, 1201, 1302, 1304 - 1306, 1309	303
53-7-301 - 309	46.6.102, 302, 304, 305	299
53-7-302	Rules III - VII (SRS)	297
53-7-302	46.6.306, 517, 602, 605, 606, 701, 801, 901, 903, 906, 907, 1101, 1201, 1302, 1304 - 1306, 1309	303
53-7-302, 303	Rules I, II (SRS)	297
53-7-302, 303	46.6.605, 606, 701, 801, 901, 903, 906, 907	305
53-7-306, 307	46.6.306, 517	303
53-24-204	20.3.415	681, 930
60-3-101	18.7.241	323
60-4-402	18.7.241	323

<u>MCA</u>	<u>Rule or A.G.'s Opinion</u>	<u>Register Page No.</u>
61-1-306	Opinion No. 51	884
61-8-103	Opinion No. 51	884
61-8-303	Opinion No. 51	884
61-8-310	Opinion No. 51	884
61-8-711	Opinion No. 51	884
61-9-420	Rules I - III (Justice)	571
61-10-121	18.8.502, 503	11
61-10-121, 122	18.8.513, 514, 601, 801, 1004, 1007	12
61-10-124	18.8.502, 503	11
61-12-101	Opinion No. 31	329
61-12-101	Opinion No. 51	884
69-3-103	Rules I - VII (Public Service Regulation)	360
69-3-103	Rules III, IV (Public Service Regulation)	952
69-3-203, 204	Rule IV (Public Service Regulation)	952
69-3-204	Rule III (Public Service Regulation)	952
69-3-301, 302	Rule III (Public Service Regulation)	952
69-3-304	Rule III (Public Service Regulation)	952
69-4-601 et seq.	Rule I (Public Service Regulation)	360
69-4-603	Rules II - VII (Public Service Regulation)	360
69-12-103	38.3.203	950
69-12-201	38.3.201 - 203, 502, 801, 805, 2014, 2101	950
69-12-207	38.3.203	950
69-12-325	38.3.2101	951
69-12-326	38.3.2014	951
69-12-401, 402	38.3.202	950
69-12-407	38.3.805	951
69-12-421, 423	38.3.201, 801	950
69-12-423	38.3.203, 805, 2014, 2101	950
69-14-111	Rules I, II (Public Service Regulation)	951
69-14-251	Rule II (Public Service Regulation)	952
70-23-102	Opinion No. 54	1005
75-1-201, 202	Rule I (Commerce)	859
75-2-111	16.8.1102	239
75-2-204	16.8.1102	239
75-6-103	16.38.302	873
75-10-204	16.14.811	259
76-3-606	Opinion No. 49	838
76-4-104	Rules I - III (Health)	772
76-4-104	16.16.101, 103 - 106, 108, 110, 301 - 305, 309, 310, 603, 605, 606	765
13-7/12/84	Montana Administrative Register	

<u>MCA</u>	<u>Rule or A.G.'s Opinion</u>	<u>Register Page No.</u>
76-4-105	16.16.803 - 805	786
76-4-125	16.16.103 - 106, 108, 110, 302 - 305, 310, 603, 605, 606	768
76-4-128	16.16.803, 804	786
80-12-102, 103	4.14.301	363
80-12-103	4.14.307, 312, 315, 601	364
80-12-201	4.14.307	364
80-12-211	4.14.601	364
80-12-211	42.15.415	391
80-12-211	42.23.424	392
81-1-102	32.2.401	266
81-2-102	32.3.203, 212, 2301	267
81-2-102, 103	32.3.406, 407, 407A - 407F	268
81-2-707	32.3.203, 212, 2301	267
81-2-801	32.3.203, 212, 2301	267
81-23-104	8.79.301	292
81-23-104, 105	8.79.101	752
81-23-202	8.79.301	292
81-23-302	8.86.301	411
82-1-104	36.22.502	683
82-2-204	26.4.1206 - 1211	442
82-4-204, 205	Rules I - IV (State Lands)	420
82-4-231	Rules I - IV (State Lands)	420
82-4-254	26.4.1206 - 1211	442
82-4-401 - 441	Opinion No. 47	832
82-11-111	Rule I (DNR-Oil & Gas Conservation)	324
82-11-111	36.22.307	683
82-11-111	36.22.1221	877, 932
82-11-123	Rule I (DNR-Oil & Gas Conservation)	324
82-11-123	36.22.1217, 1243, 1305	684
82-11-123	36.22.1221	877, 932
82-11-124	36.22.1217, 1305	684
85-2-113	36.12.102, 103	494, 882
87-2-803	Rule I (Fish, Wildlife & Parks)	236
87-2-901	12.3.202	236
87-2-901	12.3.208	441
87-2-902	Rule I (Fish, Wildlife & Parks)	237
87-2-903	12.3.202	236
87-2-903	12.3.208	441
87-1-301, 303	12.5.401	762
87-1-301, 303	12.6.801, 901	502
87-2-803	12.3.106	441
87-4-406	12.6.1506	254
87-4-409, 411	12.6.1501	251
87-4-416	12.6.1502	251
87-4-417	12.6.1504	253

<u>MCA</u>	<u>Rule or A.G.'s Opinion</u>	<u>Register Page No.</u>
87-4-419	12.6.1505	253
87-4-422	12.6.1501, 1502, 1504 - 1506	250
87-4-904	12.6.1503	251
87-4-904, 905	12.6.1601, 1603	247
87-4-911	12.6.1602	247
87-4-912	12.6.1604	248
87-4-913	12.6.1503	251
87-4-913	12.6.1601 - 1604	247
87-4-1003	12.6.1701, 1703	249
87-4-1004	12.6.1701	249
87-4-1007	12.6.1702	249
87-4-1011	12.6.1704	249
87-4-1012	12.6.1702 - 1704	249
87-4-1013	12.6.1701	249
90-7-202	8.120.206	418
90-7-211	8.120.206	418