

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 11

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 The Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

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BEFORE THE GRANT REVIEW COMMITTEE
DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PROPOSED
ARM 8.99.803 pertaining to the) AMENDMENT
submission and review of applications)
for workforce training grants) NO PUBLIC HEARING
) CONTEMPLATED

TO: All Concerned Persons

1. On July 9, 2007, the Department of Commerce proposes to amend the above-stated rule.

2. The Department of Commerce will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., June 21, 2007, to advise us of the nature of the accommodation that you need. Please contact Fran Viereck, Department of Commerce, Business Resources Division, 301 South Park Avenue, P.O. Box 200505, Helena, Montana 59620-0505; telephone (406) 841-2736; fax (406) 841-2731; or e-mail fviereck@mt.gov.

3. STATEMENT OF REASONABLE NECESSITY: This amendment to administrative rule is reasonably necessary so that the department may incorporate by reference the latest iteration of application guidelines for workforce training grants into the Administrative Rules of Montana.

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

8.99.803 INCORPORATION BY REFERENCE OF RULES GOVERNING SUBMISSION AND REVIEW OF APPLICATIONS FOR GRANTS SUBMITTED TO COMMITTEE (1) The committee adopts and incorporates by reference the Montana Workforce Training Grant (WTG) Program Application Guidelines dated ~~2005~~ 2007 published by it as rules governing the submission and review of applications under the program. A copy of the guidelines may be obtained from the Department of Commerce, P.O. Box 200505, Helena, MT 59620-0505 and on the department's web site at <http://commerce.mt.gov/indexBRD.asp> or at mtfinanceonline.com.

(2) and (3) remain the same.

AUTH: 39-11-201, MCA
IMP: 39-11-201, 39-11-202, MCA

5. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Fran Viereck, Department of Commerce, Business Resources Division, 301 South Park Avenue, P.O. Box 200505, Helena, Montana 59620-0505; telephone (406) 841-2736; fax (406) 841-2731; or e-mail fviereck@mt.gov, and must be received no later than 5:00 p.m., July 12, 2007.

6. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to Fran Viereck at the above address no later than 5:00 p.m., July 5, 2007.

7. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons directly affected by the proposed action; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 500 based on 5,000 businesses in Montana that could apply for grants.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Such written request may be mailed or delivered to the Department of Commerce, 301 South Park Avenue, P.O. Box 200501, Helena, Montana 59620-0501, by fax to (406) 841-2701, by e-mail to lgregg@mt.gov, or by completing a request form at any rules hearing held by the department.

9. An electronic copy of this Proposal Notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ G. MARTIN TUTTLE
G. MARTIN TUTTLE
Rule Reviewer

/s/ ANTHONY J. PREITE
ANTHONY J. PREITE
Director
Department of Commerce

Certified to the Secretary of State May 29, 2007.

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

In the matter of the adoption of New)	NOTICE OF PUBLIC HEARING ON
Rules I through VI; the amendment of)	PROPOSED ADOPTION,
ARM 12.6.1601, 12.6.1602, and)	AMENDMENT, AND TRANSFER
12.6.1603; and the transfer of)	
12.6.1606 pertaining to game bird)	
farms, possession of captive-reared)	
game birds, and field trial permits)	

TO: All Concerned Persons

1. On June 28, 2007, at 7:00 p.m. the Department of Fish, Wildlife and Parks (department) will hold a public hearing at the Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana to consider the proposed adoption, amendment, and transfer of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., June 14, 2007, to advise us of the nature of the accommodation that you need. Please contact Tim Feldner, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana 59620-0701; telephone (406) 444-4039; fax (406) 444-4952; or e-mail tfeldner@mt.gov.

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

NEW RULE I DEFINITIONS The following definitions apply to this subchapter:

- (1) "Captive-reared birds" means live, upland game birds reared in captivity and purchased from a game bird farm.
- (2) "Department" means the Department of Fish, Wildlife and Parks.
- (3) "Dog training" means the informal handling, exercising, teaching, instructing, and disciplining of dogs in the skills and techniques of hunting and retrieving game birds characterized by absence of fees, judging, or awards.
- (4) "Permit" means a permit to use or possess live, captive-reared upland game birds.

AUTH: 87-4-913, MCA
IMP: 87-4-915, MCA

NEW RULE II PERMIT TO USE CAPTIVE-REARED BIRDS (1) A person using captive-reared birds in the training of dogs or raptors must have a permit issued by the department.

(2) Persons desiring a permit shall submit a completed permit application on forms provided by the department. Applicants shall submit the application to the regional office in the area where the training is expected to take place.

(3) The department may allow a person training dogs to use a maximum of 50 captive-reared birds per year. The department may allow an applicant more than 50 captive-reared birds if the applicant provides written justification.

(4) A permit to use captive-reared birds for dog training is valid from January 1 through December 31 of each year.

(5) The department may allow a person training raptors to use a maximum of 20 captive-reared birds during the permitted period.

(6) A permit to use captive-reared birds for raptor training is valid from August 1 through March 31 and must be renewed annually.

(7) Permits to use captive-reared birds are nontransferable. The department shall revoke a permit if the permittee does not comply with the rules in this subchapter. When revocation occurs, the department shall deny any application for a subsequent permit for one year after the date of revocation. The department has sole discretion on whether or not to issue or revoke a permit. The department's decision is final.

AUTH: 87-4-902, 87-4-913, 87-4-915, MCA

IMP: 87-4-915, MCA

Reason: Under 87-4-902(1), MCA, a person using game birds for purposes other than sale or conveyance must have written authorization from the department. Previously, department policy established the criteria for obtaining the department's written authorization. New Rules I and II will clarify the previous policy in administrative rule.

NEW RULE III USE OF CAPTIVE-REARED BIRDS IN TRAINING (1) When captive-reared birds are used in dog training:

(a) all captive-reared birds used must have a streamer of fluorescent surveyor tape conspicuously attached to the leg prior to release at the training site;

(b) captive-reared birds may only be killed by the permittee or persons accompanying the permittee and assisting in training; and

(c) captive-reared birds may only be killed on land that the permittee owns, leases, or has permission to use for dog training.

(2) Captive-reared birds killed during raptor or dog training must remain in the possession of the permittee unless the permittee transfers the birds to a person who also possesses a valid permit. The permittee may assign ownership of killed birds to a nonpermit holder by written documentation that is signed by the permittee.

(3) When captive-reared birds are used in raptor training, birds may only be released on land that the permittee owns, leases, or has permission to use for raptor training.

AUTH: 87-4-913, MCA

IMP: 87-4-902, 87-4-915, MCA

Reason: Training dogs with a method that will kill birds acquired from a game bird farm requires a written permit from the department according to 87-4-915(6)(b), MCA. The department currently issues a permit to kill captive-reared birds in dog training. New Rule III is necessary to delineate the specific requirements that the department will apply to a permit to use captive-reared birds in dog training as well as in raptor training.

The department is requiring a streamer on captive-reared birds used in dog training so that the trainers can distinguish birds used in training from native birds they would need a license to hunt. The department is establishing requirements that landowner permission be obtained for use of captive-reared birds to protect landowner rights. Additionally, New Rule III provides the details of who may kill a captive-reared game bird and how killed birds may be transferred to another person so that reasonable training can take place and to prevent waste of birds.

NEW RULE IV PERMIT TO RELEASE RING-NECKED PHEASANTS FOR NONCOMMERCIAL PURPOSES (1) A person wishing to release ring-necked pheasants for noncommercial purposes shall file a completed application on a form provided by the department at the regional office in the region where birds will be released.

(2) To obtain a permit, a person shall own the land where the release of birds is contemplated or shall have the written permission of the landowner. A nonlandowner must provide written proof of landowner permission to the department before the department may issue the permit.

(3) A permittee may release a maximum of 200 ring-necked pheasants on an annual basis on one contiguous parcel of property.

(4) A permittee may release ring-necked pheasants only between March 1 and August 31.

(5) Once released, captive-reared pheasants are considered wild birds and fall under all upland game bird hunting regulations.

AUTH: 87-4-913, MCA

IMP: 87-4-501, 87-4-902, 87-4-915, MCA

Reason: The introduction or transplantation of ring-necked pheasants by the department is allowed under 87-5-714, MCA, upon approval by the commission. This approval has been granted with certain conditions under a permit previously issued by policy. The policy conditions were developed to protect landowner rights and native birds. This new rule provides clarification of the criteria permittees must meet to release ring-necked pheasants in Montana. New Rule IV replaces policy by administrative rule.

NEW RULE V PERMIT TO POSSESS CAPTIVE-REARED BIRDS FOR NONCOMMERCIAL PURPOSES (1) A person wishing to possess captive-reared birds for noncommercial purposes not associated with training, release, or field trials shall file a completed application on a form provided by the department at the regional office in the region where the person will keep the birds.

(2) Permits to possess captive-reared birds for noncommercial purposes expire on December 31 of the year issued.

(3) A permittee shall confine captive-reared birds in fencing designed to prevent the entry of wild game birds and to prevent the escape of captive-reared birds into the wild.

(4) A permittee may not release captive-reared birds into the wild without authorization from the department.

AUTH: 87-4-913, MCA

IMP: 87-4-902, 87-4-915, MCA

Reason: Written authorization to own, control, or propagate captive-reared upland game birds for purposes other than sale or conveyance is required according to 87-4-902(1), MCA. Previously, written authorization was issued with conditions determined by department policy. The policy was developed to protect native birds and to allow the department to effectively keep track of the permitted birds. This new rule will clarify the previous policy in administrative rule.

NEW RULE VI NATIONAL POULTRY IMPROVEMENT PLAN (1) Game bird farm licensees who maintain a breeding flock over the winter to hatch out offspring for sale and potential release in Montana must be National Poultry Improvement Plan (NPIP) certified.

(2) Game bird farm licensees who do not over-winter birds, but purchase their eggs or chicks from NPIP sources do not need to acquire NPIP certification.

(3) NPIP certification is obtained through the Montana Department of Livestock.

AUTH: 87-4-913, MCA

IMP: 87-4-906, 87-4-908, MCA

Reason: NPIP requires that birds be tested for various pathogens in order for the hatchery to become NPIP certified. NPIP certification of source stock for Montana game bird farms will help assure that only healthy birds are available for sale and potential release in Montana.

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

12.6.1601 APPLICATION FOR AND RENEWAL OF GAME BIRD FARM LICENSE (1) Application for a game bird farm license shall be made in writing on a form prescribed by the department of fish, ~~wildlife, and parks~~.

(2) The application shall include a ~~\$25~~ 100 license fee with the initial application.

(3) A game bird farm license may be renewed prior to January 31 upon payment of a fee of ~~\$45~~ 50.

(4) All game bird farm licenses expire on January 31 following the date of issuance.

(5) A game bird farm operator whose license has expired for more than 4 one year will be considered a new applicant and pay the ~~\$25~~ 100 initial application fee accompanied by an initial application form.

(6) The department may not renew a game bird farm license until the licensee has submitted the report described by 87-4-912, MCA, on forms provided by the department.

AUTH: 87-4-913, MCA
IMP: 87-4-911, MCA

Reason: This increase in fees for game bird farms was evaluated during a programmatic environmental impact statement completed by the department in 2002. Two public hearings and a written public comment period were conducted during the programmatic environmental impact statement process. The department initially set the game bird farm fees in 1984. This increase will help offset the costs of program administration.

12.6.1602 PURCHASE AND SALE OF GAME BIRDS (1) No person may purchase live game birds from within the state except from the holder of a current game bird farm license. Licensees may sell live game birds within the state only if the prospective purchaser is legally entitled to possess live game birds as evidenced by any of the following:

(a) a permit to possess live game birds for ~~non-commercial~~ noncommercial use;

(b) a permit to kill captive-reared birds in dog training;

(c) a permit to kill captive-reared birds in raptor training;

~~(b)~~ (d) a permit to release live game birds ring-necked pheasants;

~~(c)~~ (e) a shooting preserve license;

~~(d)~~ (f) a zoo or menagerie permit;

~~(e)~~ (g) a permit to conduct a field trial; or

~~(f)~~ (h) a game bird farm license.

(2) remains the same.

AUTH: 87-4-913, MCA
IMP: 87-4-902, 87-4-915, MCA

Reason: The permit to kill captive-reared birds in dog training was previously included in the permit to possess live game birds for noncommercial use. It has now been developed as a stand-alone permit. The department thought that this permit could be tracked and administered much more effectively if it was separated from the general permit. The two permits are administered very differently because the tracking requirements of a permit to use captive-reared birds in dog training are much different than, for example, a permit to allow an individual to raise a few captive-reared birds for consumption.

The permit to kill captive-reared birds in raptor training is a new permit. Recently people training raptors have requested permits to use captive-reared game birds.

Since this kind of training differs markedly from dog training, the department needed to create a separate permit to address use of captive-reared game birds in this situation.

12.6.1603 FENCING (1) The licensee shall fence or enclose his operation sufficiently to prevent the entry of wild game birds and to prevent the escape of game bird farm birds into the wild.

(2) The fencing enclosures of all game bird farm operations licensed on or before October 1, 1983, are deemed adequate for compliance with this rule.

AUTH: 87-4-913, MCA
IMP: 87-4-911, MCA

Reason: The department decided to amend ARM 12.6.1603 as proposed to prevent confusion of game bird farms with game farms, or alternative livestock ranches.

5. The department proposes to transfer the following rule:

<u>OLD</u>	<u>NEW</u>	
12.6.1606	12.6.210	FIELD TRIAL PERMITS

Reason: This administrative rule is currently under subchapter 16, "Game Bird Farms." The rule is being moved to subchapter 2 of the administrative rules entitled "Field Trial Regulations" so that all the rules pertaining to the use of captive-reared upland game birds for training or other events will be in one place in the administrative rules. The department hopes having all the rules in one place will reduce confusion and make it easier for department personnel and the public to locate all pertinent rules.

6. Concerned persons may submit their data, views, or arguments concerning the proposed actions either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Tim Feldner, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana 59620-0701; telephone (406) 444-4039; fax (406) 444-4952; or e-mail tfeldner@mt.gov, and must be received no later than 5:00 p.m., July 5, 2007.

7. Tim Feldner, or another hearings officer appointed by the department, has been designated to preside over and conduct this hearing.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make written request which includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-

7456, or may be made by completing the request form at any rules hearing held by the department.

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

/s/ M. Jeff Hagener
M. Jeff Hagener
Director
Department of Fish, Wildlife
and Parks

/s/ Rebecca J. Dockter
Rebecca J. Dockter
Rule Reviewer

Certified to the Secretary of State May 29, 2007.

***EDITOR'S NOTE: The phone number for comments was incorrectly printed in the hard copy of the Montana Administrative Register. This is the correct phone number.**

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

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 12.9.1105 pertaining to hunting) PROPOSED AMENDMENT
season extensions)

TO: All Concerned Persons

1. On June 27, 2007, at 7:00 p.m. the Fish, Wildlife and Parks Commission (commission) will hold a public hearing at the Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana to consider the proposed amendment of the above-stated rule.

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., June 13, 2007, to advise us of the nature of the accommodation that you need. Please contact Quentin Kujala, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana 59620-0701; telephone (406) 444-5672; fax (406) 444-4952; or e-mail qkujala@mt.gov.

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

12.9.1105 HUNTING SEASONS EXTENSIONS (1) The commission may determine that the extension of a hunting season may be an acceptable strategy to achieve deer or elk management objectives under the following conditions:

(a) a liberal general season deer or elk management package has been in place for two consecutive years, including the year in which the extension is proposed. A liberal season package is established when populations observed in department surveys exceed management objectives. Season packages for deer and elk are numerically described in the department's current Deer and Elk Plans;

(b) elk populations are 20% or more over the current department Elk Plan population objectives as determined by department survey, or deer populations are 20% - 30% over the current department Deer Plan population objectives as determined by department survey and as specifically identified in the five ecotypes described in the Deer Plan;

(c) public hunting access during the five-week general hunting season was at levels necessary to accomplish harvest management objectives, but management objectives were still not achieved; and

~~(d) mild weather conditions during the fall hunting season result in a harvest that is at least 25% below the five-year average for that check station.~~ weather conditions during the fall hunting season result in a harvest that was substantially below the desired level in districts that are over objective. Evaluation of harvest may include, but is not limited to, field observations, check stations, weather conditions, or public comments.

(2) Additionally, the commission may consider season extensions in the event of severe winter weather conditions, and these conditions create a situation where game damage complaints occur across multiple hunting districts or represent real opportunity to secure additional needed harvest in districts that are over objective.

(3) through (5) remain the same.

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

4. The hunting season extensions rule, ARM 12.9.1105, was adopted in December of 2004. The purpose of the rule was to establish criteria to guide the department and commission in determining when a hunting season may be extended. After having the rule effective for two hunting seasons, it became apparent that adjustment of the rule was necessary.

The existing rule states that mild weather conditions during a fall hunting season that result in a harvest 25% below the five-year average is one of the conditions that must occur for a hunting season to be extended. However, for almost a decade, fall hunting seasons have been mild. Several years of mild weather and low game harvest have skewed the five-year harvest averages to be much lower than they would have been if a more normal pattern had been in effect. When game harvest has been low and game numbers remain high, the skewed averages have not allowed the hunting season extension rule to be triggered.

The rule amendments provide for an annual evaluation of the game harvest and game populations. This allows wildlife managers the flexibility needed to effectively manage game populations during unusual conditions. Under this proposal, skewed averages would not limit the department and commission's ability to extend a hunting season when an extension would be beneficial. This proposal also allows managers to take advantage of a weather event that would promote harvest of game to reach management objectives.

5. Concerned persons may submit their data, views, or arguments concerning the proposed amendment either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Quentin Kujala, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana 59620-0701; telephone (406) 444-5672; fax (406) 444-4952; or e-mail qkujala@mt.gov, and must be received no later than July 5, 2007.

6. Rebecca Dockter, or another hearings officer appointed by the department, has been designated to preside over and conduct this hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make written request which includes the name and mailing address of the person to receive the notice and specifies the subject or

subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made by completing the request form at any rules hearing held by the department.

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

/s/ Jeff Hagener

M. Jeff Hagener

Secretary

Fish, Wildlife and Parks Commission

/s/ Rebecca Dockter

Rebecca Dockter

Rule Reviewer

Certified to the Secretary of State May 29, 2007.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment) NOTICE OF PUBLIC HEARING
of ARM 24.29.1416, and the proposed) ON PROPOSED AMENDMENT
adoption of NEW RULE I both related to) AND ADOPTION
allowable charges for prescription drugs)
under a workers' compensation claim)

TO: All Concerned Persons

1. On June 29, 2007, at 10:00 a.m., the Department of Labor and Industry (department) will hold a public hearing to be held in the first floor conference room (Room 104), Walt Sullivan Building, 1327 Lockey Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., on June 22, 2007, to advise us of the nature of the accommodation that you need. Please contact the Workers' Compensation Regulations Bureau, Employment Relations Division, Department of Labor and Industry, Attn: Keith Messmer, P.O. Box 8011, Helena, MT 59624-8011; telephone (406) 444-6541; fax (406) 444-3465; TDD (406) 444-5549; or e-mail kmessmer@mt.gov.

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

24.29.1416 APPLICABILITY OF DATE OF INJURY, DATE OF SERVICE

(1) The amounts of the following types of payments are determined according to the specific department rates in effect on the date the medical service is provided, regardless of the date of injury:

- (a) medical fees; and
- (b) hospital charges.

~~(2) The reimbursement rate for prescription drugs is based upon the rate in effect on the date the drug is dispensed. The rate for a specific generic-name drug is the average wholesale price of that drug plus a reasonable dispensing fee established by the insurer. If the generic drug is unavailable and the pharmacist so certifies under 39-71-727, MCA, the reimbursement rate is the average wholesale price of the brand-name drug plus the dispensing fee.~~

~~(3) Department rates (fee schedules) do not apply to preferred providers or managed care organizations to the extent that they are rendering services or providing goods to workers who are covered by insurers with which they have a contract.~~

~~(4) Pursuant to statute, a pharmacist may not dispense more than a 30 days supply at any one time.~~

AUTH: 39-71-203, MCA
IMP: 39-71-704, ~~39-71-727~~, MCA

REASON: Chap. 117, L. 2007 (Senate Bill 108) requires the department to establish a schedule of fees for prescription drugs. NEW RULE I represents how the department proposes to satisfy that requirement. There is a reasonable necessity to amend this rule in order to place all requirements for payment of prescription drugs into one location under NEW RULE I for convenience of affected parties in referencing only a single rule. Sections (3) and (4) are proposed to be deleted as the substance of both appears to be adequately explained in 39-71-727, MCA.

4. The proposed new rule provides as follows:

NEW RULE I PRESCRIPTION DRUGS FEE SCHEDULE (1) In addition to the limitations on the payments for and dispensing of prescription drugs as set out by 39-71-727, MCA, the following apply:

- (a) The reimbursement rate for prescription drugs is based upon the rate in effect on the date the drug is dispensed.
 - (b) Reimbursement rates to retail pharmacies for brand-name drugs are limited to the average wholesale price (AWP), minus 15 percent, of the product at the time of dispensing, plus a dispensing fee, not to exceed \$3.00 per product.
 - (c) Reimbursement rates to retail pharmacies for generic-name drugs are limited to the AWP, minus 25 percent, of the product at the time of dispensing, plus a dispensing fee, not to exceed \$3.00 per product.
 - (d) For the purposes of this rule, average wholesale prices must be updated weekly.
- (2) If, prior to liability for a claim being accepted by the insurer, an injured worker has personally paid for prescription drugs, prescribed for a condition for which liability is subsequently accepted, the injured worker is entitled to a refund of the price paid by the injured worker for the prescription drug.
- (a) The insurer, when accepting liability for a condition for which a prescription drug has been prescribed, must reimburse the injured worker the retail price paid.

AUTH: 39-71-203, MCA
IMP: 39-71-727, 39-71-743, MCA

REASON: There is reasonable necessity to adopt proposed NEW RULE I to implement the statutory changes enacted by Chap. 117, L. 2007 (SB 108) requiring the department to annually adopt a schedule of fees for prescription drugs. The department selected reimbursement rates for brand-name and generic-name drugs, as well as the dispensing fee, at a level that represents a mid-range of rates paid by other insurers in the Montana marketplace.

The department notes that NEW RULE I was developed after discussion with representatives of the Montana Pharmacy Association, private sector insurers, and

the Montana State Fund. The department also notes that the average wholesale price (AWP), referred to in NEW RULE I, is greater than the net cost actually paid by a pharmacy that dispenses the prescription drug, and thus the proposed rule does not require that pharmacies operate at a loss or subsidize the cost of workers' compensation prescriptions.

Although proposed NEW RULE I establishes a rate schedule for prescription drug reimbursement for workers' compensation claims, it does not establish specific, fixed monetary amounts payable for particular drugs. The dispensing fee is being reduced from the former statutory maximum of \$5.50 to \$3.00 per product. However, many workers' compensation insurers have developed preferred provider organizations for pharmacies, and have been paying a dispensing fee of less than the maximum fee allowed under the former statute to pharmacies that are members of those preferred provider organizations. Likewise, the reimbursement rate in a preferred provider organization for the cost of prescription drugs is typically lower than the average wholesale price. The department estimates the aggregate amount of the fiscal impact upon workers' compensation insurers (the payors) and upon pharmacies (the payees) as being as much as \$1.1 million. The department estimates that of that potential \$1.1 million, not more than approximately \$100,000 is attributable to the change in the dispensing fee. There are approximately 471 workers' compensation insurers currently authorized to write coverage in Montana who may be affected by the proposed rule. There are approximately 325 licensed pharmacies in Montana who may be affected by the proposed rule.

Finally, there is reasonable necessity to clarify the procedure for providing a refund to the injured worker for prescriptions paid for prior to the insurer's acceptance of liability on a claim. The department has received a number of inquiries over the years on this subject, and believes that including the information as part of the rule will make it easier for pharmacies and injured workers to make sure that the costs of work-related injuries are appropriately borne by the workers' compensation system.

5. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Keith Messmer, Bureau Chief, Workers' Compensation Regulations Bureau, Employment Relations Division Department of Labor and Industry, P.O. Box 8011, Helena, Montana 59624-8011; by facsimile to (406) 444-3465; or by e-mail to kmessmer@mt.gov, and must be received no later than 5:00 p.m., July 6, 2007.

6. An electronic copy of this Notice of Public Hearing is available through the department's web site at <http://dli.mt.gov/events/calendar.asp>, under the Calendar of Events, Administrative Rules Hearings Section. The department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may

be unavailable during some periods, due to system maintenance or technical problems, and that a person's difficulties in sending an e-mail do not excuse late submission of comments.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Department of Labor and Industry administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Department of Labor and Industry, attention: Mark Cadwallader, 1327 Lockey Avenue, P.O. Box 1728, Helena, Montana 59624-1728, faxed to the department at (406) 444-1394, e-mailed to mcadwallader@mt.gov, or may be made by completing a request form at any rules hearing held by the agency.

8. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled. The primary sponsor of Senate Bill 108 was notified on May 17, 2007, by regular mail.

9. The department's Hearings Bureau has been designated to preside over and conduct this hearing.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

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

Certified to the Secretary of State May 29, 2007

BEFORE THE BOARD OF OCCUPATIONAL THERAPY PRACTICE
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment of) NOTICE OF PUBLIC HEARING
ARM 24.165.404 applications, 24.165.501) ON PROPOSED AMENDMENT
supervision, 24.165.509 instruction,)
24.165.510 training, 24.165.513 modalities,)
and 24.165.2301 unprofessional conduct)

TO: All Concerned Persons

1. On June 28, 2007, at 11:00 a.m., a public hearing will be held in room 439, 301 South Park Avenue, Helena, Montana to consider the proposed amendment of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Occupational Therapy Practice (board) no later than 5:00 p.m., on June 22, 2007, to advise us of the nature of the accommodation that you need. Please contact Helena Lee, Board of Occupational Therapy Practice, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2385; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdotp@mt.gov.

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

24.165.404 APPLICATIONS FOR LICENSURE (1) Applications for an original license or temporary practice permit must be made on forms provided by the department and completed and signed by the applicant, ~~with the signature acknowledged before a notary public.~~

(2) through (8) remain the same.

AUTH: 37-1-131, 37-24-201, 37-24-202, MCA

IMP: 37-1-131, 37-24-302, MCA

REASON: The department has determined and the board agrees that the requirement for applications to be notarized is not necessary. In anticipation of and to further facilitate the online submission of license applications, the board will no longer require the signature or content to be notarized on any application.

24.165.501 SUPERVISION - GENERAL STATEMENT (1) remains the same.

(2) A fully-licensed occupational therapist shall not require supervision except for the direct supervision required for proctored treatments.

(3) A certified occupational therapist assistant, in accordance with 37-24-103~~(2)~~, MCA, shall work under the general supervision of a licensed occupational therapist.

(4) Temporary practice permit holders under 37-1-305~~(2)~~, MCA, shall work under the routine supervision of a certified occupational therapist assistant or a licensed occupational therapist.

(5) remains the same.

(6) Occupational therapy aides under 37-24-103~~(6)~~, MCA, shall work under the direct supervision of a licensed occupational therapist or a certified occupational therapist assistant. Occupational therapy aides shall have no supervisory capacity.

AUTH: 37-1-131, 37-1-319, 37-24-201, 37-24-202, MCA

IMP: 37-1-305, 37-24-103, 37-24-106, 37-24-107, MCA

REASON: It is reasonably necessary to amend this rule and clarify that direct supervision is required when licensed occupational therapists complete proctored treatments required to utilize sound and electrical physical agent modalities and techniques using topical medications. The board determined that the current rule is confusing and potentially misleading to licensees. The rule is further amended to delete internal references to specific MCA sections to comply with ARM formatting rules and reduce the incorrect references in rule that must be changed following amendment of the referenced statute. Authority and implementation cites are being amended to accurately reflect all statutes implemented through the rule and to provide the complete sources of the board's rulemaking authority.

24.165.509 APPROVED INSTRUCTION (1) through (1)(d) remain the same.

(e) self-study course work pursuant to ARM 24.165.2101~~(4)~~.

(2) and (3) remain the same.

(4) The instructor must be preapproved by the board and shall submit proof that the instructor:

(a) is a Montana licensed professional allowed to use sound and electrical physical agent modalities or superficial physical agent modalities; and

(b) has more than one year of clinical experience in the use of sound and electrical physical agent modalities or superficial physical agent modalities.

AUTH: 37-1-131, 37-24-201, 37-24-202, MCA

IMP: 37-24-105, 37-24-106, 37-24-107, MCA

REASON: The board determined it is reasonably necessary to amend this rule to clarify that providers of didactic instruction for sound and electrical physical agent modalities and superficial physical agent modalities must be preapproved by the board. The board is amending this rule to address applicant confusion regarding the board's approval process and the requirements for instructor approval.

The board is also deleting an internal reference to a specific rule section to comply with ARM formatting rules and reduce the number of incorrect references that must be changed following amendment of the referenced rule. Authority cites

are being amended to accurately provide the complete sources of the board's rulemaking authority.

24.165.510 APPROVED TRAINING (1) The term "training" includes ~~refers to~~ proctored learning sessions provided ~~via~~ by example and observation by a qualified person.

(2) remains the same.

AUTH: 37-1-131, 37-24-201, 37-24-202, MCA
IMP: 37-24-105, 37-24-106, 37-24-107, MCA

REASON: It is reasonably necessary to amend the definition of "training" in this rule for increased clarity and ease of use. Authority and implementation cites are being amended to accurately reflect all statutes implemented through the rule and to provide the complete sources of the board's rulemaking authority.

24.165.513 APPROVAL TO USE SOUND AND ELECTRICAL PHYSICAL AGENT MODALITIES (1) through (1)(c)(ii) remain the same.

(A) five proctored treatments under the direct supervision of a licensed medical practitioner in sound physical agent modality devices; ~~and~~

(B) five proctored treatments under the direct supervision of a licensed medical practitioner in electrical physical agent modality devices; ~~and~~

(C) two proctored treatments equal one hour of instruction or training for the purpose of 37-24-106, MCA. No more than five hours of proctored treatments may count toward the 40 hour instruction or training requirement in sound and electrical physical agent modalities.

(2) remains the same.

AUTH: 37-1-131, 37-24-201, 37-24-202, MCA
IMP: 37-24-106, 37-24-107, MCA

REASON: It is reasonably necessary to amend this rule to address board acceptance of proctored treatments as a portion of required instruction and training. The board concluded that the available board approved courses on sound and electrical physical agent modalities do not provide a full 20 hours of instruction or training and are offered out of state and are not readily accessible to Montana licensees. Authority and implementation cites are being amended to accurately reflect all statutes implemented through the rule and to provide the complete sources of the board's rulemaking authority.

24.165.2301 UNPROFESSIONAL CONDUCT (1) For the purpose of implementing Title 37, chapter 1, MCA, and in addition to the provisions at 37-1-316, MCA, the board defines "unprofessional conduct" as follows:

(1) through (15) remain the same but are renumbered (a) through (o).

~~(46)~~ (p) acting in such a manner as to present a danger to public health or safety, or to any client including, but not limited to, incompetence, negligence, or malpractice;

(17) through (28) remain the same but are renumbered (q) through (ab).

~~(29) (ac) failing to obtain informed consent from client or client's representative prior to providing any therapeutic intervention; or American society of hand therapists and 100 treatments under instructor proctoring of sound and electrical physical agent modalities done on patients directly supervised by the instructor/proctor. The instructor must be pre-approved by the board and show certificate of proof of being a licensed professional allowed to use deep modalities who has more than one year clinical experience in the use of deep modalities, an occupational therapist, registered and certified in providing sound and electrical modalities.~~

(ad) failing to complete 40 hours of instruction or training under proctoring of sound and electrical physical agent modalities done on patients directly supervised by the instructor/proctor;

(30) and (31) remain the same but are renumbered (ae) and (af).

~~(32) (ag) ordering, performing, or administering, without clinical justification, tests, studies, x-rays, treatments, or services;~~

~~(33) (ah) failing to provide to a client, client's representative, or an authorized health care practitioner, upon a written request, the medical record or a copy of the medical record relating to the client which is in the possession or under the control of the professional. Prior payment for professional services to which the records relate, other than photocopy charges, may not be required as a condition of making the records available;~~

~~(34) (ai) sexual, verbal, or mental abuse of a client;~~

(35) remains the same but is renumbered (aj).

~~(36) (ak) engaging in sexual contact, sexual intrusion, or sexual penetration, as defined in Title 45, chapter 2, MCA, with a client during a period of time in which a professional relationship exists, or for up to six months after the relationship has terminated;~~

(37) remains the same but is renumbered (al).

~~(38) (am) Failure failing to supply continuing education documentation as requested by the audit procedure set forth in ARM 24.165.2101 or supplying misleading, incomplete, or false information relative to continuing education taken by the licensee.~~

AUTH: 37-1-131, 37-1-136, ~~37-1-307, 37-1-316~~, 37-1-319, 37-24-201, 37-24-202, MCA

IMP: 37-1-136, 37-1-307, 37-1-308, 37-1-309, 37-1-311, 37-1-312, 37-1-316, 37-24-106, 37-24-107, 37-24-202, MCA

REASON: The board determined it was reasonably necessary to amend this rule and move the provision on board approval of instructors to ARM 24.165.509 as a more appropriate location. The board is striking the 100 treatment requirement because it is out-of-date and was replaced by the 40 hours of instruction or training in 2003 at 37-24-106, MCA. The board is adding (1)(ad) to address violations of the current 40 hour requirement. Authority and implementation cites are being amended to accurately reflect all statutes implemented through the rule and to provide the complete sources of the board's rulemaking authority.

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Occupational Therapy Practice, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdotp@mt.gov, and must be received no later than 5:00 p.m., July 6, 2007.

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

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

7. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was notified on April 19, 2007, by regular mail. For previous rule projects involving the same bill, the primary sponsor was given appropriate notice.

8. Anne O'Leary, attorney, has been designated to preside over and conduct this hearing.

BOARD OF OCCUPATIONAL THERAPY
PRACTICE
DEB AMMONDSON, OTR, CHAIRPERSON

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

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

Certified to the Secretary of State May 29, 2007

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

In the matter of the proposed amendment) NOTICE OF PUBLIC HEARING
of ARM 24.101.413 renewal dates,) ON PROPOSED AMENDMENT
24.183.404 fees, 24.183.502 applications,) AND ADOPTION
24.183.504 application disposal, 24.183.509)
examination procedures, 24.183.510 grant)
and issue licenses, 24.183.2102 inactive)
status, and adoption of NEW RULE I)
teaching engineering subjects, and NEW)
RULE II certificate of authorization)

TO: All Concerned Persons

1. On June 29, 2007, at 10:00 a.m., a public hearing will be held in room 439, 301 South Park Avenue, Helena, Montana to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Professional Engineers and Professional Land Surveyors (board) no later than 5:00 p.m., on June 22, 2007, to advise us of the nature of the accommodation that you need. Please contact Brooke Jasmin, Board of Professional Engineers and Professional Land Surveyors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2351; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2309; e-mail dlibsdpels@mt.gov.

3. The department is proposing to amend the following rule. The rule proposed to be amended provides as follows, stricken matter interlined, new matter underlined:

24.101.413 RENEWAL DATES AND REQUIREMENTS (1) through (5)(aa) remain the same.

	BOARD OR PROGRAM JURISDICTION	LICENSE CATEGORY	FREQUENCY	RENEWAL DATE
(ab)	Professional Engineers and Professional Land Surveyors	Certificate of Authority <u>Authorization</u>	Biennially, Even Numbered Years <u>Annually</u>	June 30 <u>October 1</u>
		Emeritus Status		

	Engineer Intern	Indefinite	
	Land Surveyor Intern	None, Indefinite	
	Professional Engineer	Biennially, Even Numbered Years	June 30
	Professional Engineer by Comity	Biennially, Even Numbered Years	June 30
	Professional Land Surveyor	Biennially, Even Numbered Years	June 30
	Professional Land Surveyor by Comity	Biennially, Even Numbered Years	June 30

(ac) through (7) remain the same.

AUTH: 37-1-101, 37-1-141, MCA
IMP: 37-1-101, 37-1-141, MCA

REASON: The department determined it is reasonable and necessary to amend this rule to align the renewal frequency for certificates of authorization with that set forth in board rules. The board is changing the renewal frequency from biennial to annual elsewhere in this notice. This rule is also being amended to correct terminology as used in 37-67-320, MCA, and to change the renewal date to October 1 to stagger renewals among different types of board licenses.

In addition, the board and the department are proposing to modify rules pertaining to renewal within one notice to reduce costs associated with rulemaking and to ensure the rule changes are more efficient and timely. Consolidating the board and department rule changes into one notice will avoid a conflict between department and board rules on renewal frequency.

4. GENERAL STATEMENT OF REASONABLE NECESSITY: The board has determined it is reasonably necessary to amend throughout the authority and implementation cites to accurately reflect all statutes implemented through the rules, to provide the complete sources of the board's rulemaking authority, and to delete references to repealed statutes.

5. The board is proposing to amend the following rules. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

24.183.404 FEE SCHEDULE (1) remains the same.

(2) In every case, should the board deny the issuance of a certificate and/or license to any applicant, the initial fee deposited shall be retained by the board as an application fee.

(3) remains the same.

(a) Engineer interns (EI) initial application \$ 25

(b) Land surveyor interns (<u>LSI</u>) initial application	25
(c) Professional engineers (<u>PE</u>)	
(i) and (ii) remain the same.	
(d) Professional land surveyors (<u>PLS</u>)	
(i) and (ii) remain the same.	
<u>(iii) Reschedule fee for Montana law specific exam</u>	<u>25</u>
(iii) remains the same but is renumbered (iv).	
(e) Certificate of authority <u>authorization</u>	
(i) remains the same.	
<u>(ii) Annual renewal fee of certificate of authorization</u>	<u>25</u>
<u>(iii) Certificate of authorization late renewal</u>	<u>25</u>
(f) through (f)(iii) remain the same.	
(iv) Certificate of authority	50
(g) through (g)(iii) remain the same.	
(iv) Reschedule fee for Montana law examinations	25
(v) Certificate of authority issued in conjunction with late renewal	12.50
<u>(iv) Reexamination fee for PE, PLS, LSI, EI</u>	<u>25</u>
<u>(v) Exam reschedule fee for PE, PLS, LSI, EI</u>	<u>25</u>
(4) remains the same.	

AUTH: 37-1-134, 37-67-202, 37-67-311, MCA

IMP: 37-1-134, 37-1-141, 37-1-319, 37-67-303, 37-67-311, 37-67-312, 37-67-313, 37-67-320, 37-67-321, MCA

REASON: The board determined it is reasonably necessary to amend and reorganize this rule for better clarity and ease of use. The board is also amending this rule to implement fees for reexaminations and exam rescheduling and for consistent use of the term certificate of authorization. The board is statutorily obligated to set fees commensurate with board costs and these new fees will adequately support the administrative work in rescheduling exams and processing reexaminations. The board estimates that the new fees will affect 475 applicants and will increase annual revenue by approximately \$11,875.

The board is proposing to adopt New Rule II to provide specific requirements for entities renewing or making changes under certificates of authorization. It is reasonable and necessary to amend this rule to change from biennial to annual renewal of certificates of authorization to comply with and further implement the new rule. This amendment results in no change to board revenue. The board is also increasing to \$25 the fee for late renewal of certificates of authorization to comply with the department rule at ARM 24.101.403(2) that provides a late penalty fee must be 100 percent of the renewal fee. The board estimates approximately 200 late renewal fees and a resulting annual revenue increase of \$2,500.

24.183.502 APPLICATIONS (1) remains the same.

(2) The board, after due consideration of an application and of information pertaining thereto:

(a) will find the applicant eligible to sit for the appropriate exam; or

(b) request the applicant to furnish such additional information as may be necessary; or

(c) advise the applicant of the application's rejection in accordance with provisions of the law.

(3) A rejected applicant may request reconsideration under the section originally applied for, within one year of the date of notification, without additional fees. Additional evidence pertaining to the application must be furnished. However, reconsideration does not take into account experience or education subsequent to the date of application.

(4) An applicant who applies under a different section than that previously submitted shall submit a new complete application accompanied by the appropriate fee.

(5) Applications received after a board set application deadline will be processed for the following examination.

(6) If an application is withdrawn, no refund of the application fee will be made.

AUTH: 37-1-131, 37-67-202, MCA

IMP: 37-67-303, MCA

REASON: The board has determined it is reasonably necessary to amend this rule to include language previously set forth in ARM 24.183.504 as a more appropriate location. The board is also amending the rule to address confusion among applicants by specifically delineating the board process for late-received applications and clarifying that fees for withdrawn applications are nonrefundable.

24.183.504 DISPOSAL OF APPLICATIONS (1) An application will be on file one year from the date of receipt. If no action is taken by the applicant within one year, the application fee will be forfeited and reapplication will be required. The board, after due consideration of an application and of information pertaining thereto:

(a) will find the applicant eligible to sit for the appropriate exam; or

(b) request the applicant to furnish such additional information as may be necessary; or

(c) advise the applicant of the application's rejection in accordance with provisions of the law.

(2) A rejected applicant may request reconsideration under the section originally applied for, within one year of the date of notification, without additional fees. Additional evidence pertaining to the application must be furnished. However, reconsideration does not take into account experience or education subsequent to the date of application.

(3) An applicant who applies under a different section than that previously submitted shall submit a new complete application accompanied by the appropriate fee.

AUTH: 37-1-131, 37-67-202, MCA

IMP: 37-67-303, MCA

REASON: It is reasonable and necessary to delete the text of this rule and relocate it to ARM 24.183.502 as a more appropriate location. The board is also amending this rule to clearly delineate for applicants the board's process of retaining applications for one year before disposing of the outdated applications.

24.183.509 EXAMINATION PROCEDURES (1) remains the same.

(2) Applicants will be notified of the time and place of examination at least 30 days in advance. The applicant will not be allowed to reschedule the examination without approval by the board staff or it's a board designee, ~~if the board is not advised 30 days in advance of the examination date of the extenuating circumstance which requires rescheduling.~~ If the board does not approve the rescheduling, the applicant will have to pay a rescheduling fee. An applicant will be required to pay an exam reschedule fee if they wish to reschedule their examination 30 days after receipt of their original exam notification letter.

(3) remains the same.

(4) A candidate failing to pass any examination may take that examination again ~~a second time at a subsequent examination period~~ upon payment of the reexamination fee specified by ARM 24.183.404. ~~However, if more than three examination dates have passed since the candidate's original failure, the candidate must submit a new application and pay the appropriate application and test fee specified by ARM 24.183.404 before the candidate will be reexamined.~~

(5) The examinee who has failed the Montana law state specific examination may review the examination paper in the board office within 60 days after being notified of the status. Note taking will be allowed during the time of review, but the notes must be left in the board office. ~~No notes are to be made nor any marks made on the examination paper.~~

(6) The Montana law state specific examination documents (test papers) will be retained in the examinee's file for a period of ~~two years~~ one year, and then destroyed.

AUTH: 37-1-131, 37-1-134, 37-67-202, MCA

IMP: 37-1-131, 37-1-134, 37-67-311, MCA

REASON: The board determined it is reasonably necessary to amend this rule to adjust exam processes following the board's contracting with a third-party exam vendor. The board concluded it is unnecessary to require an applicant to reapply if more than three exam cycles have passed since the original failure. In most cases, there would be very few changes from the original application. The board is amending the rule to address applicants' review of the Montana law state specific examination because the other exams are national exams monitored by the National Council of Examiners for Engineering and Surveying and the board only receives exam scores and diagnostic reports. The board determined it is necessary to allow note taking when reviewing the Montana law state specific examination as there are several exam questions that involve a calculator. Retaining the Montana law state specific examinations for one year is consistent with board retention rules and will allow for storage of other pertinent documentation.

24.183.510 GRANT AND ISSUE LICENSES (1) At the time an applicant is ~~voted~~ has met the requirements for licensure by the board, the applicant will be assigned a license number and issued a license as a professional engineer and/or professional land surveyor as appropriate. These numbers will be issued consecutively in the order in which the applications are approved by the board. The applicant will be advised of the license number in the notice sent to the applicant.

(2) A license authorizing the practice of professional engineering or professional land surveying by a sole proprietorship, firm, partnership, or corporation will be granted by the board and issued by the department after approval of an application for certificate of authorization and payment of the license fee. ~~The license~~ A wall certificate shall be signed by the presiding officer and the secretary and shall bear the license number of the licensee, sole proprietorship, firm, partnership, or corporation.

AUTH: 37-1-131, 37-67-202, MCA

IMP: 37-67-305, 37-67-306, 37-67-308, 37-67-309, 37-67-320, MCA

REASON: The board determined it is reasonable and necessary to amend this rule to clarify that the board does not vote approval of routine applications for licensure. A license is issued once the applicant has met all minimum requirements. The board is also amending this rule to correct terminology and the actual process for an entity holding a certificate of authorization to obtain a wall certificate.

24.183.2102 INACTIVE STATUS AND REACTIVATION CONVERSION FROM INACTIVE TO ACTIVE STATUS (1) A licensee may place the license on inactive status by either indicating on the renewal form that inactive status is desired, or by informing the board office, in writing, that an inactive status is desired. It is the sole responsibility of the inactive licensee to keep the board informed as to any change of address during the period of time the license remains on inactive status. Inactive licensees must pay the renewal fee ~~annually~~ biennially to maintain license status.

(2) A licensee may not practice any professional engineering or professional land surveying work in the state of Montana while the license is ~~in an~~ on inactive status.

(3) Upon application and payment of the appropriate fee, the board may ~~reactivate~~ convert an inactive status license to active status if the applicant completes each of the following:

(a) and (b) remain the same.

(4) In the event an inactive licensee does not maintain a current license in any jurisdiction for the three previous years prior to requesting ~~reinstatement~~ conversion to active status, the board may require the applicant to take and pass the principles and practice of engineering (PE) examination or the principles and practice of land surveying (PLS) examination.

AUTH: 37-1-319, 37-67-202, MCA

IMP: 37-1-319, ~~37-67-315~~, MCA

REASON: It is reasonable and necessary to amend this rule to correct terminology used for changing inactive licenses to active status. The board is amending terms in the rule to avoid conflict or confusion with the terms "reactivate" as used in 37-1-131, MCA, regarding license renewals, and "reinstatement" as used in situations following license discipline. The board is changing the period for inactive license renewal from annual to biennial to coincide with the renewal of active licenses.

6. The proposed new rules provide as follows:

NEW RULE I TEACHING OF ADVANCED ENGINEERING SUBJECTS

(1) The term "teaching of advanced engineering subjects" means engineering class instruction of courses at the junior class level and above within a board approved curriculum.

(2) Either the class instructor or the person in responsible charge of the board approved curriculum shall be a Montana licensed professional engineer and be in responsible charge of class instruction of engineering classes at the junior level and above.

AUTH: 37-1-131, 37-67-201, MCA

IMP: 37-67-101, MCA

REASON: The board determined it is reasonably necessary to adopt New Rule I to address the teaching of advanced engineering subjects as part of the practice of engineering at 37-67-101, MCA. Following lengthy board discussion and input from several Montana engineering programs, the board is proposing this rule to specifically delineate at what level the teaching of advanced engineering requires licensure. Further, the board is clarifying in this rule that the person in responsible charge of the advanced engineering class instruction must be a Montana licensed professional engineer.

NEW RULE II CERTIFICATE OF AUTHORIZATION (1) Certificates of authorization shall be renewed annually on or before the date set by ARM 24.101.413. The annual renewal form must indicate the name and license number of the professional engineer and/or professional land surveyor in responsible charge and affirm that they are in good standing with the Montana Secretary of State's office and be accompanied by the renewal fee as specified by ARM 24.183.404.

(2) A professional engineer or professional land surveyor in responsible charge who leaves the employment of a sole proprietorship, firm, partnership, or corporation (who has obtained the required certificate of authorization from the board), for whatever reason, must provide written notification to the board office of that fact, within ten working days. The sole proprietorship, firm, partnership, or corporation must provide the board office within ten working days, on a prescribed form, the change of the professional engineer and/or professional land surveyor in responsible charge. Failure to name another professional engineer and/or professional land surveyor in responsible charge within ten working days shall be cause for suspension of the certificate of authorization and cause for revocation.

AUTH: 37-67-201, MCA
IMP: 37-67-320, MCA

REASON: The 1995 Montana Legislature enacted Chapter 108, Laws of 1995 (House Bill 148), an act revising certain provisions of professional engineer and land surveyor licensure. The bill became effective on October 1, 1995.

The board finds it reasonable and necessary to adopt New Rule II to specifically delineate the requirements for certificates of authorization for entities providing engineering and/or land surveying services in the state of Montana. This will allow the board to more closely monitor any changes of the required professional engineer and/or professional land surveyor in responsible charge in accordance with 37-67-320, MCA, and to ensure the firms are in good standing with the Montana Secretary of State's office. This new rule is being adopted to address provisions that were deleted from statute through HB 148 and further implement the statute.

7. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Professional Engineers and Professional Land Surveyors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2309, or by e-mail to dlibsdpels@mt.gov, and must be received no later than 5:00 p.m., July 9, 2007.

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

9. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Professional Engineers and Professional Land Surveyors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2309, e-mailed to dlibsdpels@mt.gov, or made by completing a request form at any rules hearing held by the agency.

10. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was notified on May 23, 2007, by regular mail.

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

BOARD OF PROFESSIONAL ENGINEERS
AND PROFESSIONAL LAND SURVEYORS
TOM HEINECKE, PE, PRESIDING OFFICER

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

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

DEPARTMENT OF LABOR AND INDUSTRY

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

Certified to the Secretary of State May 29, 2007

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

In the matter of the proposed amendment) NOTICE OF PUBLIC HEARING
of ARM 24.189.401 fees, and 24.189.604) ON PROPOSED AMENDMENT
minimum standards)

TO: All Concerned Persons

1. On June 28, 2007, at 9:00 a.m., a public hearing will be held in room 439, 301 South Park Avenue, Helena, Montana to consider the proposed amendment of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Psychologists (board) no later than 5:00 p.m., on June 22, 2007, to advise us of the nature of the accommodation that you need. Please contact Cheryl Brandt, Board of Psychologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2394; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibspsy@mt.gov.

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

- 24.189.401 FEE SCHEDULE (1) and (1)(a) remain the same.
- (b) Renewal fee ~~250~~ 400
- (c) through (2) remain the same.

AUTH: 37-1-134, 37-17-202, MCA
IMP: 37-1-134, 37-1-141, 37-17-302, MCA

REASON: The board has determined that reasonable necessity exists to increase the renewal licensure fee for psychologists to comply with the provisions of 37-1-134, MCA, and keep board fees commensurate with associated costs. The department, in providing administrative services to the board, has determined that unless the renewal fee is increased as proposed, the board will have a shortage of operating funds by the 2008 licensure renewal period. The number of licensees has remained nearly constant over the past few years, thus board revenue has not kept pace with rising inflation and expenses. The board estimates that the fee change will affect approximately 231 renewing licensees and will result in an estimated \$34,650 increase in annual revenue.

24.189.604 MINIMUM STANDARDS (1) A doctorate degree qualifies under 37-17-302(2)(c)(iii) (3)(c), MCA, if it is obtained from a psychology program which meets the following criteria:

(a) through (i) remain the same.

AUTH: 37-1-131, 37-17-202, 37-17-302, MCA

IMP: 37-17-302, MCA

REASON: It is reasonably necessary to amend this rule to correct the reference to 37-17-302, MCA. The statute was amended and renumbered in the 2005 legislative session and section (2)(c) no longer exists. It is necessary to reference the specific section in this rule as (3)(c) is the only particular statutory section implemented through this rule.

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Psychologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibspsy@mt.gov, and must be received no later than 5:00 p.m., July 6, 2007.

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

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

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

8. Darcee Moe, attorney, has been designated to preside over and conduct this hearing.

BOARD OF PSYCHOLOGISTS
GEORGE WATSON, PhD., CHAIRPERSON

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

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

Certified to the Secretary of State May 29, 2007

BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the proposed)
amendment of ARM 36.12.101,)
definitions and ARM 36.12.113,)
reservoir standards)

NOTICE OF EXTENSION OF
COMMENT PERIOD ON
PROPOSED AMENDMENT

To: All Concerned Persons

1. On April 12, 2007, the Department of Natural Resources and Conservation published MAR Notice No. 36-22-118 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 456, 2007 Montana Administrative Register, Issue No. 7. In a separate rulemaking action, on April 26, 2007, ARM 36.12.101 was amended per court order at page 508, 2007 Montana Administrative Register, Issue No. 8.

2. A public hearing was held on May 2, 2007. The deadline for written comments was May 10, 2007. The department has decided to reopen the comment period for further comment. The department is extending the comment period to July 5, 2007, in order to allow interested parties further opportunity to comment on the above-stated rules.

3. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on June 21, 2007, to advise us of the nature of the accommodation that you need. Please contact Kim Overcast, Department of Natural Resources and Conservation, 1424 Ninth Avenue, Helena, MT 59620; fax (406) 444-5918; or e-mail kovercast@mt.gov.

4. Concerned persons may submit their data, views, or arguments, in writing to Kim Overcast, Department of Natural Resources and Conservation, 1424 Ninth Avenue, Helena, MT 59620; fax (406) 444-5918; or e-mail kovercast@mt.gov, and must be postmarked no later than July 5, 2007.

5. If persons who are directly affected by the proposed amendment wish to express their data, views, and arguments orally or in writing at an additional public hearing, they must make written request for a hearing and submit this request along with any written comments to Kim Overcast, Department of Natural Resources and Conservation, 1424 Ninth Avenue, Helena, MT 59620. The comments must be received on or before July 5, 2007.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or

from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 25 based on the number of water rights permits received.

7. An electronic copy of this Notice of Extension of Comment Period on Proposed Amendment is available through the department's site on the World Wide Web at <http://www.dnrc.mt.gov>. The department strives to make the electronic copy of this Notice of Extension of Comment Period on Proposed Amendment conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered.

8. The agency maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources or combination thereof. Such written request may be mailed or delivered to Legal Unit, Department of Natural Resources and Conservation, 1625 Eleventh Avenue, Helena, MT 59620, faxed to the office at (406) 444-2684, or may be made by completing a request form at any rules hearing held by the agency.

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

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

/s/ Mary Sexton

MARY SEXTON

Director

Natural Resources and Conservation

/s/ Anne Yates

ANNE YATES

Rule Reviewer

Certified to the Secretary of State on May 29, 2007.

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

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 12.11.3205 pertaining to a no)
wake zone at White Sandy Recreation)
Area on Hauser Lake)

To: All Concerned Persons

1. On March 22, 2007, the Fish, Wildlife and Parks Commission (commission) published MAR Notice No. 12-324 regarding the public hearing on the proposed amendment of the above-stated rule at page 326 of the 2007 Montana Administrative Register, Issue Number 6.

2. The commission has amended ARM 12.11.3205 as proposed.

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

Comment 1: One person supported the no wake zone but wondered if 300 feet was large enough given the technically advanced watercraft now in existence. This person noted that she had witnessed unsafe behavior on the water in no wake zones too often and wondered how the department would enforce the new no wake zone.

Response: The commission recognizes the need for enforcement and provides enforcement in the area concerned. Department of Fish, Wildlife and Parks game wardens, water safety officers, and other department employees enforce no wake zone rules, and many citations are issued on Hauser Reservoir each year for violations. This existing enforcement will apply to the White Sandy no wake zone. Unfortunately, not all violations occur in the presence of our law enforcement staff. The duties of our enforcement personnel are varied, and coverage of all the recreation sites is extremely difficult.

While increasing the level of enforcement presence is desirable, enforcement can only be done where regulations exist. The addition of a no wake zone would allow enforcement personnel another tool to effectively deal with dangerous or reckless circumstances when they occur.

The commission believes that enlarging the no wake zone beyond 300 feet would probably not increase public safety more than the proposed 300 foot zone. The purpose of the no wake zone is to provide for public safety at the newly established boat ramp and swim area at White Sandy. The Bureau of Land Management intends to mark the area with buoys. Additionally, the swim area will be delineated with connecting floats. These measures should adequately address safety issues.

Comment 2: One person did not support the proposed no wake zone and thought there were enough no wake zones on Hauser Reservoir already. This person said one of the best water skiing areas is along the bank at White Sandy.

Response: The commission has the authority and duty to establish regulations on the use of public waters to promote public health, safety, and welfare and to protect property and public resources. The proposed no wake zone will only restrict a small portion of the shoreline immediately adjacent to the boat ramp and swim area. If the no wake zone was not established, it would still be unsafe to water ski around the boat ramp and swim area. The majority of the shoreline along Hauser Reservoir will remain open for water skiing.

By: /s/ Jeff Hagener
M. Jeff Hagener
Secretary, Fish, Wildlife and
Parks Commission

By: /s/ Rebecca Dockter
Rebecca Dockter
Rule Reviewer

Certified to the Secretary of State May 29, 2007.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

In the matter of the petition of)	Utility Division
Bonneville Power Administration)	Docket No.
for Declaratory Order)	D2007.3.32
disclaiming jurisdiction)	
)	DECLARATORY
)	RULING

DECLARATORY RULING
DISCLAIMING JURISDICTION

Introduction and Procedure

1. On March 30, 2007, Bonneville Power Administration (BPA) filed with the Montana Public Service Commission (commission) a Petition for Declaratory Order Disclaiming Jurisdiction (Petition).

2. BPA will be constructing in the Pacific Northwest various, as of yet undetermined, transmission facilities including system replacements, upgrades, and additions to be put into service, and primarily affecting existing transmission infrastructure ranging from 69 kV to 1000 kV (the facilities). Some of the facilities will be located in Montana. The facilities will be financed by a special purpose entity owner lessor (the Owner Lessor) and acquired, constructed and/or installed by BPA pursuant to a construction agency agreement between the Owner Lessor and BPA.

3. On April 6, 2007, the commission issued a Notice of Petition of Bonneville Power Administration for Declaratory Order and Opportunity to Submit Comments (Notice). The Notice invited interested persons to submit comments upon the matter posited by BPA and established May 2, 2007 as the deadline for submission of any such comments. The Notice further informed the public that, pursuant to ARM 1.3.227(4)(c), the commission did not contemplate convening a hearing in the docket unless good cause is shown therefore. No comments or any other pleadings were received by the commission in response to the Notice.

4. The commission has adopted the Attorney General's Model Procedural Rules governing declaratory ruling requests. See ARM 38.2.101 and ARM 1.3.226 through 1.3.229. BPA's Petition will be processed under the aforementioned ARM provisions as well as 2-4-501, MCA.

Questions Presented

5. BPA seeks a declaratory ruling by the commission addressing whether the Owner Lessor is exempt from commission regulation as a public utility under 69-3-111, MCA.

Additionally, BPA requests a declaratory ruling that 69-3-101; 69-3-102 and 69-3-111 of the Montana Code Annotated do not apply to the Owner Lessor.

Further, BPA seeks a declaratory ruling that the Owner Lessor in the proposed lease financing is exempt from the definition of "public utility" under 69-3-101, MCA, and is therefore not subject to commission jurisdiction under 69-3-102, MCA.

Factual Background

6. BPA is an agency of the United States government. It is a federal power marketing administration that markets wholesale and interstate electrical transmission services. It operates electrical power transmission facilities in the Pacific Northwest, including facilities within the state of Montana.

7. The facilities referenced in paragraph 2 above will be put into service over time and all facilities will be used exclusively by BPA to provide interstate transmission service and will not be available for use for bundled retail service. It is possible that certain facilities lower than 69 kV may be financed in cases of voltage step-ups of generation and station service to generating stations, but the facilities will not otherwise be used in support of service that may possibly be designated as distribution service.

8. The facilities will be constructed, installed and/or acquired for the purposes of enhancing Northwest transmission grid (grid) reliability, ensuring compliance with mandatory reliability standards, enabling the integration of new generation into the grid and managing grid congestion. The facilities will be constructed or installed on real property or real property easements or similar rights held by BPA on land that is owned by a variety of parties, both private and governmental.

9. The facilities will be financed by the Owner Lessor, a special purpose entity. The facilities will be owned by the Owner Lessor, special purpose entity Northwest Infrastructure Financing Corporation II, a Delaware corporation which will be formed expressly for the purpose of arranging for the acquisition and financing of the facilities.

10. All of the capital stock of the Owner Lessor will be owned by JH Holdings, not individually but acting solely in its capacity as trustee under a trust agreement between J.H. Management Corporation (JHM), a Massachusetts corporation, as grantor, and JH Holdings Corporation, a Massachusetts corporation (JHH), as trustee. All of the capital stock of JHM and JHH will be owned by The 1960 Trust, an independent charitable support organization qualified under 501(c)(3) of the Internal Revenue Code and operated for the benefit of Harvard University.

11. The Owner Lessor will initially finance the acquisition and construction of the facilities through one or more bank loans. The Owner Lessor's sole source of

funds to repay the loans will be payments made by BPA under the lease of the facilities to BPA.

12. The Owner Lessor will not engage in any business other than arranging for the acquisition and financing of the facilities. The Owner Lessor and BPA will execute a master lease that will govern and incorporate from time to time separate individual lease commitments between BPA and the Owner Lessor for related facilities (collectively, the lease). Under the lease, the Owner Lessor will lease its undivided interest in each of the facilities to BPA at the time each such facilities is acquired, installed, and/or constructed. Pursuant to the lease, BPA will acquire a leasehold interest in and possession of the facilities from the Owner Lessor; the term of the lease will be seven years from the date that the master lease and the first lease commitment are executed.

13. BPA will agree in the lease to operate and maintain the facilities in the same manner as it operates and maintains its other transmission facilities. The Owner Lessor will have no operating responsibilities or control rights with respect to the facilities under the lease or any other agreement. The lease will not impede the ability of BPA to transfer operational control over the facilities to a regional transmission organization.

14. BPA asserts that during the term of the lease, the Owner Lessor will have a mere passive interest in the facilities. The Owner Lessor will own the legal title to the facilities, but BPA states that it will have dominion and control over the facilities during the lease term. BPA further states in the Petition that the Owner Lessor and/or its affiliates will not be in the business of producing, selling, or transmitting electric power, either from the facilities or otherwise.

15. At the conclusion of the lease, BPA will have the following options: (a) purchase each facility for \$10.00, (b) renew the lease for a term of one year for a nominal annual rental payment, or (c) remove the facilities at its own expense, or (d) execute a new lease if and to the extent the Owner Lessor assigns the lease to another passive owner. At the expiration of the lease term, the Owner Lessor would not reacquire the facilities; rather, the Owner Lessor would have its interests in the facilities terminated in the event BPA purchases or removes the facilities, would merely retain its passive interest in the event BPA renews the lease, or would assign its interests to another passive owner.

Ruling Analysis

16. In Montana, the term "public utility:"
- (1) ...shall embrace every corporation, both public and private, company, whatsoever, that now or hereafter may own, operate, or control any plant or equipment, any part of a plant or equipment, or any water right within the state for the production, delivery, or furnishing for or to other

persons, firms, associations, or corporations, private or municipal:

(a) heat;

....

(c) light;

(d) power in any form or by any agency;

...

(2) The term 'public utility' does not include:

...

(c) a person exempted from regulation as a public utility as provided in 69-3-111.

Section 69-3-101, MCA

17. If a business is deemed a public utility, the commission has jurisdiction over its regulated activities. Section 69-3-102, MCA provides:

The commission is hereby invested with full power of supervision, regulation, and control of such public utilities, subject to the provisions of this chapter and to the exclusion of the jurisdiction, regulation, and control of such utilities by any municipality, town, or village.

18. BPA seeks a ruling addressing whether the Owner Lessor is exempt from commission regulation as a public utility under 69-3-111, MCA, which provides in relevant part:

(1) Upon application, the commission, by order, may determine that any person not otherwise a public utility is not a public utility subject to the jurisdiction, control or regulation of the commission under this title, solely because such person owns or controls any plant or equipment, any part of or undivided interest in a plant or equipment or any water right described in 69-3-101:

(a) which is leased or sold or held for lease or sale to any public utility or other lessee; or

(b) the operation and use of which is vested by lease or other contract in a public utility or other lessee; or

(c) for a period of not more than 90 days after termination of any lease or contract described in subsection (1)(a) or (1)(b) or after such person gains possession of such property following a breach of such lease or contract.”

19. In Montana, the test to determine public utility status is:

...whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product

or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals ...

Lockwood Water Users Ass'n v. Anderson, 168 Mont. 303 (1975), 542 P.2d 1217.

20. BPA asserts that the Owner Lessor will not engage in any business other than arranging for the acquisition and financing of the facilities. Under the terms of the lease, BPA will operate and maintain the facilities and the Owner Lessor will have no operating responsibilities or control rights with respect to the facilities under the lease. The Owner Lessor will have legal title to the facilities, but BPA will have dominion and control over the facilities during the lease term. The Owner Lessor and/or its affiliates will not be in the business of producing, selling, or transmitting electric power, either from the facilities or otherwise. Under these circumstances, the Owner Lessor is not holding itself out to provide a public utility service to electricity end-users in Montana. The Owner Lessor would therefore not be a "public utility" under 69-3-101, MCA. As the Owner Lessor would not be a Montana public utility, the Owner Lessor would be exempt from application of the provisions of 69-3-102, MCA.

21. Moreover, the facilities will not be available for bundled retail service in Montana; rather, the facilities will be constructed, installed and/or acquired for the purposes of enhancing grid reliability, ensuring compliance with mandatory reliability standards, enabling the integration of new generation into the grid, and managing grid congestion.

Section 201 of the Federal Power Act, 16 U.S.C. 824, as amended (FPA), states that the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction over the unbundled transmission of electric energy in interstate commerce:

(b) Use or sale of electric energy in interstate commerce.

(1) **The provisions of this subchapter shall apply to the transmission of electric energy at wholesale in interstate commerce**, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. **The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy**, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in the local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter. (emphasis added)

Under these circumstances, the facilities are not dedicated to providing retail electric services to electricity end-users in Montana; rather, the facilities will be used

by BPA to provide transmission service which, under section 201 of the FPA, is under the exclusive jurisdiction of the FERC.

22. Lastly, the commission finds that the provisions of 69-3-111, MCA describe the contemplated traits and activities of the Owner Lessor. The Owner Lessor will possess legal title to the facilities, but is required to lease the facilities to BPA under its articles of incorporation. With no operational responsibilities, and the control and operation of the facilities vested in BPA, ownership alone does not render the Owner Lessor to classification as a Montana public utility. The Owner Lessor is not a public utility under 69-3-111, MCA, subject to the jurisdiction of the commission.

DECLARATORY RULING

1. The Owner Lessor in the proposed lease financing arrangement described by BPA in its request for a declaratory ruling would be exempt from the definition of "public utility" under 69-3-101, MCA.

2. The provisions of 69-3-102, MCA would not apply to the Owner Lessor in the proposed financing arrangement described by BPA in its request for a declaratory ruling as the Owner Lessor would not be a Montana public utility subject to the provisions of Title 69, MCA.

3. The Owner Lessor in the proposed lease financing arrangement described by BPA in its request for a declaratory ruling would not be a Montana public utility pursuant to the provisions of 69-3-111, MCA.

Done and dated this 15th day of May, 2007, by a vote of 4 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

/s/ Greg Jergeson

GREG JERGESON, Chairman

/s/ Doug Mood

DOUG MOOD, Vice Chairman

/s/ Brad Molnar

BRAD MOLNAR, Commissioner

/s/ Robert H. Raney

ROBERT H. RANEY, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

11-6/7/07

Montana Administrative Register

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee:

- Department of Agriculture;
- Department of Commerce;
- Department of Labor and Industry;
- Department of Livestock;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

Education and Local Government Interim Committee:

- State Board of Education;
- Board of Public Education;
- Board of Regents of Higher Education; and
- Office of Public Instruction.

Children, Families, Health, and Human Services Interim Committee:

- Department of Public Health and Human Services.

Law and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration and Veterans' Affairs Interim Committee:

- Department of Administration;
- Department of Military Affairs; and
- Office of the Secretary of State.

Environmental Quality Council:

- Department of Environmental Quality;
- Department of Fish, Wildlife, and Parks; and
- Department of Natural Resources and Conservation.

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is PO Box 201706, Helena, MT 59620-1706.

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

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

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

Use of the Administrative Rules of Montana (ARM):

- | | |
|---------------|---|
| Known Subject | 1. Consult ARM topical index.
Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued. |
| Statute | 2. Go to cross reference table at end of each Number and title which lists MCA section numbers and Department corresponding ARM rule numbers. |

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 2007. This table includes those rules adopted during the period April 1 through June 30, 2007, and any proposed rule action that was pending during the past six-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 2007, this table, and the table of contents of this issue of the MAR.

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

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

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