

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 2

The Montana Administrative Register (MAR or Register), a twice-monthly publication, has three sections. The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 Adoption 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 FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of)
ARM 12.11.805, 12.11.3205, the)
adoption of NEW RULES I through V,)
and the repeal of ARM 12.11.3963,)
regarding recreational use rules in)
Montana)

NOTICE OF PUBLIC HEARINGS ON
PROPOSED AMENDMENT,
ADOPTION, AND REPEAL

TO: All Concerned Persons

1. On February 22, 2011 at 6:00 p.m. the Fish, Wildlife and Parks Commission (commission) will hold a public hearing at the Fish, Wildlife and Parks Region 1 office located at 490 North Meridian Rd., Kalispell, Montana to consider the proposed amendment, adoption, and repeal of the above-stated rules.

On February 23, 2011 at 6:00 p.m. the commission will hold a public hearing at the Fish, Wildlife and Parks Headquarters office located at 1420 East 6th Avenue, Helena, Montana to consider the proposed amendment, adoption, and repeal of the above-stated rules.

On February 23, 2011 at 6:00 p.m., the commission will hold a public hearing at the Troy Ranger Station located at 12858 U.S. Highway 2, Troy, Montana to consider the proposed amendment, adoption, and repeal of the above-stated rules.

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, please contact the commission no later than February 15, 2011, to advise us of the nature of the accommodation that you need. Please contact Jessica Fitzpatrick, Fish, Wildlife and Parks, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-9785; fax (406) 444-7456; e-mail jfitzpatrick@mt.gov.

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

12.11.805 TONGUE RIVER RESERVOIR (1) remains the same.

(2) Tongue River Reservoir is limited to a controlled no wake speed, as defined in ARM 12.11.101(1), in the following areas:

(a) ~~(b)~~ Tongue River Reservoir as buoyed in the marina area at Campers Point;

~~(b)~~ (a) ~~the entire Tongue River Reservoir~~ from shoreline to 300 feet from shoreline from the south point that forms Corral Creek Bay (DNRC cabin site) , north to the face of the dam, west along the dam face, and south along the west shore of the reservoir to the point where the Tongue River enters the reservoir;

~~(c)~~ (h) Rattlesnake Bay; and

~~(d)~~ (c) Campers Point Bay;
~~(e)~~ (g) Pee Wee Point Bay;
~~(f)~~ (d) Cormorant Bay;
~~(g)~~ (e) Corral Creek Bay (DNRC cabin site bay); and
(f) Neck Bay;
~~(h)~~ (i) Tongue River from the Wyoming border to the Tongue River Reservoir;
(3) remains the same.

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

Reasonable Necessity: Tongue River Reservoir State Park is located six miles north of Decker, Montana. Boating, fishing, and other water sports are popular on this 12-mile-long reservoir. The high-use levels of motorized watercraft on Tongue River Reservoir make water safety a major concern. Currently, all bays on the west side of Tongue River Reservoir are controlled no wake speed areas, with the exception of Neck Bay which is no wake from shoreline to 300 feet from shoreline. Due to the geographic design of Neck Bay, at full pool and through the drawdown of the reservoir during irrigation, the 300-foot boundaries change and are often unclear as to where the rule is in effect. The commission is proposing restricting Neck Bay to a no wake zone to be consistent with the other bays on the western side of Tongue River Reservoir and eliminating the confusion regarding the constantly changing 300-foot boundary from shore.

12.11.3205 HAUSER RESERVOIR (1) and (2) remain the same.
~~(3) The upper end of Hauser Reservoir from Canyon Ferry Dam to below Brown's Gulch is either closed as posted or marked by barrel booms to the use of all watercraft, during the time period beginning October 15 and ending December 15 of each year.~~

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

Reasonable Necessity: In September 1995, the commission amended Administrative Rule of Montana (ARM) 12.6.801 (which was transferred to ARM 12.11.3205 in 2001) closing to the use of all watercraft from Canyon Ferry Dam to below Brown's Gulch from October 15 and ending December 15. The commission adopted this closure in order to protect a large concentration of migrating bald eagles that used this section of the reservoir to feed on kokanee salmon carcasses. Bald eagles no longer migrate to this portion of the reservoir making the rule no longer necessary.

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

NEW RULE I FLATHEAD RIVER (1) A portion of the Flathead River is located in Flathead County.

- (2) Church Slough is:
 - (a) closed to boating March 1 to April 10; and
 - (b) restricted to a controlled no wake speed, as defined in ARM 12.11.101(1) from April 11 to the last day of February.
- (3) Fennon Slough is restricted to a controlled no wake speed, as defined in ARM 12.11.101(1).
- (4) The North Fork of the Flathead River:
 - (a) is closed to all motorboats from the Canadian border to the Camas Bridge; and
 - (b) is closed to all motorboats with motors greater than 10 horsepower from Camas Bridge to the confluence of the Middle Fork of the Flathead River.
- (5) The Middle Fork of the Flathead River:
 - (a) is closed to all motorboats from the Bob Marshall Wilderness boundary to the Highway 2 Bridge at Essex; and
 - (b) is closed to all motorboats with motors greater than 10 horsepower from the Highway 2 Bridge at Essex to the confluence of the South Fork of the Flathead River.
- (6) The South Fork of the Flathead River:
 - (a) is closed to all motorboats from Spotted Bear Footbridge to the Bob Marshall Wilderness boundary; and
 - (b) is closed to all motorboats with motors greater than 10 horsepower from Spotted Bear foot bridge to Hungry Horse Reservoir at full pool (3850 feet elevation).

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

Reasonable Necessity: The commission is proposing language restricting Church Slough in response to a petition filed by Flathead Wildlife, Inc. to close the entire Church Slough to boating from March 1 to April 10 to protect migrating waterfowl and to make the slough no wake from April 11 through Feb. 28 to decrease bank erosion and boating hazards and to put all boaters on an equal basis.

The commission is proposing language restricting Fennon Slough in response to a petition filed by private landowners requesting wake restrictions on Fennon Slough to address concerns regarding accelerated bank erosion due to increased usage of motorboats in the area.

The U.S. Forest Service has adopted regulations restricting motorboats on portions of the North Fork, Middle Fork, and South Fork of the Flathead River. Currently, department wardens cannot enforce the rules. The commission is proposing adoption of the U.S. Forest Service restrictions so wardens can enforce them and help resolve complaints.

The commission is holding public hearings on the petitions in order to develop a record and to allow the petitioners and interested persons to present their views.

NEW RULE II ALVORD LAKE (1) Alvord Lake is located in Lincoln County.
(2) Alvord Lake is limited to a controlled no wake speed as defined in ARM 12.11.101.

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

NEW RULE III KILBRENNAN LAKE (1) Kilbrennan Lake is located in Lincoln County.

(2) Kilbrennan Lake is limited to a controlled no wake speed as defined in ARM 12.11.101.

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

Reasonable Necessity: The commission is proposing language restricting Alvord Lake and Kilbrennan Lake in response to a petition filed the U.S. Forest Service and Lincoln County Commissioners requesting wake restrictions on Alvord Lake and Kilbrennan Lake to address recent complaints by the majority of the recreational users of the lakes.

The commission is holding public hearings on the petition in order to develop a record and to allow the petitioners and interested persons to present their views.

NEW RULE IV BRUSH LAKE (1) Brush Lake is located in Sheridan County.
(2) Brush Lake is limited to a controlled no wake speed as defined in ARM 12.11.101 surrounding the Brush Lake State Park boat ramp, dock, and swimming area as buoyed.

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

Reasonable Necessity: In 2006, Brush Lake State Park was established, and a day-use area was developed at the north end of the lake. A campground is to be constructed in the summer of 2011. The park's day-use and picnic area includes a boat ramp, dock, and an approximately 100-foot by 9-foot swimming area. As anticipated, with the presence of the concrete boat ramp and a quality dock, the amount of motorized boat traffic noticeably increased, causing periodic congestion in the area of the ramp, dock, and swimming area. The commission is proposing the restrictions on Brush Lake to address the unsafe environment caused by the concentration of watercraft and swimmers on the water in the vicinity of the park's day-use area.

NEW RULE V PLACEMENT OF WATER OBSTACLES (1) A water obstacle includes but is not limited to:

- (a) pier;
- (b) floating dock;
- (c) platform;
- (d) shoreline dock greater than 75 feet from shoreline;
- (e) navigational aid;
- (f) slalom course;

- (g) jump/rail; and
- (h) inflatable recreational equipment located greater than 75 feet from shoreline.

(2) No person shall place any permanent or anchored water obstacle on the waters of this state without a permit issued by the department or a federal, state, or county entity with authority. Water obstacles that are permitted by a federal, state, or county entity with authority are not required to obtain an additional permit from the department.

(3) All permitted water obstacles must be visibly marked with the owner's name with letters that are:

- (a) a contrasting color to the object; and
- (b) at least three inches in height with the letter width proportionate to the height.

(4) Each permitted water obstacle must be marked with lights if placed overnight and the marker lights:

- (a) must meet United States Coast Guard requirements for marker lights;
- (b) must float at least 39 inches above the water;
- (c) must be an amber color flashing light that flashes a minimum of 30 flashes per minute and is visible for up to one-half mile; and
- (d) if buoyed, the buoy must be self-righting and have a three-inch silver radar reflective band around the top.

(5) Placement of water obstacles without a proper permit or failure to abide the permit requirements constitutes a violation of commission rules and regulations and the water obstacles must be removed by the entity that placed the obstacle immediately upon notification. Water obstacles that create a hazard may be removed by the department at the owner's expense. Any damages incurred during removal by the department will not be the responsibility of the department.

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

IMP: 23-1-106, 23-2-525, 87-1-303, MCA

Reasonable Necessity: Section 23-2-525, MCA, states "A person may not anchor a vessel or other obstacle for fishing or pleasure purposes on any body of water over which the state has jurisdiction in a position that obstructs a passageway ordinarily used by other vessels." This statute is vague and leaves plenty of room for interpretation of what is a passageway. Montana has seen an increase in people placing objects on state waters that may create a hazard to other recreational boaters, specifically the placement of slalom courses in western Montana waters. Other western states are seeing an increase for requests for putting up jumps and rails. The commission is proposing limited restrictions on the placement of obstacles on state waters to prevent water obstructions creating safety hazards and limited recreation.

5. The rule proposed to be repealed is as follows:

12.11.3963 MILLTOWN DAM

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

Reasonable Necessity: In November 2003, the commission adopted ARM 12.11.3963 restricting boating, sailing, floating and swimming 200 feet above the dam and 200 feet below the dam. Milltown Dam was removed in March 2008 making ARM 12.11.3963 obsolete.

6. 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 Jessica Fitzpatrick, Fish, Wildlife and Parks, 1420 East 6th Avenue, P.O. Box 200701, Helena, MT 59624-0701; fax (406) 444-7456; e-mail jfitzpatrick@mt.gov, and must be received no later than March 4, 2011.

7. Jessica Fitzpatrick or another hearing officer appointed by the department has been designated to preside over and conduct the hearings.

8. The Department of Fish, Wildlife and Parks maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the commission or department. 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 commission or department.

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

/s/ Bob Ream
Bob Ream, Chairman
Fish, Wildlife and Parks Commission

/s/ Rebecca Jakes Dockter
Rebecca Jakes Dockter
Rule Reviewer

Certified to the Secretary of State January 18, 2011

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF EXTENSION OF
17.30.617 and 17.30.638 pertaining to)	COMMENT PERIOD ON
outstanding resource water designation)	PROPOSED AMENDMENT
for the Gallatin River)	
)	(WATER QUALITY)

TO: All Concerned Persons

1. On October 5, 2006, the Board of Environmental Review published MAR Notice No. 17-254 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2294, 2006 Montana Administrative Register, issue number 19. On March 22, 2007, the board published MAR Notice No. 17-257 regarding a notice of extension of comment period on the proposed amendment of the above-stated rules at page 328, 2007 Montana Administrative Register, issue number 6. On September 20, 2007, the board published MAR Notice No. 17-263 regarding a notice of extension of comment period on the proposed amendment of the above-stated rules at page 1398, 2007 Montana Administrative Register, issue number 18. On March 13, 2008, the board published MAR Notice No. 17-268 extending the comment period on the proposed amendment of the above-stated rules at page 438, 2008 Montana Administrative Register, issue number 5. On September 11, 2008, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 1953, 2008 Montana Administrative Register, issue number 17. On February 26, 2009, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 162, 2009 Montana Administrative Register, issue number 4. On August 13, 2009, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 1324, 2009 Montana Administrative Register, issue number 15. On February 11, 2010, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 264, 2010 Montana Administrative Register, issue number 3. On July 29, 2010, the board published MAR Notice No. 17-276 extending the comment period on the proposed amendment of the above-stated rules at page 1648, 2010 Montana Administrative Register, issue number 14.

2. During the initial comment period and extensions of the original comment period, the board was advised that members of the Big Sky community, which would be affected by this rulemaking, had formed a collaborative and had hired an engineering firm, which completed a feasibility study on extending the coverage of the Big Sky Water and Sewer district service area. The board received comments indicating that this would protect water quality in the Gallatin River as well as or better than adoption of the proposed rule. Members of the community were exploring funding options when the current economic downturn began. That downturn has resulted in an interruption of the efforts to find funding. However, the

board believes that these efforts should resume as the economy recovers. On November 9, 2010, the board received a public comment requesting that the board further extend the comment period. The Department of Environmental Quality has recommended that the comment period be extended to allow resumption of efforts to obtain funding. The board has granted this request.

3. Written data, views, or arguments may be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana, 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than April 29, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

4. The board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking action or need an alternative accessible format of this notice. If you require an accommodation, contact the board no later than 5:00 p.m., February 9, 2011, to advise us of the nature of the accommodation that you need. Please contact the board secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or e-mail ber@mt.gov.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ John F. North

JOHN F. NORTH
Rule Reviewer

BY: /s/ Joseph W. Russell

JOSEPH W. RUSSELL, M.P.H.
Chairman

Certified to the Secretary of State, January 18, 2011.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF PROPOSED
17.50.213 pertaining to reimbursement)	AMENDMENT
payments for abandoned vehicle removal)	
)	(MOTOR VEHICLE RECYCLING
)	AND DISPOSAL)
)	
)	(NO PUBLIC HEARING
)	CONTEMPLATED)

TO: All Concerned Persons

1. On February 28, 2011, the Department of Environmental Quality proposes to amend the above-stated rule.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, please contact Elois Johnson, Paralegal, no later than 5:00 p.m., February 14, 2011, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.50.213 PAYMENT REQUESTS (1) through (2) remain the same.

(3) The department shall pay each claim at the flat rate of ~~\$85.00~~ 100 per vehicle removed.

(4) through (8) remain the same.

AUTH: 75-10-503, MCA

IMP: 75-10-532, MCA

REASON: Section 75-10-503(3), MCA, authorizes the department to adopt rules for reimbursement of charges by tow truck drivers for removing abandoned vehicles at the request of law enforcement in accordance with 61-12-401, MCA. ARM 17.50.213 establishes the amount of the reimbursement payment for each abandoned vehicle removed with a valid claim for payment. The reimbursement rate was set at \$70 in 1999, and raised to \$85 in 2006. The money for reimbursement is contained in the junk vehicle fund authorized under 15-1-122(2), MCA.

Because of inflation and increased fuel expenses incurred by tow truck operators who are hired to remove these abandoned vehicles, the Montana Tow Truck Association has requested an increase in the reimbursement payment. The

president of that association provided the department with the following information concerning the increase in expenses from 2006 to 2010:

- (a) the national average price of diesel fuel in January of 2006 was \$2.47 per gallon, and on November 15, 2010, the price was about \$3.29, a 33% increase;
- (b) the price of tires has increased approximately 30% in that period;
- (c) the cost of electricity, heat, and consumer goods, based on the Consumer Price Index for 2006 through 2010, is up 9.8%; and
- (d) for his truck repair/towing business, insurance has risen about 30% and health insurance for employees is up 35%.

Based on that request, and on its belief that the costs of tow truck operators have risen sufficiently to justify the proposed increase in the reimbursement payment, the department is proposing to increase it from \$85 to \$100 per vehicle removed.

In calendar year 2009, approximately 300 tow truck operators removed approximately 810 vehicles for which reimbursement was paid. Therefore, the department estimates that the proposed increase in the reimbursement payment would provide each tow truck operator an average \$40 per year increase in reimbursement payments. The total proposed increase in reimbursement payments by the department is estimated to be about \$12,000 per year. Sufficient funds are available in the junk vehicle fund authorized under 15-1-122(2), MCA, to pay for the proposed increase in reimbursement payments.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov, no later than February 24, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov, no later than February 24, 2011.

6. If the department receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 45 based on the 300 tow truck drivers and the 154 licensed motor vehicle wrecking facilities in Montana.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; e-mailed to ejohnson@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

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

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/ David Rusoff
DAVID RUSOFF
Rule Reviewer

BY: /s/ Richard H. Opper
RICHARD H. OPPER, Director

Certified to the Secretary of State, January 18, 2011.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
AND THE BOARD OF ATHLETIC TRAINERS
STATE OF MONTANA

In the matter of the amendment of)
ARM 24.101.413 renewal dates and)
requirements, 24.118.402 fee)
schedule, and the adoption of NEW)
RULES I through VII pertaining to)
licensure of athletic trainers)

NOTICE OF PUBLIC HEARING ON
PROPOSED AMENDMENT AND
ADOPTION

TO: All Concerned Persons

1. On February 17, 2011, 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 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 Athletic Trainers (board) no later than 5:00 p.m., on February 11, 2011, to advise us of the nature of the accommodation that you need. Please contact Priscilla Bode, Board of Athletic Trainers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2037; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdatr@mt.gov.

GENERAL STATEMENT OF REASONABLE NECESSITY: The 2007 Montana Legislature enacted Chapter 388, Laws of 2007 (House Bill 665), an act creating the Board of Athletic Trainers (board) and setting forth licensure requirements. The bill was signed by the Governor on May 3, 2007, and became effective October 1, 2007. The board determined it is reasonably necessary to adopt New Rules I through VII to further implement the statutory provisions for the licensure, conduct, and continuing education of athletic trainers in Montana. Where additional specific bases for a proposed action exist, the board will identify those reasons immediately following the rule.

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)(c) remain the same.

(d)	Athletic Trainers	Athletic Trainers	Triennially <u>Annually</u>	August 31
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(e) through (7) remain the same.

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

REASON: The 2009 Montana Legislature enacted Chapter 109, Laws of 2009 (House Bill 80), an act revising professional and occupational licensing laws. The bill was signed by the Governor on April 1, 2009, became effective on October 1, 2009. The bill changed the licensure period for athletic trainers from three years to an annual license period. The department is amending the renewal cycle in this rule to align with the statutory change.

24.118.402 FEE SCHEDULE (1) Fees for original examination and license, and original endorsement and license ~~are based on a calendar year beginning with calendar year 2008, are effective for three years, and must be renewed annually~~ by the date specified in ARM 24.101.413. The following is the fee schedule for licensed athletic trainers:

(a) Original examination application and license fee	\$ 750 <u>175</u>
(b) Original endorsement application and license fee	750 <u>175</u>
<u>(c) License renewal fee</u>	<u>175</u>

(2) and (3) remain the same.

AUTH: 37-1-134, 37-36-102, MCA
IMP: 37-1-134, 37-36-201, 37-36-202, MCA

REASON: The board is amending this rule to further implement and align with HB 80, which changed the licensure period for athletic trainers from three years to an annual license period. The original licensure fees were set to ensure sufficient operating funds for the board's business over a three-year licensure period. In providing administrative services to the board, department staff determined that the actual costs associated with original and renewal licensure processes were lower than originally estimated. The board is statutorily required by 37-1-134, MCA, to set licensure fees at a level commensurate with related board costs. Therefore, the board is amending the licensure fees to accurately reflect annual licensure costs.

Licenses obtained under the initial legislation are valid until August 31, 2011, when they can be renewed for one year at the new annual renewal fee. The board estimates that the new fees will affect approximately 110 new and renewal applicants and result in an \$8,250 reduction in annual board revenue.

Implementation cites are being amended to accurately reflect all statutes implemented through the rule.

4. The proposed new rules provide as follows:

NEW RULE I BOARD ORGANIZATION (1) The Board of Athletic Trainers adopts and incorporates the organizational rules of the Department of Labor and Industry as listed in chapter 1 of this title.

AUTH: 2-4-201, 37-36-102, MCA
IMP: 2-4-201, MCA

REASON: The board is adopting New Rules I and II to adopt and incorporate the department's organizational and procedural rules for consistency among all the professional and occupational licensing boards. Adopting the rules by reference lowers rulemaking costs and avoids repetition within administrative rules.

NEW RULE II PROCEDURAL RULES (1) The Board of Athletic Trainers adopts and incorporates by this reference the public participation rules of the Department of Labor and Industry as listed in ARM chapter 101, subchapters 3 and 4.

AUTH: 2-4-201, 37-36-102, MCA

IMP: 2-4-201, MCA

NEW RULE III DEFINITIONS (1) In addition to the terms defined in 37-36-101, MCA, the following definitions apply to the rules in this chapter:

(a) "Approved clinical instructor" means a BOC certified athletic trainer, licensed physician, or other individual credentialed in a health care profession, for no less than one year and who:

(i) is not currently enrolled in the entry level athletic training education program at the instructor's institution; and

(ii) whose training curriculum follows the standards of the Commission on Accreditation of Athletic Training Education (CAATE), June 30, 2008 edition, which are adopted and incorporated by reference. A copy of the CAATE standards may be obtained through the Board of Athletic Trainers, 301 S. Park Avenue, PO Box 200513, Helena, Montana, 59620-0513.

(b) "Board of Certification" means the Board of Certification, Inc. (BOC), the only accredited, certifying body accepted by the Board of Athletic Trainers, and which sets the standards of practice of athletic training.

(c) "Clinical instructor" means an individual credentialed in a health care profession for no less than one year, who may supervise students during clinical and/or field experiences, and who is not currently enrolled in the entry level athletic training education program at the instructor's institution. An individual credentialed in a health care profession for less than one year may serve as a clinical instructor if the instructor's institution has developed, documented, and implemented a plan for supervision of that instructor by an experienced, credentialed clinical instructor that ensures the quality of instruction provided to athletic training students.

(d) "Clinical instructor educator" means a clinical instructor educator as defined by the CAATE standards, June 30, 2008 edition, which are adopted and incorporated by reference. A copy of the CAATE standards may be obtained through the Board of Athletic Trainers, 301 S. Park Avenue, PO Box 200513, Helena, Montana, 59620-0513. A clinical instructor educator must also:

(i) have been recognized and designated by the institution as the clinical instructor educator for the individual's institution;

(ii) have been BOC credentialed for no less than three years;

(iii) have been designated and authorized by the institution to oversee approved clinical instructor training;

(iv) be knowledgeable in the content areas required for the training of approved clinical instructors; and

(v) if more than one individual is designated as the clinical instructor educator for the institution, then at least one of those individuals must be a BOC credentialed athletic trainer.

(e) "Graduate assistant" means a person who has graduated from a postsecondary institution with a baccalaureate degree, and has taken and passed the BOC's examination, and who is in the process of attaining a higher level of education.

(f) "Health care professional" means a licensed athletic trainer, chiropractor, naturopathic physician, nurse, nurse practitioner, occupational therapist, physical therapist, physician, physician's assistant, or podiatrist as defined in Title 37, chapters 3, 6, 8, 11, 12, 20, 24, 26, or 36, MCA.

(g) "Student assistant or athletic training student" means an intern or undergraduate currently enrolled in an accredited athletic training curriculum, in an undergraduate or graduate program at a postsecondary institution. An intern or student trainee may be called by the title "student assistant" or "athletic training student."

AUTH: 37-36-102, MCA

IMP: 37-36-101, 37-36-203, MCA

NEW RULE IV LIMIT ON NONLICENSEE CONDUCT (1) "Preventative care and continuous follow up care" permitted by 37-36-203(2)(g), MCA, may not include modalities restricted to licensees in 37-36-101 and 37-36-204, MCA. Specifically, such unlicensed individuals' care may not involve the practice of prevention, recognition, assessment, management, treatment, disposition, or reconditioning of athletic injuries or include the following:

(a) the use of heat, light, sound, cold, electricity, exercise, reconditioning, or mechanical devices related to the care and conditioning of athletes;

(b) education and counseling of the public on matters related to athletic training;

(c) application and administration of topical medications by:

(i) direct application;

(ii) iontophoresis, a process by which topical medications are applied through the use of electricity; or

(iii) phonophoresis, a process by which topical medications are applied through the use of ultrasound; or

(d) the administration or application of:

(i) bactericidal agents;

(ii) debriding agents;

(iii) anesthetic agents;

(iv) anti-inflammatory agents;

(v) antispasmodic agents; or

(vi) adrenocorticosteroids.

AUTH: 37-1-131, 37-36-102, MCA

IMP: 37-1-131, 37-36-101, 37-36-203, 37-36-204, MCA

REASON: The board is adopting New Rule IV to specify the limits of the licensure exemptions in 37-36-203, MCA, by clarifying "preventative care" and "continuous follow-up care." Those functions declared by the Legislature to be the exclusive province of a licensee cannot be performed by a nonlicensee, and the board elected to include a recitation of the Legislature's expressed intent on restricted conduct.

NEW RULE V SUPERVISION (1) A qualified supervisor of an intern or student trainee studying a course of athletic training must be an approved clinical instructor, clinical instructor educator, licensed athletic trainer, or a health care professional.

(2) Graduate assistants as defined in [New Rule III], are not considered to be student assistants or student athletic trainers, and are required to be licensed if they are practicing athletic training.

AUTH: 37-1-131, 37-36-102, MCA

IMP: 37-1-131, 37-36-101, 37-36-203, MCA

NEW RULE VI UNPROFESSIONAL CONDUCT (1) The BOC's Athletic Trainers Standards of Professional Practice, implemented January 1, 2006, are adopted and incorporated by reference. A copy of the BOC Standards of Professional Practice may be obtained through the Board of Athletic Trainers, 301 S. Park Avenue, PO Box 200513, Helena, Montana, 59620-0513. Violation of BOC practice standards or codes of professional responsibility may be grounds for discipline.

(2) Licensees may be subject to discipline for those forms of unprofessional conduct defined in 37-1-316, MCA.

(3) The following is unprofessional conduct for a licensee or license applicant under Title 37, chapter 36, MCA, and may be grounds for discipline:

(a) exploiting a professional relationship with the patient for personal or financial gain;

(b) using a false, fraudulent, or deceptive statement in any document connected with the practice of athletic training;

(c) having been subject to disciplinary action of another state or jurisdiction, including the BOC, against a license or other authorization to practice athletic training based upon acts or conduct by the licensee, similar to acts or conduct that would constitute grounds for disciplinary action under Title 37, chapter 36, MCA, or these rules; a certified copy of the record of the action taken by the other state or jurisdiction is evidence of unprofessional conduct;

(d) willfully disobeying of a rule adopted by the board, or an order of the board regarding evaluation or enforcement of discipline of a licensee;

(e) failing to furnish to the board or its investigators or representatives information legally requested by the board;

(f) failing to cooperate with a lawful investigation conducted by the board;

(g) failing to report to the board any adverse judgment, settlement, or award arising from a medical liability claim or other unprofessional conduct;

- (h) obtaining a fee or other compensation, either directly or indirectly, by the misrepresentation that a manifestly incurable disease, injury, or condition of a person can be cured;
- (i) abusive billing practices;
- (j) making promises of athletic prowess or ability as a result of athletic training;
- (k) conspiring to misrepresent or willfully misrepresenting medical conditions improperly to increase or decrease a settlement, award, verdict, or judgment;
- (l) promoting or involvement in, gambling of any kind on the outcome of an athlete's or team's participation in an athletic competition or event;
- (m) committing any act of sexual abuse, sexual misconduct, or sexual exploitation, whether or not related to the licensee's practice of athletic training;
- (n) administering a controlled substance as defined by the U.S. Food and Drug Administration (FDA) or successors; otherwise than in the course of legitimate or reputable professional practice;
- (o) having been convicted of a federal or state law regulating the possession, distribution, or use of a controlled substance as defined by the FDA or successors, whether or not an appeal is pending;
- (p) failing to transfer pertinent and necessary medical records to another licensed health care provider, the patient, or the patient's representative when requested to do so by the patient or the patient's legally designated representative;
- (q) failing to appropriately supervise any student assistant or athletic training student practicing under the licensee's supervision, according to scope of practice and generally accepted standards of practice;
- (r) failing to disclose having voluntarily relinquished or surrendered a license or privileges, or having withdrawn an application for licensure or privileges while under investigation, or prior to the granting or denial of an application in this state or in another state or jurisdiction;
- (s) failing to maintain current BOC certification as required by statute, including adhering to and complying with all BOC continuing education requirements, and obtaining and carrying the proscribed professional liability insurance as required by BOC for certified athletic trainers; or
- (t) any other act, whether specifically enumerated or not, that in fact constitutes unprofessional conduct.

AUTH: 37-1-319, 37-36-102, MCA
IMP: 37-1-316, 37-1-319, 37-36-202, MCA

NEW RULE VII CONTINUING EDUCATION (1) Those continuing education credits required by the BOC to maintain current certification, will also serve as continuing education to maintain licensure as an athletic trainer in Montana.

AUTH: 37-1-319, 37-36-102, MCA
IMP: 37-1-131, 37-1-306, MCA

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be

submitted to the Board of Athletic Trainers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdatr@mt.gov, and must be received no later than 5:00 p.m., February 24, 2011.

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

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

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on August 2, 2010 by regular mail.

9. Michael Fanning, attorney, has been designated to preside over and conduct this hearing.

BOARD OF ATHLETIC TRAINERS
CHRIS HEARD, CHAIRPERSON

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

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

Certified to the Secretary of State January 18, 2011

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

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 12.10.103, 12.10.106, and)
12.10.112 regarding shooting range)
development grants)

TO: All Concerned Persons

1. On December 9, 2010 the Department of Fish, Wildlife and Parks (department) published MAR Notice No. 12-367 pertaining to the proposed amendment of the above-stated rules at page 2794 of the 2010 Montana Administrative Register, Issue Number 23.

2. The department has amended ARM 12.10.103, 12.10.106, and 12.10.112 as proposed.

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

Comment 1: One person stated the department should go back to the two-year program because it would give the clubs more time to apply and then finish an award after notification.

Response 1: The department feels that a one-year application cycle allows potential applicants more opportunity to apply and compete for funding. The change will still allow successful range applicants up to two years to complete a grant.

Comment 2: One person stated that the match requirement should be dropped because it is difficult for the clubs to come up with the match.

Response 2: Matching funds are required by 87-1-278, MCA. The department cannot change the requirement that clubs provide matching funds through the rulemaking process.

/s/ Joe Maurier
Joe Maurier, Director
Department of Fish, Wildlife and Parks

/s/ William A. Schenk
William A. Schenk
Rule Reviewer

Certified to the Secretary of State January 18, 2011.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF AMENDMENT
ARM 24.17.103, 24.17.107,)	
24.17.121, and 24.17.127 related to)	
prevailing wage rates for public works)	
projects - building construction)	
services, heavy construction services,)	
highway construction services, and)	
nonconstruction services)	

TO: All Concerned Persons

1. On November 26, 2010, the Department of Labor and Industry published MAR Notice No. 24-17-253 regarding the public hearing on the amendment of the above-stated rules on page 2681 of the 2010 Montana Administrative Register, issue no. 22.

2. On December 17, 2010, a public hearing was held at which time members of the public made oral and written comments and submitted documents. Additional comments were received during the comment period.

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

Comment 1: Lee Vaughan, Pacific Northwest Regional Council of Carpenters Local 1172, noted that the travel and per diem for the same classification of worker could vary amongst districts and asked if there is any indication that the number of zones would be decreased.

Response 1: The department sets travel rates and ranges based upon documented practices within the different industries or occupations. When the union has multiple locals and each local has different travel and per diem, the rates will reflect those differences.

Comment 2: Robert Bergsing, Sheet Metal & Air Conditioning Contractors National Association Local 103, opposes the wages and benefits for Sheet Metal Workers and Heating and Air Conditioning in districts 1, 2, and 10 and the benefits in district 6.

Response 2: The department received additional data after the public hearing from Mr. Bergsing. The department incorporated the new data and the revised rates for Sheet Metal Workers and Heat and Air Conditioning are noted in paragraph 5.

Comment 3: Mario Martinez, Pacific Northwest Regional Council of Carpenters Local 286, asked that the data used to set the wage and benefits in district 4 be reevaluated.

Response 3: The department received additional data after the public hearing from Mr. Martinez. The department incorporated the new data and the revised rates for carpenters are noted in paragraph 5.

Comment 4: Carey Hegreberg, Montana Contractors Association, voiced concern that the benefit rates across districts in all trades are not indicative of what the market place is reflecting.

Response 4: The department acknowledges the differences in the benefit rates. The more participation the department has the more accurate the rates are. To increase participation, the department is willing to make follow-up calls to contractors during the survey period who have not turned in their survey before the survey period closes. With the input of interested parties, the department is also willing to change the method in which prevailing wages are calculated and the number of prevailing wage districts. The department also notes that prevailing wage rates merely establish a minimum level for wages paid on a public works project, not a ceiling or maximum.

Comment 5: Carey Hegreberg, Montana Contractors Association, submitted a letter from Pavlik Electric making note that the highway rates have not seen any increases in several years, creating a financial hardship on the employees because the employer is forced to bid and pay lower wages and benefits to stay competitive with other contractors.

Response 5: The department adopts the heavy and highway rates from the U.S. Department of Labor (US DOL) established under the federal Davis-Bacon Act. The reason why some of the rates in the federal heavy and highway rates have stayed the same while others have increased is due to how the federal rates were established the last time they were set, which was several years ago. Rates that have increased have done so, because they were set with a collective bargaining agreement by the union providing the US DOL with the new collective bargaining agreement (CBA). The rates that have not increased were set through survey response instead of a CBA and have had to stay the same until a new survey is conducted. The US DOL sent out a survey last year, and the department hopes that the new rates that come from that will be out in time for the department to adopt in the 2012 heavy and highway publications. The department has also had discussions about possibly setting the heavy and highway rates through a survey like it does for the building rates. As mentioned in Response 5 above, the department also notes that prevailing wage rates merely establish a minimum level for wage paid on a public works project, not a ceiling or maximum.

Comment 6: Keith Allen, International Brotherhood of Electrical Workers Local 233, in a letter to the department, notes the travel for electricians in districts 4, 5, and 7 should be \$55/day when traveling >50/mi., not \$54.

Response 6: The department has reviewed the travel rates for electricians. Revised travel and per diem rates for electricians are identified below in paragraph 5.

Comment 7: Pamela Bompert, Bompert Cleaning Service Inc., commented that she pays the second highest wage rate (\$12.00) in the state (according to the Job Service) and questions how the department arrived at the prevailing wage rate (\$17.51) for janitors and cleaners in district 5.

Response 7: The proposed prevailing wage rate for janitors and cleaners in district 5 is \$15.71, not \$17.51. Commenter states she pays about \$12.00/ hour. The wage portion of the proposed prevailing wage rate is \$11.99/hour. The department also did not receive a survey from Bompert Cleaning Service Inc. during this last survey period. The department gathers a list of employers that perform the types of work outlined in 18-2-401(9)(a-l), MCA. The department then sets the rates according to the methodology provided by 18-2-415, MCA and ARM 24.17.121.

Comment 8: The department received additional data from All Glass Services and Valley Glass & Windows for Glaziers in districts 5 and 6 respectively during the public comment period.

Response 8: Revised rates are identified below in paragraph 5.

4. The rules have been amended exactly as proposed.

5. The following rates in "The State of Montana Prevailing Wage Rates – Building Construction Services" publication incorporated by reference in the rule have been amended as follows, stricken matter interlined, new matter underlined:

Electricians

Travel:

Districts 4, 5, 7

0-8 mi. free zone

>8-50 mi. federal mileage rate/mi.

>50 mi. ~~\$54~~55/day

Carpenters

District	Wage	Benefit
4	\$18.31 <u>\$19.74</u>	\$5.30 <u>\$8.74</u>

Sheet Metal Worker and Heating and Air Conditioning

District	Wage		Benefit	
1	\$23.59	<u>\$24.24</u>	\$ 9.35	<u>\$13.24</u>
2	\$24.55	<u>\$25.10</u>	\$10.96	<u>\$13.24</u>
6	\$26.24		\$10.02	<u>\$13.24</u>
10	\$17.26	<u>\$18.00</u>	\$ 4.04	<u>\$ 6.30</u>

Glaziers

District	Wage		Benefit	
5	\$13.50	<u>\$15.65</u>	\$0.70	
6	\$20.00	<u>\$19.32</u>	\$8.18	<u>\$3.47</u>

/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 January 18, 2011

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

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 37.50.901 pertaining to)
interstate compact on the placement)
of children)

TO: All Concerned Persons

1. On October 14, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-521 pertaining to the proposed amendment of the above-stated rule at page 2297 of the 2010 Montana Administrative Register, Issue Number 19.

2. The department has amended the above-stated rule as proposed.

3. No comments or testimony were received.

/s/ Michelle Maltese
Rule Reviewer

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

Certified to the Secretary of State January 18, 2011.

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

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 37.78.102 and 37.78.420)
pertaining to Temporary Assistance)
for Needy Families (TANF))

TO: All Concerned Persons

1. On October 28, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-523 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 2515 of the 2010 Montana Administrative Register, Issue Number 20.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ Francis X. Clinch
Rule Reviewer

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

Certified to the Secretary of State January 18, 2011.

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

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 37.70.115, 37.70.305,)
37.70.311, 37.70.401, 37.70.402,)
37.70.406, 37.70.407, 37.70.408,)
37.70.601, 37.70.602, 37.70.607, and)
37.70.901 pertaining to Low Income)
Energy Assistance Program (LIEAP))

TO: All Concerned Persons

1. On November 26, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-527 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 2700 of the 2010 Montana Administrative Register, Issue Number 22.

2. The department has amended the above-stated rules as proposed.

3. No comments or testimony were received.

4. The department intends the changes to ARM 37.70.601 to be applied effective August 1, 2010.

/s/ Barbara Hoffmann
Rule Reviewer

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

Certified to the Secretary of State January 18, 2011.

VOLUME NO. 54

OPINION NO. 1

ATTORNEYS GENERAL - Attorney General not bound to follow prior district court opinion;
COUNTY OFFICERS AND EMPLOYEES - County Superintendent of School not entitled to receive hourly fees in addition to salary for serving as substitute in another county;
EXPENSES - County Superintendent of School not entitled to receive hourly fees in addition to salary for serving as substitute in another county;
FEES - County Superintendent of School not entitled to receive hourly fees in addition to salary for serving as substitute in another county;
PUBLIC OFFICERS - County Superintendent of School not entitled to receive hourly fees in addition to salary for serving as substitute in another county;
SUPERINTENDENTS OF SCHOOLS - County Superintendent of School not entitled to receive hourly fees in addition to salary for serving as substitute in another county;
MONTANA CODE ANNOTATED - Sections 2-2-104(3)(a), 2-15-501(7), 7-4-2511(2), 20-3-203(1), -210, -211, -212, (1), (2);
OPINIONS OF THE ATTORNEY GENERAL - 45 Op. Att'y Gen. No. 14 (1993), 41 Op. Att'y Gen. No. 33 (1985).

HELD: A county superintendent of schools is not allowed to charge an hourly fee for performing services as a substitute superintendent under Mont. Code Ann. § 20-3-211.

January 18, 2011

Ms. Kristin Hansen
Chief Deputy Hill County Attorney
315 Fourth Street
Havre, MT 59501

Dear Ms. Hansen:

You have requested an opinion of this office on the question of the ability of a county superintendent of schools to charge hourly fees in addition to her salary when deciding administrative contested cases in another county by invitation pursuant to Mont. Code Ann. § 20-3-212. Nearly 20 years ago this office issued a letter of advice indicating that such a practice was permissible. On further consideration, I have determined that the letter of advice was in error. For the following reasons, I conclude that serving as a substitute superintendent under Mont. Code Ann. § 20-3-212 is part of a county superintendent's statutory job responsibilities. The only compensation she may receive for performing her duties is her regular salary paid by the county in which she is elected.

The general rule is that a county official may receive no compensation for the performance of official duties other than her county salary. Mont. Code Ann. § 7-4-

2511(2); 45 Op. Att'y Gen. No. 14 (1993) (City attorney may not receive fee from private entity for work on city bond issue); cf. Mont. Code Ann. § 2-2-104(3)(a) ("[A] public officer . . . may not receive salaries from two separate public employment positions that overlap for the hours compensated . . ."). When questions have arisen as to whether additional compensation may be received, the Montana Supreme Court has looked to the applicable statutes to find whether the service for which the compensation is paid is part of the officer's official duty. Platz v. Hamilton, 201 Mont. 184, 188, 653 P.2d 144, 147 (1982) (no statute requires district court clerk to collect passport fees, ergo, she may retain the fees), citing Anderson v. Hinman, 138 Mont. 397, 357 P.2d 895 (1960) (no statute requires supreme court clerk to remit uncertified copies of court opinions to West publishing, ergo, she may retain fees).

In this matter, the power to serve as a substitute county superintendent of schools is statutory. Montana Code Annotated § 20-3-212 provides:

(1) When a county superintendent is disqualified pursuant to 20-3-211, that county superintendent must appoint another county superintendent to hear and decide the matter of controversy arising pursuant to 20-3-210.

(2) The county in which the controversy was initiated shall reimburse the county served by the county superintendent appointed pursuant to subsection (1) for actual costs of travel, room, and board as a result of the appointment. Such county superintendent is entitled to expenses as provided in 20-3-203(1).

By statute, the disqualified superintendent "must appoint" another county superintendent. The substitute has the power to act in the matter only by reason of the fact that she is clothed with the statutory authority to do so.

The statutory provisions controlling the calling in of a substitute support the conclusion that the substitute may not claim additional compensation for serving as substitute. When a county superintendent appoints a substitute, the appointing county is responsible for "the actual costs of travel, room, and board as a result of the appointment." Mont. Code Ann. § 20-3-212(2). Significantly, the statute goes on to provide that the substitute superintendent "is entitled to expenses as provided in 20-3-203(1)." (Emphasis added.) Montana Code Annotated § 20-3-203(1) provides, in pertinent part: "The county superintendent must be paid from the county general fund all necessary traveling expenses actually incurred in discharging duties, after the expenses have been audited by the board of county commissioners." (Emphasis added.)

If service as a substitute were not part of the substitute's duties, but rather was a private arrangement between the substitute and the appointing county, it would make little sense for the Legislature to involve itself in determining the substitute's expenses and putting both counties to the trouble of paying and auditing them. Moreover, Mont. Code Ann. § 20-3-203(1) applies to payment of expenses for

performance of "official duties." The Legislature could hardly have been clearer in expressing its intent to treat substitution as an official duty of the substitute superintendent.

On March 8, 1994, an attorney in this office issued a nonbinding letter of advice in which he concluded that a county superintendent may receive additional compensation for acting under Mont. Code Ann. § 20-3-212 as a substitute for a disqualified superintendent. Having reviewed the reasoning of this letter I find that its decision overlooks a major consideration in deciding the question. The 1994 letter reviewed whether there was a specific statute prohibiting the substitute from receiving additional compensation. It does not discuss the related but separate question whether service as a substitute is part of the official duties of the superintendent. It does not consider the effect of Mont. Code Ann. §§ 20-3-212 and 20-3-203(1) in expressing the intention of the Legislature to treat substitution as an official duty. On further review the letter of advice is incomplete in its reasoning. It therefore should be considered overruled by this opinion.

You have provided a copy of the decision of the Montana Thirteenth Judicial District Court in Isbell v. Stillwater County, et al., Stillwater County Docket No. DV 94-076. In that case, the district court held that a contract between the Stillwater County Superintendent and the Hill County Superintendent, under which the latter agreed to substitute for the former in consideration of the payment by the county to the latter of an hourly fee plus expenses incurred, was enforceable and authorized by law. Its reasoning went no further than to adopt the March 24, 1994 letter of advice overruled above. For the reasons stated there, I find the district court's decision unpersuasive and choose not to follow it. See 41 Op. Att'y Gen. No. 33 (1985) (district court declaratory judgment does not displace Attorney General opinion unless it specifically overrules it); Mont. Code Ann. § 2-15-501(7) (if attorney for state agency or local government disagrees with Attorney General opinion, the opinion "is controlling unless overruled by a state district court or the supreme court."). (Emphasis added.)

THEREFORE, IT IS MY OPINION:

A county superintendent of schools is not allowed to charge an hourly fee for performing services as a substitute superintendent under Mont. Code Ann. § 20-3-211.

Sincerely,

/s/ Steve Bullock
STEVE BULLOCK
Attorney General

sb/cdt/jym

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

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

Economic Affairs Interim Committee:

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

Education and Local Government Interim Committee:

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

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

- Department of Public Health and Human Services.

Law and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration and Veterans' Affairs Interim Committee:

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

Environmental Quality Council:

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

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

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

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

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

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

Use of the Administrative Rules of Montana (ARM):

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

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 2010. This table includes those rules adopted during the period October 1, 2010, through December 31, 2010, and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 2010, 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 2010 and 2011 Montana Administrative Register.

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BOARD APPOINTEES AND VACANCIES

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

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

In this issue, appointments effective in December 2010 appear. Vacancies scheduled to appear from February 1, 2011, through April 30, 2011, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

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

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of January 1, 2011.

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

BOARD AND COUNCIL APPOINTEES FROM DECEMBER, 2010

Appointee

Appointed by

Succeeds

Appointment/End Date

No appointees from December, 2010.

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2011 THROUGH APRIL 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Architects and Landscape Architects (Labor and Industry) Mr. Bayliss Ward, Bozeman Qualifications (if required): registered architect with three years continuous practice	Governor	3/27/2011
Board of Dentistry (Labor and Industry) Dr. Mark Colonna, Whitefish Qualifications (if required): licensed dentist with at least 5 years experience	Governor	3/29/2011
Ms. Laura Germann, Glendive Qualifications (if required): public representative	Governor	3/29/2011
Ms. Luella Vogel, Great Falls Qualifications (if required): public representative	Governor	3/29/2011
Board of Hail Insurance (Agriculture) Mr. Gary Gollehon, Brady Qualifications (if required): public member	Governor	4/18/2011
Board of Livestock (Livestock) Ms. Janice French, Hobson Qualifications (if required): cattle producer	Governor	3/1/2011
Mr. Ed Waldner, Chester Qualifications (if required): swine producer	Governor	3/1/2011
Mr. Jeffery Lewis, Corvallis Qualifications (if required): dairy producer	Governor	3/1/2011

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2011 THROUGH APRIL 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p>Board of Optometry (Labor and Industry) Ms. Delores Hill, Mosby Qualifications (if required): public member</p>	Governor	4/3/2011
<p>Mr. Douglas Kimball, Bozeman Qualifications (if required): registered optometrist</p>	Governor	4/3/2011
<p>Board of Regents (Higher Education) Ms. Janine Pease, Billings Qualifications (if required): resident of District 2</p>	Governor	2/1/2011
<p>Clinical Laboratory Science Practitioners (Labor and Industry) Ms. Charliene Staffanson, Deer Lodge Qualifications (if required): public representative</p>	Governor	4/16/2011
<p>Ms. Rosemary Shively, Helena Qualifications (if required): clinical laboratory science practitioner</p>	Governor	4/16/2011
<p>Ms. Barbara Henderson, Miles City Qualifications (if required): clinical laboratory science practitioner</p>	Governor	4/16/2011
<p>County Printing Board (Administration) Commissioner Marianne Roose, Eureka Qualifications (if required): County Commissioner</p>	Governor	4/1/2011
<p>Mr. Dan Killoy, Miles City Qualifications (if required): printing industry representative</p>	Governor	4/1/2011

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2011 THROUGH APRIL 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
County Printing Board (Administration) cont. Mr. Milton Wester, Laurel Qualifications (if required): printing industry representative	Governor	4/1/2011
Mr. Calvin J. Oraw, Sidney Qualifications (if required): public representative	Governor	4/1/2011
Commissioner Laura Obert, Townsend Qualifications (if required): County Commissioner	Governor	4/1/2011
MSU - Great Falls College of Technology Local Executive Board (University System) Mr. Dave Warner, Great Falls Qualifications (if required): public representative	Governor	4/15/2011
MSU - Northern Local Executive Board (University System) Ms. Pamela A. Hillery, Havre Qualifications (if required): public representative	Governor	4/15/2011
Montana State University - Billings Local Executive Board (University System) Mr. Jeremy Seidlitz, Billings Qualifications (if required): public representative	Governor	4/15/2011
Montana State University Local Executive Board (University System) Mr. Bill Bryan, Bozeman Qualifications (if required): public representative	Governor	4/15/2011

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2011 THROUGH APRIL 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Private Alternative Adolescent Residential or Outdoor Programs Board (Labor and Industry) Rep. Tim Callahan, Great Falls Qualifications (if required): public member	Governor	4/19/2011
Ms. Mary Alexine, Eureka Qualifications (if required): representing residential adolescent programs (medium size)	Governor	4/19/2011
Mr. John Santa, Kalispell Qualifications (if required): representing residential adolescent programs (large size)	Governor	4/19/2011
Ms. Darcie Kelly, Helena Qualifications (if required): public member	Governor	4/19/2011
Ms. Penny James, Trout Creek Qualifications (if required): representing residential adolescent programs (small size)	Governor	4/19/2011
Public Employees Retirement Board (Administration) Mr. Timm Twardoski, Helena Qualifications (if required): public representative	Governor	4/1/2011
State Compensation Mutual Insurance Fund Board (Administration) Mr. Joe Dwyer, Billings Qualifications (if required): policy holder	Governor	4/28/2011
Mr. Wally Yovetich, Billings Qualifications (if required): private enterprise	Governor	4/28/2011

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2011 THROUGH APRIL 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
State Compensation Mutual Insurance Fund Board (Administration) cont. Mr. Boyd Taylor, Butte Qualifications (if required): policy holder and in private enterprise	Governor	4/28/2011
State Employee Charitable Giving Campaign Advisory Council (Administration) Ms. Joy McGrath, Helena Qualifications (if required): federal representative	Director	2/14/2011
Mr. Matthew Dale, Helena Qualifications (if required): employee representative	Director	2/14/2011
Ms. Mary Wright, Helena Qualifications (if required): employee representative	Director	2/14/2011
Ms. Marcia Armstrong, Helena Qualifications (if required): employee representative	Director	2/14/2011
Ms. Kathy Miller, Helena Qualifications (if required): federal representative	Director	2/14/2011
Mr. Gary Owen, Great Falls Qualifications (if required): federal representative	Director	2/14/2011
Mr. Jack Lynch, Helena Qualifications (if required): employee representative	Director	2/14/2011
Mr. Rob Mayer, Helena Qualifications (if required): employee representative	Director	2/14/2011

VACANCIES ON BOARDS AND COUNCILS -- FEBRUARY 1, 2011 THROUGH APRIL 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
State Employee Charitable Giving Campaign Advisory Council (Administration) cont. Ms. Marie Matthews, Helena Qualifications (if required): employee representative	Director	2/14/2011
Mr. Dave Paton, Helena Qualifications (if required): employee representative	Director	2/14/2011
Ms. Shannon Lewis, Helena Qualifications (if required): employee representative	Director	2/14/2011
Mr. Joe Hamilton, Helena Qualifications (if required): employee representative	Director	2/14/2011
UM-Helena College of Technology Local Executive Board (University System) Mr. Ray Peck, Helena Qualifications (if required): public representative	Governor	4/15/2011
UM-Montana Tech Local Executive Board (University System) Mr. Doug Peoples, Butte Qualifications (if required): public representative	Governor	4/15/2011
UM-Western Local Executive Board (University System) Ms. Mary Ann Nicholas, Dillon Qualifications (if required): public representative	Governor	4/15/2011
University of Montana Local Executive Board (University System) Mr. Bill Woody, Missoula Qualifications (if required): public representative	Governor	4/15/2011