ISSUE NO. 3

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 8.94.3814 and 8.94.3815 pertaining to governing the submission and review of applications for funding under the Treasure State Endowment Program (TSEP)	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On February 25, 2016, at 1:00 p.m., the Department of Commerce will hold a public hearing in Room 504A of the Park Avenue Building, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

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 of Commerce no later than 5:00 p.m., February 22, 2016, to advise us of the nature of the accommodation that you need. Please contact Amy Peck, Department of Commerce, 301 South Park Avenue, P.O. Box 200523, Helena, Montana 59620-0523; telephone (406) 841-2869; TDD (406) 841-2702; facsimile (406) 841-2771; or e-mail to apeck@mt.gov.

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

8.94.3814 INCORPORATION BY REFERENCE OF RULES FOR THE ADMINSTRATION OF TREASURE STATE ENDOWMENT GRANTS (1) The Department of Commerce adopts and incorporates by reference the ~~2014~~ 2016 Montana Treasure State Endowment Program Project Administration Manual (January 2016)~~, published by it~~ as rules for the administration of TSEP grants.

(2) and (3) remain the same.

AUTH: 90-6-710, MCA
IMP: 90-6-710, MCA

REASON: It is reasonably necessary to amend this rule because 90-6-710, MCA, requires the department to adopt rules to implement the program.

8.94.3815 INCORPORATION BY REFERENCE OF RULES GOVERNING THE SUBMISSION AND REVIEW OF APPLICATIONS FOR FUNDING UNDER THE TREASURE STATE ENDOWMENT PROGRAM – PROJECT GRANTS

(1) The Department of Commerce adopts and incorporates by reference the ~~2014~~ 2016 Montana Treasure State Endowment Construction Application Guidelines

(January 2016) as rules governing the submission and review of applications under the TSEP program.

(2) remains the same.

(3) Copies of the regulation adopted by reference in (1) can be viewed on the department's web site at ~~http://comdev.mt.gov/TSEP~~ http://comdev.mt.gov/Programs/TSEP, or may be obtained from the Department of Commerce, Community Development Division, P.O. Box 200523, Helena, Montana 59620-0523.

AUTH: 90-6-710, MCA
IMP: 90-6-710, MCA

REASON: It is reasonably necessary to amend this rule because 90-6-710, MCA, requires the department to adopt rules to receive and review the program.

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 Department of Commerce, Community Development Division, 301 South Park Avenue, P.O. Box 200523, Helena, Montana, 59620-0523; by facsimile to (406) 841-2771, or e-mail to banseth@mt.gov, and must be received no later than 5:00 p.m., March 4, 2016.

5. Becky Anseth, TSEP Program Manager, has been designated to preside over and conduct this hearing.

6. 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 may make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the 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 bmartello@mt.gov, or by completing a request form at any rules hearing held by the department.

7. 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.

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

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Kelly A. Lynch
KELLY A. LYNCH
Rule Reviewer

/s/ Douglas Mitchell
DOUGLAS MITCHELL
Deputy Director
Department of Commerce

Certified to the Secretary of State on January 25, 2016

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

In the matter of the amendment of ARM 36.25.1001, 36.25.1002, 36.25.1004 through 36.25.1006, 36.25.1008 through 36.25.1011, and 36.25.1013, the adoption of New Rules I and II, and the repeal of ARM 36.11.101, 36.25.1003, 36.25.1007, 36.25.1012, and 36.25.1016 through 36.25.1021 regarding cabin site leasing	))))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT, ADOPTION, AND REPEAL

To: All Concerned Persons

1. The Department of Natural Resources and Conservation will hold two public hearings at the following dates and times to consider the proposed amendment, adoption, and repeal of the above-stated rules:

10:00 a.m. on February 29, 2016, Bannack Conference Room, 1625 Eleventh Avenue, Helena, Montana 59601; and

1:00 p.m. on March 1, 2016, Hampton Inn, 1140 U.S. Highway 2 West, Kalispell, Montana 59901.

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 agency no later than 5:00 p.m. on February 15, 2016, to advise the department of the nature of the accommodation that you need. Please contact Amy Randall, P.O. Box 201601, Helena, MT 59620-1601; telephone (406) 444-3844, fax (406) 444-2684, e-mail arandall@mt.gov.

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

36.25.1001 ~~CABINSITE~~ DEFINITIONS (1) remains the same.

~~(2) "Adjusted 2009 appraised value" means an amount equal to the 2003 Montana Department of Revenue (DOR) appraised value for a state parcel increased at a rate of 6.53 percent compounded annually to 2009.~~

~~(3) "Annual lease rental period" means March 1 to February 28, annually.~~

(~~4~~2) "Assignment" means the transfer of rights, obligations, and ownership of a current lease agreement to another person or other legal entity qualified to hold a lease. Assignments must be executed on a form prescribed by the department, and are subject to department approval.

~~(5) "Base rent" means the lower of five percent of the adjusted 2009 appraised value of the state trust land under lease or an amount equal to five percent of the actual 2009 reappraisal of market value by the DOR.~~

(~~6~~3) "Board," also referred to as "Land Board," means the Board of Land Commissioners.

(~~7~~4) "~~Cabinsite~~ Cabin site,"~~,~~ also referred to as "~~homesite~~ home site," ~~and "residential lease",~~ means land leased or to be leased ~~occupied or to be occupied~~ for single-family residential use that is noncommercial in nature. ~~a noncommercial use as a temporary or principal place of residence for a single family or equivalent of the same, and the supporting buildings, within the lease area.~~

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

~~(9) "Consumer Price Index" (CPI) is a measure of the annual change in the price of a basket of consumer goods over time. For these rules, the department will use the CPI-U, West Urban Index published by the U.S. Bureau of Labor Statistics (http://www.bls.gov/) or, should the CPI-U, West Urban Index be discontinued, a similar index published by the U.S. Bureau of Labor Statistics chosen by the department. The CPI shall be established by reviewing the annual change in the CPI on October 1 of each year.~~

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

(7) "Improvement" means structures including, but not limited to:

(a) a home or residence;

(b) outbuildings;

(c) sleeping cabins;

(d) utilities;

(e) water systems;

(f) septic systems;

(g) docks;

(h) landscaping;

(i) any other structure necessary for the conservation or utilization of state trust land; and/or

(j) any other structure determined by the department to meet this definition.

~~(11) "Director" means the director of Natural Resources and Conservation, chief administrative officer of the Department of Natural Resources and Conservation, or the director's designee.~~

(~~12~~8) "Lease" means a contract ~~by which the board conveys~~ conveying state trust land for:

(a) a specific term of years;

(b) ~~for~~ a specified ~~rental~~ lease fee~~,~~; and

(c) ~~for the~~ use ~~for which the land is~~ as classified under ~~(~~77-1-401, MCA~~)~~.

(9) "Leased land" means the land leased for a cabin site, and does not include any improvements.

(10) "Neighborhood" means a cabin site management region as determined by the department.

~~(13) "Lease fee adjustment" means the department application of the rental rate contracted in the lease to the most recent appraised market value to determine if it is necessary to alter the annual rental payment. The adjustment will occur at the review period defined in the lease.~~

~~(14) "Lease fee adjustment process" means the annual process by which the department applies the Lease Fee Indicator to the adjusted 2009 appraised value of the leased premises, or by which the department applies the rental rate contracted in the lease to the actual 2009 reappraisal of market value by the DOR, and subsequent reappraisals, to determine if it is necessary to alter the annual rental payment. Future lease fee adjustments will occur at the review period defined in the lease, or at any time that it is considered necessary to protect the interests of the trusts, as determined at the sole discretion of the director of the department.~~

~~(15) "Lease Fee Indicator" (LFI) means the increase that is applied annually to the previous year's lease fee. The LFI, which is recalculated annually, is the average of the CPI and the Real Estate Index; however, the LFI shall be limited in that it may never be less than 3.25 percent and may never be more than 6.5 percent. The LFI is named for the year the CPI data was primarily collected, but applied to the billing for the following year. For example, an LFI determined from CPI data from calendar year 2014 would be called the 2014 LFI and would be applied to the 2015 cabinsite lease fee adjustment process.~~

~~(16) "Real Estate Index" (REI) means a moving 25-year average of the annual appreciation of all cabinsite parcel values. This number will be adjusted after every new reappraisal cycle by the DOR. The REI is currently 8.75 percent and will remain so until the next DOR appraisal, which is currently scheduled for 2014.~~

(11) "Rental rate" means a percentage of the Department of Revenue (DOR) valuation of the leased land to derive a lease fee. The rental rate for renewing leases is 5 percent or $800, whichever is higher, unless otherwise determined by the board. The minimum rate for new leases issued through a competitive bid is 6.5 percent unless reduced in accordance with these rules, or as otherwise determined by the board.

(12) "Security bond" means an amount submitted by the lessee and held by the department throughout the term of the lease to secure costs incurred by the department as a result of activity or improvements upon the lease site.

(~~17~~13) "Security interest" means an interest ~~that~~ a third party retains in any portion of ~~a lease and~~ the lease improvements located on that lease in order to secure the payment by the lessee to that third party.

(14) "State trust land" means lands or property interests held in trust by the state as defined by 77-1-101, MCA.

~~(18) "Semiannual lease rental period" means March 1 to August 31 or September 1 to February 28.~~

(19) remains the same but is renumbered (15).

AUTH: 77-1-202, 77-1-204, 77-1-209, MCA
IMP: 77-1-208, MCA

36.25.1002 ~~CABINSITE LEASES~~ AUTHORITIES, LIMITATIONS, AND RESTRICTIONS (1) A ~~cabinsite~~ cabin site lease generally may only include a maximum of five acres~~;~~ ~~unless~~ however, special circumstances may exist for which the department may grant more than five acres.

(2) through (2)(b) remain the same.

(c) all other local, state, and federal statutes and regulations. ~~The department's approval to place or modify any improvement on the lease lot does not necessarily constitute approval from any other regulatory entity such as a county, other state administrative agencies, or federal agencies.~~

~~(3) The successful bidder for a cabinsite lease may be required to pay for the cost of any surveys, fulfillment of zoning and subdivision requirements, and other assessments, or costs related to compliance with any other local, state, and federal statutes and regulations.~~

~~(4) Cabinsite leases shall be classified as per ARM 36.25.108, or if necessary, reclassified as per ARM 36.25.109.~~

(~~5~~3) A ~~cabinsite~~ cabin site lease authorizes the lessee ~~grants the lessee the right of~~ access to the leased land and, with prior approval from the department, ~~and the right to place~~ allows for placement of necessary utility facilities within the ~~cabinsite~~ cabin site ~~lease premises~~ and across specified adjacent state trust lands from the main utility to the ~~cabinsite~~ cabin site ~~lease premises~~ during the term of the lease~~, with the prior written approval of the department~~. For any such ~~rights~~ authority outside of state trust land, the lessee will be responsible for obtaining any necessary easements from the appropriate landowner(s).

(4) At the lessee's expense, cabin site lessees are solely responsible for road maintenance of all roads upon state trust land that are used to access the cabin site lease.

(a) The department reserves the right to require the formation of road users associations (RUA), at lessee's expense, to address the potential of multiple use on access roads to the lease land.

(b) Should the department require the formation of a RUA, the cabin site lessees shall become members of that RUA and comply with all requirements of the RUA bylaws as approved by the department.

(5) At the lessee's expense, the lessee must keep the leased land free of fire hazards by:

(a) fireproofing incinerators, fireplaces, stoves, or any other type of burner by use of spark-proof screens;

(b) removing any forest litter such as needles, twigs, or duff in a ten-foot perimeter around all buildings and roof tops;

(c) removing all tree limbs encroaching the roof or chimney(s); and

(d) abiding by all restrictions on fires which may be in effect at any time and take all reasonable precautions to prevent and suppress fires, including extinguishing all fires prior to leaving the lease area.

(6) The use of firearms or fireworks is not permitted.

(7) Any falling of live or green trees is prohibited unless otherwise permitted by the department.

(8) At the lessee's expense, the leased land must be kept free of weeds, debris, garbage, and any open pits or ditches.

AUTH: 77-1-202, 77-1-204, 77-1-209, MCA
IMP: 77-1-208, MCA

36.25.1004 ~~CABINSITE~~ LEASE FEE PAYMENT ~~DUE DATE~~ (1) All cabin sites are assessed an annual lease fee. Payment is due in one annual installment unless the lessee elects to pay the annual fee on a semi-annual schedule in two equal installments.

(a) Annual lease fees are due on March 1 of each year.

(b) Semi-annual lease fees are due on March 1 and on September 1 of each year.

(2) Lease fee payment must be postmarked by the due date. Lease fee payment that is not postmarked by the due date will be considered late and a $25 late fee will be assessed.

(a) Late payment of annual lease fees will be accepted if postmarked on or before April 1.

(b) Lease cancellation for leases on an annual fee schedule occurs if payment is not received, or is received postmarked after April 1.

(c) Late payment of the first installment of semi-annual lease fees postmarked on or before April 1 will be accepted; late payment of the second installment postmarked on or before October 1 will be accepted.

(d) Lease cancellation for leases on a semi-annual fee schedule occurs if payment is not received, or is received postmarked after either date in (c).

(3) The department will send written notice of payments due to the address of record for lessees in accordance with the following schedule:

(a) invoice in January for all annual lease fees;

(b) invoice in January and July for all semi-annual lease fees;

(c) late notice in March for any unpaid annual lease fees;

(d) late notice in March and September for any unpaid semi-annual lease fees;

(e) cancellation notice in April for any unpaid annual lease fees; and

(f) cancellation notice in April and October for any unpaid semi-annual lease fees.

(4) Late notices and cancellation notices will be mailed to the address of record by certified mail; and, will be copied to any known security interest holder for improvements upon the leased land.

~~(1) The department shall bill for cabinsite leases using the schedule outlined in (1)(a) through (c).~~

~~(a) Written notice of the amount of rental due for 2010 will be sent to each cabinsite lessee's address of record following adoption of these rules on May 28, 2010. In this instance, the specific dates for payment notification, when payments are due, and when late charges and lease cancellation may occur will be approved by the Land Board~~.

~~(b) Beginning in January 2011 and each January thereafter, the department will send written notice of the amount of rental due to each cabinsite lessee's address of record.~~

~~(i) The notice shall state that the payment is due by March 1, and if payment is not received or postmarked by April 1, that the lease is cancelled.~~

~~(A) In mid-March, prior to April 1, the department shall send a reminder letter by certified mail to each lessee who has not made payment, notifying the lessee that~~

~~the lease is cancelled if payment is not received or postmarked on or before April 1. If payment is not received or postmarked by April 1, the entire lease is cancelled.~~

~~(B) An additional $25 late fee will be charged for payments made after March 1, but before April 1. If payment is not received or postmarked by April 1, the entire lease is cancelled.~~

~~(c) If the lessee elects to make semiannual payments, the department will send written notices in January and July of each year, except as described in (1) to the address of record, per ARM 36.25.104(3), stating the amount of semiannual rental due.~~

~~(i) The notice shall state that the first-half payment is due by March 1, and if not paid by April 1, the lease is cancelled. The notice shall also state that the second-half payment is due by September 1, and if not paid by October 1, the lease is cancelled.~~

~~(A) In mid-March, prior to April 1; and mid-September, prior to October 1, the department shall send a reminder letter by certified mail to each lessee who has not made payment a letter notifying the lessee that the lease is cancelled if payment is not received or postmarked on or before April 1 or October 1. If payment is not received and postmarked by April 1 or October 1, the entire lease is cancelled.~~

~~(B) An additional $25 late fee will be charged for payments made after March 1 but before April 1; and payments made after September 1 but before October 1.~~

(~~d~~a) ~~In special circumstances,~~ As determined by~~, and~~ the department or at the direction of the board, the department may send notices regarding ~~of~~ payments due to lessees at times other than those described in this rule. ~~(1)(a) and (b). The specific dates for payment notification, when payments are due, and when late charges and lease cancellation may occur will be approved by the Land Board.~~

(~~2~~5) A cancelled lease may be reinstated at the discretion of the department. ~~for an additional~~ The minimum fee for reinstatement ~~fee, which will be a minimum of~~ is $500, or as much as three times the annual ~~rental amount~~ lease fee ~~of the lease~~. The decision ~~whether or not to offer a lessee the ability~~ to reinstate the lease ~~by paying a reinstatement fee~~, as well as the reinstatement fee amount ~~to charge for the reinstatement fee~~, are ~~both~~ at the discretion of the department.

~~(3) The rental price for the first year of a new lease shall be prorated by dividing the full amount of the rental for the first year by 365 then multiplying the result by the number of days between the lease start date and the last day of the upcoming February.~~

AUTH: 77-1-202, 77-1-209, MCA
IMP: 77-1-208, MCA

36.25.1005 ~~CABINSITE~~ IMPROVEMENTS (1) A ~~cabinsite~~ cabin site lessee may apply to the department to request authorization to place improvements on, or to install utilities to, the leased land. Approval is at the discretion of the department. ~~state trust land which are necessary for the conservation or utilization of that state trust land and associated structures such as outbuildings, utilities, and sleeping cabins, with the approval of the department; however,~~

(a) The lessee must apply for permission prior to placing any improvements or utilities on state trust land using a form provided by the department. Failure of the lessee to obtain prior written permission from the department, may result in:

(i) limited or no compensation paid to the lessee for the improvements upon termination of the lease; or

(ii) the department may require the lessee to remove any improvements placed on the leased land, at the lessee's expense.

(b) Only one single-family residence will be permitted on each ~~cabinsite~~ cabin site lease~~, and~~.

(c) The lessee is responsible to ensure all ~~such~~ installations and improvements meet all applicable rules, codes, and regulations. The department's approval to place or modify any improvement on the lease lot does not necessarily constitute approval from any other regulatory entity such as a county, other state administrative agencies, or federal agencies.

(d) The lessee is solely responsible for the installation, maintenance, and expense of any improvements or utilities to the leased land.

(e) The lessee is responsible for all initial or recurring utility company charges or taxes resulting from the installation.

(f) Applications for improvement within 100 feet of a water body may be denied or limited.

(g) The department may require a security bond, the terms of which will be defined within the lease.

(2) A lessee may apply to the department to request to sublet the improvements.

(a) The lessee must apply for permission prior to subletting.

(b) The application must be on a form prescribed by the department.

(c) Subletting of improvements is permissible for long-term (monthly or longer) single-family residential use. Any subletting for short-term and/or recreational activity for total rentals that exceed the annual lease fee in a given year is prohibited.

(d) Approval of any sublease is at the discretion of the department.

~~(2) The lessee shall apply for permission prior to placing any improvements on state trust land and shall use the form prescribed by the department.~~

~~(3) A lessee will not be entitled to compensation by a subsequent lessee for improvements placed on the land after May 10, 1979, unless those improvements were previously approved by the department in writing prior to their placement upon the land. Proof of the date of placement of improvements may be required by the department. Any improvements or fixtures paid for by state or federal monies shall not be compensable to the former lessee.~~

~~(4) The lessee shall be responsible for notifying the department of the value of the improvements. The asking price of the improvements shall be the higher of either the most recent DOR assessment of the improvements, or of an appraisal of the improvements, though the lessee retains the right to lower the asking price of the improvements. Settlement for the improvements shall be determined pursuant to 77-1-208(3), MCA, and the procedures set out in ARM 36.25.125. All settlement for improvements must occur within 120 days of the issuance of the lease.~~

~~(a) If an appraisal is needed, the appraisal shall be contracted by the department and paid for by the lessee.~~

~~(b) Determination of compensation for improvements shall utilize standard appraisal procedures, giving full consideration to the improvement's condition, its contribution to the value of the property for residential purposes, and remaining economic life. Compensation shall be the estimated cost to construct, at current prices, a building with equivalent utility as of the date of the lease or license's expiration.~~

~~(5) At the time of assignment or other transfer of interest in the leasehold, the department must be notified of the sale price of the improvements and be provided copies of any agreements reflecting the transfer of both the lease and improvements, such as, but not limited to a realty transfer certificate.~~

~~(6) The department may require a written notice from the former lessee stating that the former lessee has received full compensation for the improvements or has removed the improvements and fixtures when a new lease is issued.~~

AUTH: 77-1-202, 77-1-204, 77-1-209, MCA
IMP: 77-1-208, MCA

36.25.1006 ~~REMOVAL OF CABINSITE~~ IMPROVEMENTS UPON CANCELLATION OR ABANDONMENT ~~AND COMPENSATION~~ (1) ~~At cancellation, termination, or abandonment of the cabinsite lease, the~~ The former lessee ~~will be notified of their~~ has a limited right to remove the improvements or be compensated for ~~their~~ the improvements by a new lessee~~, or their right to remove those improvements~~. Improvements that are not removed or sold in accordance with this section will result in trust assumption and ownership of all improvements.

(2) The ability to remove or seek compensation for improvements is only available if the former lessee has continued to pay all taxes and any other applicable assessments; and, is limited to a time period of up to three years after the date of cancellation or abandonment.

(a) If, after three years there is no new lessee and the improvements have not been removed, the department will provide written notice to the former lessee granting 60 days for removal of remaining improvements. After that time, the improvements will become the property of the trust.

(b) This condition and limitation applies to all improvements on the leased land, including movable and nonmovable improvements, as well as personal property.

(c) The beginning of the three-year time period shall be either:

(i) the effective date of an abandonment form executed by the lessee and accepted by the department;

(ii) the date rent is due, if the rent is not paid, as per ARM 36.25.1004; or

(iii) the effective date of cancellation provided in the cancellation notice from the department to the lessee, if the lease is cancelled for any reason other than failure to pay rent.

(~~2~~3) ~~If the~~ A former lessee intending to ~~informs the department that they wish to~~ remove the ~~their~~ improvements~~, the former lessee~~ must~~:~~

~~(a)~~ obtain a land use license from the department to remove the improvements. The license fee must be paid in advance.

(a) The department reserves the right to withhold authorization to remove the improvements during any time a lease is being actively offered for bid by the department.

(b) The land use license may be for a term of up to 60 days.

(c) The term may be extended by the department for good cause~~; and~~.

~~(b) pay the license fee in advance.~~

(d) The license fee will be calculated as the most recent year's lease fee, divided by 365, and multiplied by the number of days in the license.

(e) The minimum fee for a removal land use license ~~shall be~~ is $50.

(~~3~~4) ~~If the~~ A former lessee intending ~~informs the department that they wish~~ to be compensated for ~~their~~ improvements by a new lessee~~,~~ must ~~the former lessee will have a maximum of three years from the time of cancellation, termination, or abandonment of the cabinsite lease to be compensated for their improvements by a new lessee. The former lessee shall have:~~

~~(a) submitted in writing to the department a statement that the former lessee is seeking third-party compensation for the improvements;~~

~~(b) paid all property taxes and any applicable special assessments; and~~

~~(c)~~ obtain a land use license from the department to access the cabin site for the limited purpose of maintaining and marketing the improvements for a potential buyer and new lessee. The former lessee may not utilize the cabin site for recreational or residential purposes.

(a) The maximum asking price of the improvements shall be the most recent DOR assessment of the improvements; or, if requested by the improvements owner, an appraisal of the improvements conducted pursuant to Uniform Standards of Professional Appraisal Practice (USPAP) standards. In case of a conflict, a USPAP appraisal will control.

(i) Improvements placed on the land after May 10, 1979, which were not previously approved by the department in writing prior to their placement, are not eligible for compensation under this rule.

(ii) Proof of the date of placement of improvements may be required by the department.

(iii) Any improvements or fixtures paid for by state or federal monies will not be compensable to the former lessee.

(b) If an appraisal is requested by the former lessee, the appraisal must:

(i) be contracted by the department and paid for by the lessee; and

(ii) utilize standard appraisal procedures, giving full consideration to the improvement's condition, its contribution to the value of the property for residential purposes, and remaining economic life. Compensation shall be the estimated cost to construct, at current prices, a building with equivalent utility as of the date of the lease or license's expiration.

(c) The lessee or improvement owner will be afforded notice and opportunity for an informal administrative hearing before the department to contest the appraisal valuation, as follows:

(i) the lessee or improvements owner must file a request for a hearing with the department within ten days of the department's notification to the lessee or

improvements owner of the appraised value of the improvements. The department shall notify the lessee or improvements owner of the time and place of the hearing before the department director, or the director's designee. The hearing will be informal, without adherence to strict rules of evidence as provided in 2-4-604, MCA. A hearing examiner may be appointed to conduct the hearing. The lessee or owner of improvements may present any evidence and/or arguments for the department to consider;

(ii) upon determination of the improvement value, the lessee or improvement owner is obligated to transfer its interest in the improvements according to the department's final determination of the value.

(d) The proposed buyer of a former lessee's improvements must still participate in, and be the successful bidder of, the cabin site lease, per ARM 36.25.1009.

(e) In no case will the department pay any realtor fees, commissions, or otherwise, for the marketing of improvements when such marketing services are contracted by the lessee or former lessee. ~~provided the department with qualifying value information for the improvements. At any time during the three-year period and at the approval of the department, the former lessee may request a license to remove the improvements, at a fee and duration consistent with this rule.~~

~~(4) The beginning of the three year time period shall be either:~~

~~(a) the effective date of an abandonment form executed by the lessee and accepted by the department; or~~

~~(b) the date rent is due, if the rent is not paid as per ARM 36.25.1004 or no abandonment form is submitted.~~

(5) ~~If the lessee abandons the improvements there shall be no obligation~~ When a former lessee intends to unconditionally abandon the lease and improvements, the abandonment shall be recorded on a form as prescribed by the department, and the following will apply:

(a) the department or other party is under no obligation ~~by the department or other party~~ to compensate the former lessee for any ~~for compensation for all~~ improvements on the leased land ~~property~~, including movable and nonmovable improvements, as well as personal property;~~.~~

(b) the improvements may be sold to a new lessee at a price determined by the department. Any revenue generated from the sale of improvements that have been unconditionally abandoned shall be distributed by the department in the same manner as rentals for the applicable leased land; and

(c) the department reserves the right to refuse an unconditional abandonment.

~~(6) The department reserves the right to withhold authorization to remove the improvements during any time that a lease is being actively bid by the department.~~

~~(7) If three years after the cancellation, termination, or abandonment of the cabinsite lease no new lessee has been found, the department shall provide written notice to the former lessee that unless the improvements are removed within 60 days, the improvements will become the property of the trust. This condition and limitation applies to all improvements on the property, including movable and nonmovable improvements, as well as personal property.~~

~~(8) If the department receives no written request from the former lessee seeking to receive compensation for improvements from a new lessee or to remove the improvements, the department shall seek a new lessee for the cabinsite lease.~~

~~(9) Final determination of settlement for improvements will be conducted in accordance with statutes and rules pertaining to arbitration.~~

AUTH: 77-1-202, 77-1-208, 77-1-209, MCA
IMP: 77-1-208, MCA

36.25.1008 CANCELLATION AND ABANDONMENT OF ~~CABINSITE~~ LEASE~~S AND SECURITY INTERESTS~~ (1) Either the department or the lessee may cancel the lease.

(a) The department may cancel a lease for ~~nonpayment of rentals or~~ any ~~other~~ breach of the lease contract.

(~~2~~b) A lessee may cancel per the terms of the lease, or unconditionally abandon a lease in accordance with ARM 36.25.1006. ~~request to abandon the lessee's right, title, and interest in the improvements on a cabinsite lease and the cabinsite lease itself to the department.~~

~~(a) The department reserves the discretion whether to accept the abandonment of the improvements and lease.~~

~~(b) All such abandonments shall utilize a form as prescribed by the department.~~

(~~3~~2) Before any cancellation or abandonment of a ~~cabinsite~~ cabin site lease, the department shall notify any known holder of a security interest for improvements located upon the cabin site ~~form issued by the department of the impending cancellation or request by the lessee for abandonment~~.

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

~~(7) The former lessee may or may not choose to market the improvements for sale. In no case will the department pay any realtor fees or commissions for the marketing of former lessee improvements when such marketing services are contracted by the lessee.~~

~~(8) The proposed buyer of a former lessee's improvements must still participate in, and be the successful bidder of the cabinsite lease, per ARM 36.25.1009.~~

~~(9) If the lease improvements have been abandoned, the improvements may be sold to a new lessee at a price determined by the department.~~

(~~10~~6) The former lessee ~~shall~~ will not be entitled to any refunds of any lease payments after ~~related to~~ cancellation or abandonment.

AUTH: 77-1-202, 77-1-209, MCA
IMP: 77-1-208, MCA

36.25.1009 ISSUANCE OF CABIN SITE LEASE ON UNLEASED AND RECLASSIFIED LAND ~~(1) A person who desires to lease unleased state trust land for a cabinsite must apply on the standard application form prescribed by the department. The application form must be returned to the department and must be accompanied by a nonrefundable application fee. Such application shall be deemed~~

~~an offer to lease land for a cabinsite as specified by the application, at a rental rate which reflects fair market value.~~

~~(2) When the department receives one or more applications to lease a cabinsite on an unleased tract of land, or on a tract which has been reclassified, it may advertise for bids on the tract and shall use the procedures set forth in this rule. The department has the discretion to put cabinsite leases up for bid even without first receiving any applications or offers for those cabinsite leases.~~

(1) Unleased cabin sites are available to lease through a competitive bidding process.

(a) The minimum bid amount will be the first year's annual lease fee, determined by applying a rental rate to the land value. In no case will a bid be considered if it is less than the minimum lease fee specified in the bid solicitation.

(i) Rental rates for new bidding shall start at 6.5 percent for all neighborhoods, or as otherwise determined by the board (in accordance with [New Rule I]).

(ii) The department may reduce the rental rate to 5 percent after 60 days if no bids are received.

(iii) In neighborhoods with vacancy rates over 30 percent, the department may incrementally reduce the rental rate after 60 additional days until the vacancy rate is no longer over 30 percent. The rental rate shall not be less than 3.5 percent or $800, whichever is higher.

(~~3~~b) The department will advertise ~~cabinsites~~ unleased cabin sites for bid on the department web site, and may advertise through other marketing avenues. ~~in one or more of the following ways:~~

~~(a) at least once in a newspaper of general circulation, which services the area where the cabinsite is located;~~

~~(b) at least once in any newspaper, magazine, trade journal, flier, or other print medium that potential cabinsite bidders may view;~~

~~(c) sending letters to interested parties;~~

(c) A response to a bid solicitation must be received prior to the bid closing date and time, at the location specified in the bid solicitation. The response must include the following:

(i) the bid form or application as provided by the department;

(ii) a bid deposit equal to 10 percent of the bid amount; and

(iii) the application fee as provided on the bid form.

~~(d) sending e-mails to interested parties; and/or~~

~~(e) placing information on the internet.~~

~~(4) Nothing in this rule shall preclude the department from generally making it known that a cabinsite is currently unleased and that the department is accepting applications to lease state trust land for a cabinsite.~~

~~(5) All bids shall be submitted at a specific place and time as specified by the department. Bids may be sealed bids, oral auction, or submitted electronically, whichever is indicated by the department at the time it advertises for bids.~~

~~(6) All competitive bids for cabinsites shall be submitted in the form of dollars per year. In no case may a bid be considered qualified if it is less than the minimum rental specified in the bid solicitation.~~

~~(a) For a bid to be considered, the bid must:~~

~~(i) include the bid application and application fee;~~

~~(ii) include a bid deposit that is ten percent of the amount the bidder bids; and~~

~~(iii) meet any other requirements as specified in the bid solicitation.~~

(6)(b) remains the same but is renumbered (1)(d).

(~~7~~2) The ~~cabinsite~~ cabin site will be leased to the highest qualified bidder unless~~, with the following qualifications~~:

(a) ~~if~~ the department, at its discretion, ~~board~~ may determine~~s that~~ the bid is not in the best interest~~s~~ of the trust and reject the ~~high~~ bid ~~is rejected.~~. T~~t~~he ~~board~~ department will issue its reason for the rejection in writing~~. The lease~~ and may accept the next highest qualified bid; ~~then be issued, at a rental rate determined by the board, to the first bidder who is willing to pay the board-determined rental, whose name is selected through a random selection process from all bidders for the cabinsite lease; or~~

(b) if no bidder is selected, or if the highest qualified bidder declines the bid, the department may determine if and when to reopen a lease for bid, or accept the next highest qualified bid. ~~offer the cabinsite lease to the next highest qualified bidder at that next bidder's bid amount.~~

(~~8~~3) The successful bidder shall sign and return the lease to the department within 30 days of receipt of the lease. If the lease is not signed and returned to the department within 30 days, the bidder ~~shall forfeit~~ forfeits the bid deposit, and the department may:

(a) ~~re~~advertise the lease for bid;

(b) ~~offer the lease to the next highest bidder acceptable to the department~~ accept the next highest qualified bid; or

(c) remains the same.

(~~9~~4) The ~~rental price~~ lease fee for the first year of a new lease ~~shall be~~ is the bid amount divided ~~prorated by dividing the full amount of the rental for the first year~~ by 365, and then multiplied ~~multiplying the result~~ by the number of days between the lease start date and the last day of the upcoming February.

~~(10) When a lease is cancelled, abandoned, or otherwise terminated, the department shall attempt to lease the land in accordance with this rule.~~

(~~11~~5) Any former lessee who has had a ~~cabinsite~~ cabin site lease cancelled and not reinstated by the board or department for nonpayment of ~~rentals~~ lease fees may bid upon that cancelled lease, or any other ~~cabinsite~~ cabin site lease provided that before the bid:

(a) the former lessee pays the unpaid ~~rentals~~ lease fee billed for that cancelled lease; and

(b) ~~if~~ the former lessee pays any unpaid taxes or similar assessments on the improvements, if ~~is~~ bidding on that cancelled lease.~~, the former lessee must pay any unpaid taxes or similar assessments on the improvements; and~~

~~(c) the bid is in compliance with this rule.~~

(~~12~~6) Any lessee who has had a ~~cabinsite~~ cabin site lease cancelled and not reinstated by the board or department for any reason other than nonpayment of ~~rentals~~ lease fees may be allowed to bid; however, the board or the department may reject any or all bids for a ~~cabinsite~~ cabin site from a lessee who has had a ~~cabinsite~~ cabin site lease cancelled in the past.

(7) The successful bidder for a cabin site lease may be required to pay for the cost of any surveys, fulfillment of zoning and subdivision requirements, and other assessments or costs related to compliance with any other local, state, and federal statutes and regulations.

AUTH: 77-1-202, 77-1-208, 77-1-209, MCA
IMP: 77-1-208, MCA

36.25.1010 ~~TERM OF CABINSITE LEASE~~ DURATION AND TRANSFER

(1) A ~~cabinsite~~ cabin site lease will be issued for a period not to exceed 15 years unless the ~~cabinsite~~ cabin site lessee demonstrates a need for a longer period for loan security purposes, in which case the new lease may be issued in the discretion of the department for a period up to five years longer than the term of the loan up to a maximum lease period of 35 years. If a lease is issued for term longer than 15 years as provided in this section, the following will apply:

(a) a d~~D~~demonstration of need ~~shall~~ must be supplied to the department in the form of a request from the lender asking for the extended lease term;~~.~~

(b) ~~A cabinsite~~ a cabin site lease ~~shall~~ will expire on February 28, ~~thirty-five~~ 35 years or less from the beginning date of the lease;~~.~~

(c) ~~L~~lease terms longer than 15 years are intended for loan security of dwelling improvements, not ancillary improvements such as septic tanks, wells, garages, and outbuildings; and~~.~~

(d) the lender may submit a form provided by the department to document its security interest in the improvements on the lease land; and, to secure in advance a transfer of the lease to the lender in the event of lessee default. ~~The loan amount shall be a minimum of 15 percent of the value of the dwelling improvements.~~

~~(e) The lender shall provide proof of the loan and the loan terms to the department.~~

(2) If all rental payments due have been paid and the terms of the lease have not been violated, the lease may be assigned on forms provided by the department. Any assignment is subject to the following:

(a) no assignment shall be effective until it is approved by the department, and the assignment fee has been paid;

(b) the department reserves the right to withhold approval of an assignment pending compliance with lease terms and conditions; and

(c) at the time of assignment or other transfer of interest in the leasehold, the department must be notified in writing of the sale price of the improvements and be provided copies of any agreements reflecting the transfer of both the lease and improvements, such as, but not limited to a realty transfer certificate.

(3) If the lessee, through enforcement of contract, foreclosure, tax sale, or other legal proceeding ceases to be the owner of the physical improvements, the department may—at its discretion—assign the lease to whom title has been transferred.

AUTH: 77-1-202, 77-1-206, 77-1-209, MCA
IMP: 77-1-208, MCA

36.25.1011 RENEWAL OF ~~CABINSITE~~ LEASE AND PREFERENCE RIGHT

(1) A current ~~cabinsite~~ cabin site is not subject to competitive bidding upon expiration if:

(a) the current lease is in good standing; and

(b) the new lease will continue to meet the terms and conditions described in this subchapter.

(2) The current lessee may apply to the department, ~~shall be sent an application~~ to request to renew the ~~cabinsite~~ cabin site lease if all ~~rentals~~ lease fees due have been ~~are~~ paid and there are no outstanding lease violations. ~~The application shall be accepted under the same conditions as specified in ARM 36.25.115; however,~~ An application for renewal must be on a form prescribed by the department.

(3) Applications for renewal will only be accepted after December 1 of the year preceding the expiration of the lease and must be postmarked on or before January 28 of the year of expiration of the lease. Failure to submit a renewal application postmarked on or before January 28 will result in an unleased tract, and the tract will be subject to the requirements for leasing an unleased tract under ARM ~~36.25.115~~ 36.25.1009.

(~~2~~4) Any renewal will be offered on the lease contract adopted by the board at the time of renewal. ~~A current cabinsite lessee that seeks to renew a lease using the competitive bid process shall follow the dates and processes described in ARM 36.25.1016 and 36.25.1018.~~

(~~3~~5) Any renewal will:

(a) be issued at the rental rate of 5 percent of the land value or $800, whichever is greater, unless otherwise determined by the board (in accordance with [New Rule I]); and

(b) will be subject to other lease fee terms in ARM 36.25.1003. ~~A cabinsite lease that is not subject to competitive bidding is not subject to bids upon renewal if the current lease is in good standing, and the new lease will continue to meet the terms and conditions described in ARM 36.25.1001 through 36.25.1013, including the rental provided in 36.25.1003.~~

AUTH: 77-1-202, 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA
IMP: 77-1-208, 77-1-235, 77-1-236, MCA

36.25.1013 ADMINISTRATIVE HEARINGS RELATED TO CABIN SITE LEASE DISPUTES (1) Any ~~cabinsite~~ cabin site lessee may request a hearing before the department to resolve any dispute which arises from the interpretation, ~~of, the~~ administration ~~of~~, or ~~the~~ cancellation of, or the ~~rental~~ lease fees due upon~~,~~ a ~~cabinsite~~ cabin site lease. However, the department ~~shall~~ will not provide for any hearing upon the assessed valuations determined by ~~the~~ DOR for any ~~cabinsite~~ cabin site under 15-7-111, MCA.

AUTH: 77-1-202, 77-1-208, 77-1-209, MCA
IMP: 77-1-208, MCA

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

NEW RULE I LEASE FEE (1) The annual lease fee for the first lease year of an individual cabin site lease will be the greater of:

(a) the amount bid by the lessee to secure the lease;

(b) the rental rate; or

(c) $800.

(2) Throughout the term of the lease, the annual lease fee for an individual cabin site lease, after the first lease year, shall be the previous year's rent plus an annually compounded escalator of two percent.

(a) The annual lease fee for the duration of the lease shall be compounded and provided within the terms of the lease.

(b) If the lease fee is $800 as provided in (1)(c), the lease fee will not include an annual escalator.

(3) Any lease renewal will begin a new lease, and a new first lease year.

(a) The department will provide lessee notice of any lease fee adjustment by November 1 of the year prior to the renewal lease year.

(b) The lessee is solely responsible for contacting DOR if he/she wants to contest the valuation of the leased land. Any adjustment in valuation made by DOR shall be incorporated into the lease fee calculation effective the year following department receipt of a DOR adjustment.

(4) The lease fee for the first year of a new lease shall be prorated by dividing the full annual lease fee for the first year by 365, then multiplying the result by the number of days between the lease start date and the last day of February.

(5) Every two years, beginning in 2017, the board will:

(a) review the data from all new competitive bids and lease renewals;

(b) complete a formal review by a qualified professional economist; and

(c) consider whether to revise procedures and/or rental rates.

AUTH: 77-1-202, 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA
IMP: 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA

NEW RULE II APPLICABILITY OF CABIN SITE RULES (1) ARM 36.25.1001 through 36.25.1015 shall apply to all cabin site leases issued after [the effective date of these rules].

AUTH: 77-1-202, 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA
IMP: 77-1-208, 77-1-235, 77-1-236, MCA

5. The department proposes to repeal the following rules:

36.11.101 CABINSITE MAINTENANCE AND RESTRICTIONS

AUTH: 77-6-104, MCA
IMP: 77-6-104, MCA

36.25.1003 CABINSITE MINIMUM RENTAL

AUTH: 77-1-202, 77-1-209, MCA
IMP: 77-1-208, MCA

36.25.1007 ACCESS TO CABINSITE IMPROVEMENTS ON AN INACTIVE LEASE

AUTH: 77-1-202, 77-1-209, MCA
IMP: 77-1-208, MCA

36.25.1012 CABINSITE HARDSHIP RENTAL DEFERMENT

AUTH: 77-1-202, 77-1-209, MCA
IMP: 77-1-208, MCA

36.25.1016 COMPETITIVE BIDDING

AUTH: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA
IMP: 77-1-235, 77-1-236, MCA

36.25.1017 ROLLING GEOGRAPHIC LOCATION AVERAGE LEASE RATE

AUTH: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA
IMP: 77-1-235, 77-1-236, MCA

36.25.1018 LEASE FEE FOR BID CABINSITE LEASES UNDER ARM 36.25.1016

AUTH: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA
IMP: 77-1-235, 77-1-236, MCA

36.25.1019 SUBLEASING AND ABANDONMENT OF IMPROVEMENTS

AUTH: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA
IMP: 77-1-235, 77-1-236, MCA

36.25.1020 SALE OF CABINSITE LANDS

AUTH: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA
IMP: 77-1-235, 77-1-236, MCA

36.25.1021 APPLICABILITY OF CABINSITE RULES

AUTH: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA
IMP: 77-1-235, 77-1-236, MCA

6. REASONABLE NECESSITY: The amendment, repeal, and adoption of these rules are reasonably necessary to clarify the cabin site leasing program under

the terms of the agreement referenced below. The amendments to ARM 36.25.1001, 36.25.1002, 36.25.1004 through 36.25.1006, 36.25.1008 through 36.25.1011, and 36.25.1013; the repeal of ARM 36.25.1003, 36.25.1007, 36.25.1012, and 36.25.1016 through 36.25.1021; and the adoption of New Rules I and II are all necessary to comply with the terms of a settlement agreement between all parties in Cause No. BDV-2012-39, in the First Judicial District, Lewis and Clark County, Montana. The agreement was approved by the Land Board on October 19, 2015, and signed by Judge Jeffrey Sherlock, First Judicial District, on November 10, 2015. The repeal of ARM 36.11.101 is necessary as the forest management bureau no longer manages the cabin site leasing program.

7. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Amy Randall, P.O. Box 201601, Helena, MT, 59620-1601; telephone (406) 444-3844; fax (406) 444-2684; or e-mailed to arandall@mt.gov, and must be received no later than 5:00 p.m. on March 4, 2016.

8. Amy Randall, Department of Natural Resources and Conservation, has been designated to preside over and conduct the public hearing.

9. An electronic copy of this proposal notice is available through the department's web site at http://www.dnrc.mt.gov. The department strives to make the electronic copy of 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.

10. 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 must make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources, or a combination thereof. 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 Lucy Richards, P.O. Box 201601, 1625 Eleventh Avenue, Helena, MT 59620; fax (406) 444-2684; e-mail lrichards@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

11. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The bill sponsor was contacted by e-mail on December 11, 2015.

12. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment, adoption, and repeal of the above-referenced rules will not significantly impact small businesses.

/s/ John E. Tubbs
JOHN E. TUBBS
Director
Natural Resources and Conservation

/s/ Dennison Butler
DENNISON BUTLER
Rule Reviewer

Certified to the Secretary of State on January 25, 2016

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 44.5.121 pertaining to miscellaneous fees charged by the Business Services Division	))))	AMENDED NOTICE AND EXTENSION OF COMMENT PERIOD ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On December 24, 2015, the Secretary of State published MAR Notice No. 44-2-214 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 2241 of the 2015 Montana Administrative Register, Issue Number 24.

2. The Secretary of State 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 Secretary of State no later than 5:00 p.m. on February 18, 2016, to advise us of the nature of the accommodation that you need. Please contact Jorge Quintana, Secretary of State's Office, P.O. Box 202801, Helena, Montana, 59620-2801; telephone (406) 431-7718; fax (406) 444-4249; TDD/Montana Relay Service (406) 444-9068; or e-mail jquintana@mt.gov.

3. The Secretary of State is extending the comment period to give notice to the sponsor of Senate Bill 1 (2015) of this rule notice. The Secretary of State first attempted to amend this rule in June of 2014 in MAR Notice No. 44-2-196 to set by rule the fee charged for the filing of surety bonds, cashier's checks, or certificates of deposit. The Secretary of State is required by 2-15-405, MCA, to "set by administrative rule each fee authorized by law."

The statutes imposing the filing duties for these documents are 20-7-604, MCA, and 82-1-104, MCA. Although these statutes did not state that the Secretary of State may charge a fee for these services, the Secretary of State believes that 2-15-405, MCA, contains rulemaking authority for all fees charged by the Secretary of State for all legislatively mandated filings in the office.

House Bill 639, as passed by the 2001 Montana Legislature, enacted 2-15-405, MCA. House Bill 639 amended 27 statutes that dealt with Secretary of State fees, eliminating any reference to rulemaking that appeared in those 27 statutes, and providing the following language: "The secretary of state shall set and deposit fees authorized in this section in accordance with [section 1] (codified as 2-15-405, MCA)."

It was the Montana Legislature's intent that 2-15-405, MCA, provides broad rulemaking authority for all Secretary of State fees and eliminates the need to mention rulemaking authority for fees in any statute that mentions Secretary of State

filing fees. However, the State Administration and Veterans' Affairs committee (SAVA) of the Montana Legislature decided to introduce legislation to the 2015 Montana Legislature inserting Secretary of State rulemaking authority into 20-7-604, MCA, and 82-1-104, MCA.

Now, almost one year later, the SAVA committee is again delaying the Secretary of State's attempt to comply with the requirement that all its fees be set by rule. Per 2-4-302, MCA, an agency is required to notify the primary sponsor of "a rule that initially implements legislation for a program." The two statutes amended by Senate Bill 1 have long been in existence and relate to textbook dealers and geophysical exploration, neither of which programs are under the authority of the Secretary of State. The amendments provided to the two statutes by Senate Bill 1 simply inserted rulemaking authority into two long existing statutes, which is not "a rule that initially implements legislation for a program."

Although, in the interest of time and efficiency, the Secretary of State agreed to re-notice the rule amendment and provide notice to the sponsor of Senate Bill 1, the Secretary of State wants to voice its strong disagreement with the statutory interpretations imposed by SAVA and the unnecessary rulemaking delays imposed upon the agency.

4. Concerned persons may present their data, views, or arguments concerning the proposed action in writing to: Jorge Quintana, Secretary of State's Office, P.O. Box 202801, Helena, Montana 59620-2801, or e-mail jquintana@mt.gov, and must be received no later than 5:00 p.m., March 3, 2016.

5. The bill sponsor was contacted by letter on January 20, 2016.

6. No member of the public commented on the rule notice.

/s/ JORGE QUINTANA
Jorge Quintana
Rule Reviewer

/s/ LINDA MCCULLOCH
Linda McCulloch
Secretary of State

Dated this 25th day of January, 2016.

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 12.2.601 pertaining to state land access tax credit	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 29, 2015, the Fish and Wildlife Commission (commission) published MAR Notice No. 12-446 pertaining to the proposed amendment of the above-stated rule at page 1803 of the 2015 Montana Administrative Register, Issue Number 20.

2. The commission has amended the rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

12.2.601 PUBLIC LAND ACCESS TAX CREDIT (1) through (4) remain as proposed.

(5) The department must consider the following when awarding contracts:

(a) remains as proposed.

(b) verification that the public land will be available for a majority of the year to all general recreational use including hunting, fishing, trapping, hiking, wildlife watching, and other uses compatible with the use of public lands;

(c) through (8) remain as proposed.

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

COMMENT 1: The commission received three comments suggesting that trapping should be included in the list of general recreational uses on public lands.

RESPONSE 1: The commission has amended the rule to include trapping on the list of general recreational uses on public lands.

/s/ Aimee Fausser
Aimee Fausser
Rule Reviewer

/s/ Dan Vermillion
Dan Vermillion
Chairman
Fish and Wildlife Commission

Certified to the Secretary of State January 25, 2016

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 12.6.106 pertaining to removal of shelter	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 29, 2015, the Fish and Wildlife Commission (commission) published MAR Notice No. 12-458 pertaining to the proposed amendment of the above-stated rule at page 1806 of the 2015 Montana Administrative Register, Issue Number 20.

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

3. No comments or testimony were received.

/s/ Aimee Fausser
Aimee Fausser
Rule Reviewer

/s/ Dan Vermillion
Dan Vermillion
Chairman
Fish and Wildlife Commission

Certified to the Secretary of State January 25, 2016.

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

In the matter of the adoption of NEW RULES I through IX, related to the reopening of medical benefits automatically closed in certain workers' compensation claims	)))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On November 25, 2015, the Department of Labor and Industry published MAR Notice No. 24-29-312 regarding a public hearing on the proposed adoption of the above-stated rules on page 2073 of the 2015 Montana Administrative Register, Issue No. 22.

2. On December 18, 2015, a public hearing was held at which time oral and written comments were received from the public. Additional written comments were received during the public comment period.

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

Comment 1: Commenters questioned how the department would ensure that reviewing physicians are neutral and qualified.
Response 1: The department has contracted with an independent third party, a medical review organization (MRO), to recruit a pool of Montana-licensed physicians who are available to perform medical reviews. An MRO has been selected via a competitive solicitation process, and the contract with the vendor, Maximus, has been finalized. The MRO is responsible for recruiting and contracting with a sufficient number of Montana-licensed physicians in a range of medical specialties, who will review medical and other information and make recommendations regarding whether closed medical benefits should be reopened. The physicians will be working pursuant to a contract with the MRO, and the MRO is responsible for paying the physicians for the review services.

In addition, the MRO will receive the medical records and other information submitted by the parties. The MRO will organize and distribute the records and information to the reviewing physicians. The MRO will manage workflow so that panel physicians timely submit their reports to the department's medical director.

The department concludes that the physicians who will be recruited by the MRO, assigned by the MRO to individual reviews, and paid by the MRO for review services, are more likely to be independent than if the department was recruiting and scheduling reviews. The MRO has an existing pool of physicians, and the MRO will recruit and screen physicians to ensure that the panel members are properly

licensed to practice in Montana. Physicians who have previously treated or examined an injured worker will not be eligible to serve as a reviewer for that worker.

Comment 2: Commenters stated that in order to be eligible to serve on a medical review panel, not only must the physician be licensed to practice in Montana, but also have hospital privileges as specified by 39-71-116(41)(a), MCA, and have been in practice for 5 years.
Response 2: The department believes that had the Legislature intended to restrict reviewing physicians to those individuals who meet the criteria of being a "treating physician," that language would have been used. Administrative rules cannot impose additional qualifications when the qualifications are expressed in statute.

As to the suggestion that a reviewing physician have been in practice for 5 years, the department notes that the statutory criteria is that the physician have "expertise and experience" in the area of medicine that is relevant to the injured worker's medical condition. The department is not aware of any scientific studies that correlate a specific number of years of practicing medicine to having "expertise and experience" in a particular field of medicine. The department is amenable to being presented with such data, however, and to amending its rules in the future.

Comment 3: A commenter stated that the definition in NEW RULE II(13) of "physician" should not include any person who is not licensed under Title 37, chapter 3, MCA, and limit the term to individuals referred to in 39-71-116(41)(a), MCA.
Response 3: As the commenter notes, the term "physician" is not expressly defined in the Workers' Compensation Act, although the term "treating physician" is defined in the Act. The department notes that there is a wide range of health care providers who are authorized to be a "treating physician" as defined in 39-71-116(41), MCA, and authorized to not only treat an injured worker, but to plan and coordinate the injured worker's medical care. The department concludes that had the Legislature intended to restrict the term, in the context of 39-71-717, MCA, solely to persons licensed under Title 37, chapter 3, MCA, it could have expressly made that limitation within the statute. In implementing the provisions of 39-71-717, MCA, the department concludes that it is reasonable to define, solely for the purposes of reviewing petitions to reopen medical benefits closed by operation of law, the term "physician" more broadly than just persons licensed under Title 37, chapter 3, MCA.

Comment 4: Commenters suggested that the injured worker be allowed to select one of the physicians who will be on the panel.
Response 4: The panel members who are not the department's Medical Director will be selected by the MRO from a pool of Montana-licensed physicians, as described in Response 1. Because of the short time allowed by law for medical review, the department concludes that it is not feasible to consult with either the injured worker or the insurer about the prospective panel members who might have an appropriate medical specialty and workload that will allow the review to be performed timely. Even if a party selected a qualified physician to conduct a review, there is no assurance that the selected physician would be willing to perform the review within the time and other constraints imposed under the law.

Comment 5: Commenters stated that an injured worker should have the right to object to a physician selected as a panel member.
Response 5: The department believes that both the injured worker and the insurer will have an opportunity to object to the qualifications of a selected physician during judicial review. The department concludes that given the 60-day timeline provided by 39-71-717, MCA, it is not feasible to provide either party with a pre-medical review challenge to a physician selected to be on the review panel. See also Response 16 for a more detailed description of business process used to comply with the 60-day timeline.

Comment 6: Commenters stated that the opinion of the treating physician should be taken into account by the medical reviewer(s).
Response 6: The department agrees, to the extent that the opinion of the treating physician is reflected in the medical records or other information submitted as part of the review process. The department notes that the injured worker is allowed to submit medical records and additional information along with the petition, or within the 14-day submission period. The department suggests that medical records and other information be submitted with the petition, but does not require that medical records or other information be submitted contemporaneously with the petition.

Comment 7: Commenters stated that the department should direct members of the medical review panel to apply the Montana common-law rules of evidence in evaluating the medical reports and other information as part of the reopening process.
Response 7: The department notes that the role of the medical review panel is to provide a professional evaluation of the information presented, not to make a legal determination. The department, through its MRO vendor, will provide training for panel members, including the appropriate evaluation of information presented as part of the review process.

Comment 8: Commenters stated that the reopening rules should be as simple as possible.
Response 8: The department agrees, and believes that NEW RULES I through IX are as simple as reasonably feasible, given the text of the statute that the rules implement.

Comment 9: A commenter stated that in NEW RULE I(2)(c) the reference to claims where the insurer did not fully accept liability was somewhat ambiguous, and suggested defining when a claim is not "fully accepted." The commenter stated that it assumed that the phrase meant that the claim was denied, but was uncertain if that was the meaning.
Response 9: The department agrees that the present wording is not as clear as it should be. The department has amended NEW RULE I accordingly.

Comment 10: Commenters suggested that the phrase "or occupational disease" be added where the current language only refers to an injury.

Response 10: The department agrees with the comment and has amended NEW RULE I accordingly.

Comment 11: A commenter pointed out that certain phraseology used in NEW RULE VI(4) and in NEW RULE III(5)(a) and NEW RULE VIII(5) was not identical, and suggested that the phrase "nature and extent" be used consistently throughout the rules.
Response 11: The department agrees with the comment, and has amended NEW RULE VI accordingly.

Comment 12: Commenters requested that rules expressly acknowledge that the recommendations of the medical director are subject to being overturned by the Workers' Compensation Court or the Montana Supreme Court.
Response 12: The department acknowledges that virtually all of its decisions are subject to judicial review. The department believes that there is no dispute that the decision of a court of competent jurisdiction overturning a department determination is binding upon the department. The department concludes that the requested language is not needed, and would unnecessarily complicate the wording of the rules without providing meaningful clarification.

Comment 13: Commenters objected to the provisions of NEW RULE III(6) as being beyond the statutory authority granted to the department, and injects an additional layer of administrative review into the reopening process.
Response 13: The department believes that the provisions of NEW RULE III(6) are reasonably necessary to implement 39-71-717, MCA, and the process for reopening medical benefits that are closed by operation of law. As noted in NEW RULE I(2)(c), the reopening process does not apply to claims where there is a dispute over the compensability of the underlying claim. The department reasons that if the insurer has not accepted liability for the underlying claim (including disputing liability by paying benefits pursuant to a reservation of rights), there are no medical benefits that have been determined to be owed to the injured worker, and therefore an entitlement to benefits has not begun. The provisions in question do not apply to situations where the insurer has accepted liability for the claim. The provisions do not apply where the insurer merely denies liability for certain medical conditions. The provisions of NEW RULE III(6) provide an insurer an opportunity to dispute that it has accepted liability for the claim, and that the reopening rules do not apply to the claim. While the department believes that such a scenario is unlikely to occur more than four years after the claim was submitted to the insurer, the department recognizes that such a possibility exists.

The department disagrees with commenter's suggestion that NEW RULE III(6) creates a new or additional layer of administrative review. To the contrary, NEW RULE III(6) makes it clear that the reopening process cannot make a determination of liability regarding the underlying claim, and directs the parties to mediation and the Workers' Compensation Court for resolution of the liability dispute.

In reviewing NEW RULE III(6) in response to the comments, the department has concluded that the phrase "rebuttable presumption" might be deemed to inappropriately imply a particular legal standard. Accordingly, the department has made minor changes to the wording used in the lead-in sentence for (6).

Comment 14: Commenters stated that the petition forms should be placed on the department web site for review and comment as part of the rulemaking process.
Response 14: The department placed the draft petition forms on its web site during the public comment period. As noted in Response 15, the petition forms are being revised in response to comments made during the rulemaking process.

Comment 15: Commenters objected to provisions in the rules requiring that a petition be submitted on a department-approved form. The commenters suggested that any written request for reopening of closed medical benefits should be treated as a petition. The same commenters also stated that petitions not be rejected because of a failure to supply certain information.
Response 15: In developing the internal business process for the reopening of medical benefits closed by operation of law and in drafting of these rules, the department considered what information was the minimum necessary to start the review process. The department decided that certain minimum information, identifying the injured worker (along with contact information) and the particular claim in question, is necessary to start the review process. In addition, the petition form contains an authorization for release of information for the purposes of the medical review process. The petition form developed by the department is a simple one page, "fill in the blanks" document, and is designed to be user-friendly. The department concludes that without sufficient identification of the injured worker and the claim (and therefore which insurer is on the risk), and a signed authorization for release of information, it is impossible to timely move forward with the review process. In response to these and related comments, however, the department has eliminated the field to describe the medical benefits requested to be reopened, and has amended the forms accordingly.

To the extent that the commenters object to using "the form" of the petition document provided by the department, the department will accept any writing that contains the required elements of information identified on the form, and an authorization, signed by the injured worker, for release of information that expressly allows the release of medical and other information for use in the medical review process. A writing which does not contain all of the required elements of information, or does not include a signed authorization for release of information will be rejected. A letter advising the injured worker of the rejection will specify the reason(s) for rejection.

Comment 16: Commenters questioned the department's ability to reject a petition, and stated that if the petition was incomplete, the missing information could be provided to the department at some point in the future.
Response 16: The department notes that it has a maximum of 60 calendar days in which to review a petition and issue the medical director's report and

recommendations. The 60-day clock begins to run on the date the petition is accepted. There is no statutory authority for "stopping the clock" if the petition is accepted despite it being incomplete. In order to complete the review and issue the medical director's report and recommendation, the acceptance of the petition triggers the 14-day period for medical records and other information to be provided by the insurer. Recognizing that an insurer has to be notified of the submission of the petition, it will be approximately the 17th day by which medical records and information must be submitted. While insurers and injured workers are requested to provide the information in electronic format, the department recognizes that some injured workers and some insurers might not have the capability to send documents electronically. If the department receives paper documents, they will have to be scanned into an electronic format. The department expects that by not later than the 20th day the information can be transmitted to the panel physicians for review. A panel member will have a maximum of 30 days in which to review the records and prepare a report and recommendation and return that report and recommendation to the department. The department's medical director will then have 10 days to review the three reports and prepare a consensus report and recommendations. In that 10-day period, it may be necessary to consult with the other panel members on matters that need clarification. In order to meet the statutory 60-day review period, the department concludes that it is not feasible to accept incomplete petitions.

Comment 17: Commenters stated that the department lacks authority to reject an incomplete petition if it pertains to a claim that is eligible for medical review.
Response 17: The department is authorized by 39-71-203, MCA, to do all things necessary or convenient in the exercise of any power, duty, or jurisdiction conferred upon it by the Workers' Compensation Act. The department has a duty to implement the medical benefits reopening provisions contained in 39-71-717, MCA. The department believes that it has selected a reasonable method for implementing the statute, including requiring a properly completed petition form be submitted to the department, before the medical review process starts.

Comment 18: Commenters stated that there was no need for a joint petition form, and that an injured worker and an insurer were free to stipulate to continuing medical benefits. The commenters characterized the joint petition form as being "overly burdensome and oppressive" and that the department was "micromanaging" the contractual freedom of contract between the parties.
Response 18: The department concludes that the commenters appear to misapprehend the purpose of NEW RULE VI and the joint petition process. As provided by NEW RULE VI(1), the filing of a joint petition is voluntary (". . . the worker and the insurer may file a joint petition for reopening.") The joint petition process is designed to provide a streamlined way for parties to enter into an agreement for the reopening of medical benefits that have closed by operation of law. The availability of the joint petition process in no way precludes an injured worker and an insurer from reaching an agreement or settlement. The reopening petition process described by NEW RULES I through IX is intended solely to implement the provisions of 39-71-717, MCA.

Comment 19: Commenters requested that the words "review and" be deleted from NEW RULE VI(3).
Response 19: The department believes that pursuant to 39-71-717(3), MCA, a petition for reopening must undergo a review by the medical director, in order for the medical director to issue a report and recommendation. The department anticipates that the review will be cursory, however, in light of the agreement of the parties in a joint petition.

Comment 20: Commenters stated that 14 days is not a long enough period for the injured worker to submit medical records and other information.
Response 20: Because the injured worker controls the timing of when the petition is submitted to the department, the department concludes that 14 days after the petition is accepted is a reasonable amount of time to provide medical records and additional information. The injured worker can submit medical records and additional information with the petition, if desired. As described in Response 16, there is a short 60-day period from the submission of the petition to the time a report and recommendation is due.

Comment 21: Commenters objected to the proposed use of consultants to assist panel members in the medical review process, and stated that using a consultant constituted an improper ex parte contact and violated the rights of injured workers.
Response 21: While the department disagrees that there would be anything improper about using an independent consultant in conjunction with the review process, the department concludes that the use of consultants as an aid to panel physicians does not appear to be necessary at this time. The department has amended the rules to remove the references to using consultants.

Comment 22: Commenters stated that if non-physician medical consultants are used as part of the review process, that fact and the substance of the consultation should be disclosed.
Response 22: The department agrees with the comment, but as noted in Response 21, it is deleting the use of consultants from the rules.

Comment 23: A commenter asked whether the parties would automatically receive a copy of all physician or consultation reports, along with the medical director's report and recommendation.
Response 23: The department does not intend to automatically send those other reports to the parties. Those "other reports" will be provided to a party upon written request, however. The department will monitor whether there are requests for "other reports" in a significant portion of reopening petition cases. If there are, the department will, as a business practice, begin providing those reports to the parties without the need for a party to make a written request. As noted above, the department is eliminating the provisions regarding consultants.

Comment 24: Commenters stated that an injured worker should be able to withdraw an election to have the medical review conducted by the medical director only (as opposed to the three-member panel).

Response 24: The department concludes that the mutual agreement of an injured worker and the insurer to review by the medical director only should be given effect. Review by the medical director only is available only when the injured worker has agreed to such a review. The department concludes that given the 60-day timeline provided by 39-71-717, MCA, it is not efficient or feasible to send the medical reports and other information to two panel members after the election has been made.

Comment 25: Commenters objected to the use of the standard for reopening as being treatment needed to look for work or to continue to work as being contrary to Montana case law and public policy.
Response 25: The standard that medical benefits be reopened only when injured workers' medical condition is a direct result of the compensable injury or occupational disease and "requires medical treatment in order to allow the worker to continue to work or return to work" is the exact wording used by 39-71-717(2), MCA. The department, as an executive branch agency, is bound by the statutory language, and cannot enlarge or reduce the scope of the standard. The department respectfully suggests that comments about what the public policy ought to be in this matter are more appropriately directed to the Montana legislature.

Comment 26: Commenters objected to the inclusion of the burden of proof provisions in NEW RULE VIII(3).
Response 26: While the department believes that the statement regarding the burden of proof accurately reflects Montana law, the department concludes that the burden of proof provision may be removed from the rule without effect, and has amended the rule accordingly.

Comment 27: Commenters stated that it is impossible for medical reviewers to perfectly predict the future medical needs of injured workers, and specify the specific procedures, testing, and times necessary.
Response 27: The department agrees with the comment. The recommendations of further medical care will necessarily be general, and will (as required by 39-71-717(8), MCA) direct that such care be consistent with Montana's utilization and treatment guidelines. The department does not expect the medical review will result in recommendations for a specific treatment or care regimen, unless the injured worker and the insurer have agreed to specific treatments, timing, or duration of care, and have submitted a joint petition.

The department does not expect that a decision to reopen medical benefits will in any way diminish the responsibility of an insurer to properly administer a claim. Disputes concerning the necessity or appropriateness of specific treatments will be subject to the dispute resolution process provided by law for disputes between injured workers and insurers concerning benefits.

Comment 28: Commenters stated that any delay in providing needed medical benefits worked to the advantage of the insurer and to the detriment of the injured worker. The commenters stated that the rules should not reference the nature,

extent, or scope of the medical benefits being reopened, and that medical benefits should be reopened, period.
Response 28: Pursuant to 39-71-717(8), MCA, the medical report "must state the extent to which the benefits must be reopened consistent with the utilization and treatment guidelines." In addition, the benefits reopened "remain open for 2 years or until maximum medical improvement is achieved following surgery or the recommended medical treatment, whichever occurs first." The department concludes that its rules appropriately implement the statutory provisions established by the Legislature.

Comment 29: Commenters suggested that specifying the nature and extent of the benefits to be reopened would cause injured workers to need to repeatedly file petitions as the injured worker's medical condition changed or deteriorated.
Response 29: The department again concludes that the commenters appear to misapprehend what will be recommended by the medical report. It is impossible for the medical reviewer to forecast with precision the future medical needs of an injured worker. Absent a general agreement by the injured worker and the insurer as to what medical benefits should be reopened, and the extent and duration of those benefits, the medical report will recommend that if medical benefits should be reopened, that the benefits are reopened for the purposes provided by statute (to enable the injured worker to return to work or remain at work), and that those medical benefits be provided as needed, in a manner consistent with the utilization and treatment guidelines. See also Response 27. Accordingly, the department believes that it will not be necessary for injured workers to need to file multiple petitions for reopening.

Comment 30: A commenter questioned, in regards to NEW RULE III(2)(b)(ii), whether an injured worker could submit a second or subsequent petition for reopening.
Response 30: No. The department believes that 39-71-717, MCA, does not contemplate successive petitions being considered. The department is aware that the underlying legislation was designed to "close claims" after 5 years from the date of injury. The department notes that the injured worker controls the timing of the submission of the petition for reopening, and has more than a 5-year window to request reopening. The department believes that in that light, it is not rational or efficient to have a system that allows multiple petitions for reopening, or for an injured worker to request reopening of medical benefits "just in case" they might be needed at some point in the future. The department therefore concludes that multiple petitions are not consistent with the legislative intent regarding closure of medical benefits by operation of law.

Comment 31: Commenters stated that 39-71-717, MCA, was likely unconstitutional, and that therefore, any rules implementing the statute would also be unconstitutional. The commenters stated that state agencies have the ability to not fully implement unconstitutional statutes. The commenters asked the department to revise its rules so as not to violate injured workers' constitutional rights.

Response 31: The department notes that as an executive branch agency, it cannot usurp the authority of the judicial branch to declare that a statute is unconstitutional, nor can it substitute its judgment for the Legislature's judgment, as to appropriateness of the public policy expressed in statute. The department believes that the rules as proposed do not violate an injured worker's constitutional rights.

Comment 32: Commenters asserted that the proposed medical review process, including the use of consultations, constitutes an unlawful ex parte communication with medical providers, and violates the various rights of injured workers.
Response 32: Because the department is not communicating with any of the health care providers furnishing treatment to the injured worker, the department concludes that there is no prohibited ex parte communication. The department's reopening rules implement the requirements of 39-71-717, MCA, which require that independent physicians review the medical records and other information concerning the injured worker in order to make a recommendation concerning the reopening of medical benefits that have closed by operation of law. In addition, the department rejects any implication that, like an insurer, it has any financial or other adverse interest to an injured worker. The department concludes that the proposed reopening process does not violate the rights of injured workers due to its contact with independent medical reviewers.

Comment 33: Commenters generally asserted that the rules and petition forms demonstrated an "inherent bias" and created additional barriers to injured workers obtaining the quid pro quo of the Workers' Compensation Act.
Response 33: The department respectfully suggests that insofar as the commenters believe that the Workers' Compensation Act is inherently biased against the rights of workers, and unduly favors the rights of employers and insurers, the commenters should direct their concerns and arguments to the legislative branch of government. The department lacks the authority to revise the Workers' Compensation Act to make systemic changes which the commenters believe are appropriate and necessary for the protection of injured workers.

Comment 34: Commenters suggested that the department should order an insurer to immediately begin paying medical benefits recommended as the medical director's report and recommendation, and that the insurer's duty to pay is not stayed by judicial review.
Response 34: The department respectfully suggests that the commenters appear to have misapprehended the effect of the department's reopening of closed medical benefits. The department does not expect that it will provide a "laundry list" of specific treatments and treatment intervals in its recommendation. See Response 29. Instead, the department expects that it will recommend the reopening of medical benefits to the extent needed by the injured worker in order to return to work or stay at work. Insurers have a duty to act reasonably in paying benefits, and the department views reopened medical benefits as being subject to that same obligation. The department further concludes that 39-71-717, MCA, does not grant the department authority to order an insurer to pay specific benefits.

Comment 35: A commenter suggested that the department should require insurers to provide notice to injured workers of the pending closure of medical benefits 120, 90, 60, and 30 days in advance of the closure by operation of law, and at the time of closure.
Response 35: The department concludes that it lacks statutory authority under 39-71-704 or 39-71-717, MCA, to require insurers to provide the notifications requested by the commenter.

Comment 36: A commenter asked whether the department would send to the injured worker a copy of all the medical records and other information submitted by the insurer.
Response 36: No. Each party has a responsibility under NEW RULE V(1)(b) to send the other party any medical records or other information which the other does not have. An injured worker can get a copy of the medical records contained in the insurer's claim file by requesting them directly from the insurer.

Comment 37: Commenters stated there is no statutory basis for having the biennial medical review conducted only by the medical director, as opposed to review by a panel.
Response 37: The department believes that in light of the presumption of correctness of the original medical director's report and recommendation provided for by 39-71-717, MCA, it is reasonable to have the medical director conduct the biennial review to determine if the previous recommendation is still appropriate. If the appropriateness of the previous recommendation is questioned, then a panel review will take place before any change can be made to the original recommendation. Likewise, the department believes that it is reasonable, when the parties originally agreed to a medical director only review, to continue using only the medical director for the biennial review.

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

NEW RULE I (24.29. 3101) INTRODUCTION - APPLICABILITY - VOLUNTARY PAYMENTS (1) through (2)(b) remain as proposed.

(c) in which the insurer did not ~~fully~~ accept liability for the underlying ~~accident~~ injury or occupational disease, or only accepted liability subject to a reservation of rights; or

(d) arising on or after July 1, 2011, where the injury or occupational disease results in:

(i) permanent total disability; or

(ii) the fitting of a prosthesis which may need to be repaired or replaced.

(3) through (5) remain as proposed.

AUTH: 39-71-203, MCA
IMP: 39-71-105, 39-71-107, 39-71-704, 39-71-717, MCA

NEW RULE III (24.29.3107) TIMELINES AND EXPLANATION OF STATUS CLASSIFICATIONS OF A PETITION (1) through (5) remain as proposed.

(6) ~~There is a rebuttable presumption~~ Unless the insurer timely notifies the department to the contrary, the department will presume that the petition relates to a claim which the insurer acknowledges is compensable. An insurer may dispute that presumption in writing by delivering to the department and the petitioner notice of the dispute regarding compensability within 14 days of the department's acceptance of the petition.

(a) through (7) remain as proposed.

AUTH: 39-71-203, MCA
IMP: 39-71-717, MCA

NEW RULE VI (24.29.3117) JOINT PETITION FOR REOPENING

(1) through (3) remain as proposed.

(4) In recognition that following the filing of the worker's petition, the parties may come to a voluntary agreement as to the nature and ~~scope~~ extent of medical benefits to be reopened, the department will treat the filing of a joint petition for reopening as a request for withdrawal of the worker's petition.

AUTH: 39-71-203, MCA
IMP: 39-71-717, MCA

NEW RULE VII (24.29.3121) REVIEW BY MEDICAL DIRECTOR - CONSENT OF BOTH PARTIES (1) remains as proposed.

~~(2) The medical director may consult with nonphysician medical providers if the medical issues presented for review make it appropriate to do so.~~

(3) through (5) remain as proposed, but are renumbered (2) through (4).

AUTH: 39-71-203, MCA
IMP: 39-71-717, MCA

NEW RULE VIII (24.29.3124) REVIEW BY MEDICAL REVIEW PANEL - REPORT AND RECOMMENDATIONS (1) Unless both the worker and the insurer agree to have a petition for reopening reviewed solely by the department's medical director, the petition will be reviewed by a three-member panel of physicians. ~~The members of the medical review panel may consult with nonphysician medical providers if the medical issues presented for review make it appropriate to do so.~~

(2) remains as proposed.

~~(3) The worker has the burden of proof to demonstrate the nature and duration of the medical benefits that should be reopened. Medical benefits will not be reopened unless the worker shows, based on a preponderance of evidence, that the criteria of (2) have been satisfied.~~

(4) through (7) remain as proposed, but are renumbered (3) through (6).

AUTH: 39-71-203, MCA
IMP: 39-71-717, MCA

5. The department has adopted the following rules as proposed: NEW RULE II (24.29.3103), NEW RULE IV (24.29.3111), NEW RULE V (24.29.3114), and NEW RULE IX (24.29.3127).

/s/ MARK CADWALLADER	/s/ PAM BUCY
Mark Cadwallader	Pam Bucy, Commissioner
Alternate Rule Reviewer	DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State January 25, 2016.

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

In the matter of the amendment of ARM 24.207.101 board organization, 24.207.401 fees, 24.207.406 definitions, 24.207.501 examination, 24.207.502 application requirements, 24.207.509 qualifying experience, 24.207.518 mentor requirements, 24.207.1501 registration and renewal, 24.207.1507 record-keeping requirements, 24.207.2305 unprofessional conduct, and the repeal of ARM 24.207.520 renewals	))))))))))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On September 24, 2015, the Board of Real Estate Appraisers (board) published MAR Notice No. 24-207-39 regarding the public hearing on the proposed amendment and repeal of the above-stated rules, at page 1405 of the 2015 Montana Administrative Register, Issue No. 18.

2. On October 15, 2015, a public hearing was held on the proposed amendment and repeal of the above-stated rules in Helena. Several comments were received by the October 23, 2015, deadline.

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

COMMENT 1: A commenter noted that the Federal Financial Institutions Examination Council Appraisal Subcommittee's (ASC) policy statement 2.B. 2.c. prohibits a state from charging a temporary practice permit fee exceeding $250, including one extension fee. The commenter pointed out that amendments to ARM 24.207.401 will establish a temporary practice permit fee of $250 and a separate $50 fee for renewal of the temporary permit for a total of $300.

RESPONSE 1: The board agreed and is amending the rule to eliminate the temporary practice renewal fee. The original temporary practice permit fee will remain at $250.

COMMENT 2: A commenter noted that proposed changes to ARM 24.207.502 includes new language at (3)(e) that the board will select work product from the experience log that is commensurate with the level of credential sought. The commenter noted that ASC Policy Statement 4. D. 2. a. provides that states must analyze a representative sample of the applicant's work product. The commenter

observed that a representative sample may include work that is not commensurate with the credential level sought.

RESPONSE 2: The board agrees and is amending the rule accordingly.

COMMENT 3: One commenter noted that the ASC does not approve individual appraisers and opined that "strictly abides," as used in ARM 24.207.502(4)(a), may be implemented in a way that creates a higher standard than that of ASC Policy Statement 5. A. The commenter suggested it would be more accurate to require that reciprocal applicants have current and unencumbered licenses in jurisdictions that are in compliance with Title XI as determined by the ASC.

RESPONSE 3: The board agrees and is amending the rule accordingly.

COMMENT 4: One commenter suggested adding the following language to ARM 24.207.510:

"(2) Unless prohibited by the policies of a client or an end user of an appraisal report or by other state or federal law, a real property appraiser performing appraisal services for a Montana licensed appraisal management company is authorized to transfer an appraisal assignment to another licensed or certified real estate appraiser who is on the appraisal management company's appraisal panel if:

(a) the transferee meets the requirements stated in the engagement documents;

(b) the transferor notifies the appraisal management company prior to the transfer;

(c) the transferee is an employee of the transferor; and

(d) the transferee can complete the appraisal assignment in accordance with the Uniform Standards of Professional Appraisal Practice, assignment conditions and pursuant to the requirements of the board."

RESPONSE 4: The board appreciates the issues the commenter has raised by suggesting the additional language to ARM 24.207.510. However, because the board did not proposed to amend this rule, the suggested language is outside of the scope of the rule notice.

COMMENT 5: A commenter requested that the board only require Appraisal Management Companies (AMCs) to retain evidence of the client's or end-user's policy, rather than the policy itself as a simpler means to confirm compliance. The commenter stated the proposed requirement that AMCs provide an actual client or end-user policy document is burdensome and unnecessary. AMCs have multiple clients and the information technology (IT) changes necessary to accommodate such an inclusion are costly. Many of the AMC client policies are embedded within their contracts with the AMC and not easily extracted. The commenter opined that the current requirements for engagement documents are already expansive enough and additional requirements would be too burdensome. The commenter suggested amending ARM 24.207.1507(1)(e) accordingly.

RESPONSE 5: The board concluded that the proposed language is more protective of the public's interest by allowing the appraiser to determine the appropriate scope of work. The board does not believe that it would be unduly burdensome and is amending the rule exactly as proposed.

COMMENT 6: A commenter objected to the proposed amendment to ARM 24.207.1507(1)(e) to require that AMCs keep and make available engagement lists, including a copy of the actual policy that prohibits inter-office transfers. The commenter stated that the amendments are unnecessarily burdensome and will create inefficiencies and delayed transactions. The commenter stated that the proposed amendments are very unlikely to cause clients and end users to begin permitting inter-office assignment transfers.

The commenter cautioned that the amendments are likely to affect virtually every appraisal transaction performed on Montana properties and opined that many clients are reluctant to provide AMCs with copies of their policies. The commenter asserted that AMCs will find it significantly more difficult and time consuming to convince clients to provide their actual policy documents. If the board amends the rule as proposed, AMCs will be forced to undertake a major effort to try to obtain and organize such policies and build related operational processes, while the number of future interoffice transfers in Montana will not be significantly greater than today.

The commenter suggested the board amend the language of ARM 24.207.1507(1)(e) to only verify that the policies of a client or end user prohibit the use of trainees or interoffice transfers.

RESPONSE 6: See RESPONSE 5.

COMMENT 7: One commenter acknowledged that enforcement of real estate appraisers' professional standards does rest with the board and suggested the board amend the unprofessional conduct rule at ARM 24.207.2305(1)(d) to require that licensees provide copies of a client's or end-user's policy to the board upon request.

RESPONSE 7: See RESPONSE 5.

COMMENT 8: For the reasons stated in COMMENT 6, one commenter urged the board to withdraw the proposed amendments to ARM 24.207.2305(1)(d) if the board further amends ARM 24.207.1507(1)(e) to merely retain evidence of the policies, rather than provide the policies themselves.

RESPONSE 8: See RESPONSE 5.

4. The board has amended ARM 24.207.101, 24.207.406, 24.207.501, 24.207.509, 24.207.518, 24.207.1501, 24.207.1507, and 24.207.2305 exactly as proposed.

5. The board has repealed ARM 24.207.520 exactly as proposed.

6. The board has amended ARM 24.207.401 and 24.207.502 with the following changes, stricken matter interlined, new matter underlined:

24.207.401 FEES (1) through (1)(c) remain as proposed.

~~(d) temporary practice permit renewal 50~~

(e) through (o) remain as proposed, but are renumbered (d) through (n).

(2) and (3) remain as proposed.

24.207.502 APPLICATION REQUIREMENTS (1) through (3)(d) remain as proposed.

(e) The board will select a representative sample of the applicant's work product from the experience log. ~~The work product requested will be commensurate with the level of licensure sought:~~

~~(i) licensure level - single unit residential appraisals are required;~~

~~(ii) certified residential - two to four unit income-producing residential appraisals are required; and~~

~~(iii) general certification - nonresidential report with all approaches to value with income approach, cost approach, and sales comparison approach are required.~~

(f) through (4) remain as proposed.

(a) have a current and unencumbered license in a jurisdiction where the appraisers are approved by the ASC as eligible to perform appraisals for federally related transactions or a jurisdiction that ~~strictly abides by~~ is in compliance with the ASC standards;

(b) through (9) remain as proposed.

BOARD OF REAL ESTATE APPRAISERS
THOMAS STEVENS, CERTIFIED
GENERAL APPRAISER, CHAIRPERSON

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

/s/ PAM BUCY
Pam Bucy, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State January 25, 2016

BEFORE THE BOARD OF BEHAVIORAL HEALTH
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.219.101 board organization, 24.219.301 definitions, 24.219.401, 24.219.405, and 24.219.409 fee schedules, 24.219.421 supervisor qualifications, 24.219.501, 24.219.504, and 24.219.512 LCSW licensure, 24.219.601, 24.219.604, and 24.219.612 LCPC licensure, 24.219.701, 24.219.704, 24.219.707, and 24.219.712 LMFT licensure, 24.219.807 code of ethics, and 24.219.2404 screening panel, the adoption of NEW RULES I public participation, II LCPC education requirements, III LMFT education requirements, IV, V, and VI social worker licensure candidates, VII, VIII, and IX professional counselor licensure candidates, and X, XI, and XII marriage and family therapist licensure candidates, and the repeal of ARM 24.219.515, 24.219.615, and 24.219.715 renewals, 24.219.801 and 24.219.804 codes of ethics, and 24.219.2401 complaint procedure	))	NOTICE OF AMENDMENT, ADOPTION, AND REPEAL

TO: All Concerned Persons

1. On November 12, 2015, the Board of Behavioral Health (board) published MAR Notice No. 24-219-29 regarding the public hearing on the proposed amendment, adoption, and repeal of the above-stated rules, at page 1991 of the 2015 Montana Administrative Register, Issue No. 21.

2. On December 4, 2015, a public hearing was held on the proposed amendment, adoption, and repeal of the above-stated rules in Helena. One comment was received by the November 11, 2015, deadline.

3. The board has thoroughly considered the comment received. A summary of the comment and the board response are as follows:

COMMENT 1: One commenter opposed the proposed fees for licensure candidate applications and annual registration, stating that the fees are excessive and will

place an undue hardship on those seeking careers in counseling and social work. The commenter opined that the candidate application process appears less onerous than that for full licensure applications, yet the fees are the same. The commenter stated the annual registration fees are exorbitant because these fees are just to inform the board that an applicant's experience requirements have been met. The commenter suggested the board amend the rules to reduce the candidate application fees to $100 and the annual registration fees to $25.

RESPONSE 1: The board points out that licensure candidates do not have to reapply or pay an additional application fee to become fully licensed. The amendments shift the application fees to the beginning of the application process. Following this change, applicants will pay a single application fee, registration fees for each year as a candidate (for a maximum of five years), and for only one fingerprint background check.

The board disagrees with the commenter's assessment that the annual registration fees are just to track experience. With the passage of the legislation, the board has more authority and regulatory responsibility regarding licensure candidates, which shifts the regulatory burden from candidate and employer to the board. The board is amending the fee rules exactly as proposed.

4. The board has amended ARM 24.219.101, 24.219.301, 24.219.401, 24.219.405, 24.219.409, 24.219.421, 24.219.501, 24.219.504, 24.219.512, 24.219.601, 24.219.604, 24.219.612, 24.219.701, 24.219.704, 24.219.707, 24.219.712, 24.219.807, and 24.219.2404 exactly as proposed.

5. The board has adopted NEW RULES I (ARM 24.219.204), II (24.219.603), III (24.219.703), IV (24.219.505), V (24.219.506), VI (24.219.507), VII (24.219.605), VIII (24.219.606), IX (24.219.607), X (24.219.705), XI (24.219.706), and XII (24.219.708), exactly as proposed.

6. The board has repealed ARM 24.219.515, 24.219.615, 24.219.715, 24.219.801, 24.219.804, and 24.219.2401 exactly as proposed.

BOARD OF BEHAVIORAL HEALTH
DR. PETER DEGEL, LCPC

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

/s/ PAM BUCY
Pam Bucy, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State January 25, 2016

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the adoption of NEW RULE I feral swine mandatory reporting and the amendment of ARM 32.2.401 fees, 32.3.212 additional requirements for cattle, and 32.3.220 semen shipped into Montana	))))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On December 24, 2015, the Department of Livestock published MAR Notice No. 32-15-267 regarding the proposed adoption and amendment of the above-stated rules at page 2221 of the 2015 Montana Administrative Register, Issue Number 24.

2. The department has adopted NEW RULE I (32.22.201) as proposed.

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

4. No comments or testimony were received.

BY: */s/ Martin Zaluski*
Martin Zaluski
Interim Executive Officer
Board of Livestock
Department of Livestock

BY: */s/ Cinda Young-Eichenfels*
Cinda Young-Eichenfels
Rule Reviewer

Certified to the Secretary of State January 25, 2016.

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

In the matter of the adoption of New Rule I regarding the East Valley Controlled Groundwater Area	)))	NOTICE OF ADOPTION

To: All Concerned Persons

1. On November 12, 2015, the Department of Natural Resources and Conservation published MAR Notice No. 36-22-180 pertaining to the public hearing on the proposed adoption of the above-stated rule at page 2020 of the 2015 Montana Administrative Register, Issue Number 21.

2. The department has adopted New Rule I (36.12.906) as proposed.

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

COMMENT 1:
Commenters stated that the East Valley Controlled Groundwater Area (EVCGWA) is important to protect human health and to prevent additional spreading of the groundwater contaminants. At some point in the future hopefully the EVCGWA could be adjusted as conditions improve.

RESPONSE 1:
The department appreciates the efforts of the Montana Environmental Trust Group (Trust), Hydrometrics, the U.S. Environmental Protection Agency (EPA), and Lewis and Clark County (County) in responding to the contaminated site.

COMMENT 2:
Commenter asked the Trust and consultants to provide data to support their conclusions about the boundaries of the groundwater area. Commenter was concerned about impacts to streamflow in Prickly Pear Creek. Commenter wants an alternative study to show what the migration paths of plumes might be if the stream is dewatered during the irrigation season. Commenter stated they were told [by who was not stated] that additional information was in the works but nothing has been forthcoming.

RESPONSE 2:
The department encourages surrounding landowners to contact the Trust or Hydrometrics in order to stay abreast of the progress and impacts of the remediation. Information regarding the contaminant plume and all supporting documentation for the EVCGWA is included in the petition, which is available to the public, and posted on the department's web site. Additional specific information regarding the EVCGWA should be directed to the Trust or Hydrometrics.

COMMENT 3:
Commenter's well was supposed to be a monitoring well, but to his knowledge it has never been monitored. Commenter wonders where Hydrometrics data is being acquired. Commenter has not seen maps of where the contaminant plume is located, or where it is moving.

RESPONSE 3:
Information regarding the contaminant plume and all supporting documentation for the EVCGWA is available in the petition submitted to the department. The petition is available to the public and was posted to the department's web site when the proposed rules were noticed and has not been removed from the web site. The link was contained within the notice. Bob Anderson, Hydrometrics, responded at the hearing offering to share all the information Hydrometrics has regarding the contaminated site, plume migration, and impact due to the creek flow.

COMMENT 4:
Commenter questioned if there is any way in the future to negate the EVCGWA. Land values have dropped and this will further decrease the land value in the area.

RESPONSE 4:
Under 85-2-506, MCA, it is possible to modify the boundaries, or eliminate an established CGWA, through a petition to the department. The department encourages surrounding landowners to contact the Trust or Hydrometrics in order to monitor the progress and impacts of the remediation.

COMMENT 5:
Commenter suggested establishing a technical advisory group (TAG) as a clearinghouse for approvals by the County Board of Health, the Water Quality Protection District, the EPA, the Montana Department of Environmental Quality (DEQ), and the Department of Natural Resources and Conservation (DNRC) to facilitate applications for new groundwater developments in Zone 2.

RESPONSE 5:
The rule provides that a TAG can be established to satisfy the prior written approvals provided for in (3)(b) and (4)(b) of the rule.

COMMENT 6:
Commenter stated that over time as groundwater quality improves, the EVCGWA boundaries could be adjusted. The TAG should annually review water quality data to make recommendations to DNRC on changes to EVCGWA boundaries, groundwater use restrictions, or other recommendations based on groundwater quality trends.

RESPONSE 6:

The boundaries of the EVCGWA may be modified by a new rulemaking process, which would require a new petition conforming to the requirements of 85-2-506, MCA.

COMMENT 7:
Commenter stated the rule, as proposed, defines the vertical boundaries of sub-area 1 as either 200 or 300 feet below the water table. The intent of the petitioners was to make those vertical boundaries as being 200 or 300 feet below the ground surface. They recommend making this correction in the final rule.

RESPONSE 7:
The water table reference in the proposed boundary is taken from page 4-4 of the petition and states, "The upper boundary is proposed to coincide with the top of the saturated zone, or groundwater table, throughout the entire CGWA." Figure 4-2 in the petition also clearly truncates the top of the vertical boundary at the water table. The petition is contradictory on whether the lower vertical boundary should be measured from the ground surface or the water table. In order to ensure maximum public health benefits from the EVCGWA, the department will use the more conservative approach and measure the lower boundary from the water table.

COMMENT 8:
Commenter stated that at some future date, they may need to add capacity to their public supply system. Commenter's proximity to the EVCGWA may require them to add that capacity from either Zone 1 or 2. As written, the rules would limit commenter to applying for new rights only in Zone 2. Commenter urges the department to add an exception to Zone 1 to allow for new applications for the limited purpose of complying with DEQ regulations for added capacity for an existing public water supply system.

RESPONSE 8:
Water quality in Zone 1 is the most hazardous to public health. Greater restrictions in Zone 1 are necessary to accomplish the objective of protecting public health. Accordingly, the department will not add an exception to Zone 1.

COMMENT 9:
The rules for Zone 2 should be adopted as proposed.

RESPONSE 9:
The department agrees.

COMMENT 10:
Commenter is concerned that additional restrictions may be put on surface water applications that could affect commenter's strategies for utilization of its existing water rights to address future needs.

RESPONSE 10:

Should the remediation of the East Valley area require restrictions on surface water applications at some time in the future, those restrictions will be addressed in a different proceeding.

COMMENT 11:
Commenter stated all affected landowners need a reliable and contaminant-free source of water. Commenter stated that since ASARCO ruined their water rights, ASARCO, or the state, should be obligated to bring in a new source of water at the expense of ASARCO or the state.

RESPONSE 11:
The establishment of the EVCGWA is a part of an overall remediation plan for the ASARCO site. Liability for damages already incurred is not a part of the EVCGWA or subject to department authority pursuant to 85-2-506, MCA.

/s/ John E. Tubbs
John Tubbs
Director, Natural Resources and Conservation

/s/ Brian Bramblett
Brian Bramblett
Rule Reviewer

Certified to the Secretary of State on January 25, 2016.

COUNTIES - County employees on workers compensation leave who are supplementing workers compensation benefits with accrued sick leave pursuant to the terms of a collective bargaining agreement are in a leave-with-pay status for the sick leave hours converted to pay, and are entitled to accrue vacation and sick leave credits on a prorated basis;
EMPLOYEES, PUBLIC - Public employees on workers compensation leave who are supplementing workers compensation benefits with accrued sick leave pursuant to the terms of a collective bargaining agreement are in a leave-with-pay status for the sick leave hours converted to pay, and are entitled to accrue vacation and sick leave credits on a prorated basis;
LABOR RELATIONS - Public employees on workers compensation leave who are supplementing workers compensation benefits with accrued sick leave pursuant to the terms of a collective bargaining agreement are in a leave-with-pay status for the sick leave hours converted to pay, and are entitled to accrue vacation and sick leave credits on a prorated basis;
STATUTORY CONSTRUCTION - In general, statutory provisions will control over conflicting contractual language;
WORKERS COMPENSATION - A public employee is not entitled to accrue vacation and sick leave credit for workers' compensation benefits received;
CODE OF FEDERAL REGULATIONS - 5 C.F.R. § 550.1203, 5 C.F.R. § 630.209, 5 U.S.C. § 6302(f);
MONTANA CODE ANNOTATED - Sections 2-18-601(15), 2-18-611, 2-18-611(3), 2-18-611(4), 2-18-618, 2-18-618(2), 2-18-618(3), 39-71-123(1)(a), 39-71-123(2)(b)(ii), 39-71-123(2)(c).

HELD: Public employees on workers compensation leave who are supplementing workers compensation benefits with accrued sick leave pursuant to the terms of a collective bargaining agreement are in a leave-with-pay status for the sick leave hours converted to pay, and are entitled to accrue vacation and sick leave credits on a prorated basis.

January 13, 2016

Ms. Eileen Joyce
Butte-Silver Bow County Attorney
Room 104, Courthouse Building
155 West Granite St.
Butte, MT 59701

Dear Ms. Joyce:

You have requested my opinion as to the following questions that I have rephrased as:

1. Are public employees on workers' compensation leave who are supplementing workers' compensation benefits with accrued sick leave pursuant to the terms of a collective bargaining agreement considered to be in a leave without pay status or a leave with pay status?

2. If such employees are considered to be in a leave with pay status, to what extent, if any, are such employees entitled to accrue vacation and sick leave credits under Mont. Code. Ann. §§ 2-18-611 and 2-18-618?

I.

Your opinion request informs me that Butte-Silver Bow County (BSB) and the LUINA Laborers Local No. 1686 entered into a collective bargaining agreement (CBA) in 2005 which, in relevant part, allows workers to supplement their workers' compensation benefits with accrued sick leave, if the employee is off work due to work-related injuries, in order to receive 100% of the employee's current wage. The Union believes that this provision requires BSB to provide full accrual of sick and vacation leave to the employee while the employee is off work and supplementing workers' compensation benefits with sick leave. BSB disagrees based upon the language of the CBA and Mont. Code Ann. §§ 2-18-611(4) and -618(2), which each respectively prohibit accrual of vacation or sick leave benefits while the employee is in a "leave-without-pay" status. As you have pointed out, there is no statutory definition of "leave-without-pay" status.

The first task is therefore to determine whether an employee receiving workers' compensation benefits while supplementing with sick leave is in "leave-without-pay" status. In general, statutory provisions will control over conflicting contractual language. *Beck v. Board of Trustees*, 233 Mont. 319, 322, 760 P.2d 83, 85 (Mont. 1988) (citing 17 C.J.S. Contracts Section 201 (1963)) ("Broadly speaking, a contract made in violation of a statute is illegal, but the true rule seems to be that of legislative intent."); *Poeppel v. Flathead County*, 1999 MT 130, ¶ 24, 294 Mont. 487, 982 P.2d 1007 ("The [statutory] six-month qualifying period established by the legislature is separate from, and not controlled by, any probationary period that the local governing body establishes by policy or negotiation of a collective bargaining agreement."). Therefore we must first look to Montana statutory law to determine the "pay" status.

Mont. Code Ann. § 2-18-601(15), defines "sick leave" as "a leave of absence *with pay* for [certain medically related events]." Emphasis added. When sick leave is earned and used, an employee is paid for the time they are on leave. Hence, absent a specific statute to the contrary, an employee converting sick leave credit is on "leave with pay." Looking to Montana's workers' compensation statutes, "wages"

means all remuneration paid for services performed by an employee for an employer. While the term "wages" does not include "vacation or sick leave benefits accrued but not paid," Mont. Code Ann. § 39-71-123(2)(c), accrued sick leave, when converted to pay, is within the definition of "wages."[1] Mont. Code Ann. § 39-71-123(1)(a) ("wages" includes "remuneration at the regular hourly rate for . . . periods of sickness."). That is the situation here, and it is reasonable to conclude that the use of accrued sick leave to augment workers compensation benefits places the employee in a "leave-with-pay" status, at least as to the sick leave converted, because they are being paid for the leave they are taking.

This determination is supported by federal law. As recognized by the Tenth Circuit:

> Leave has a monetary value. For example, it can be used for paid vacation time. When employees who accrue leave depart government service, they are entitled to a lump sum payment for unused leave. *See* 5 C.F.R. § 550.1203. . . . Likewise, a federal employee is financially responsible for leave taken in excess of what the employee has accrued. *See* 5 U.S.C. § 6302(f); 5 C.F.R. § 630.209. As the district court observed: *"the very concept of 'leave without pay' taken when an employee has no leave from which to draw, presumes that an employee is not entitled to pay in the event he must be absent from work but cannot take leave to cover the absence.*

United States v. Ransom, 643 F.3d 1285, 1290 (10th Cir. 2011) (emphasis added).

Likewise, in Washington and Indiana, "sick leave" is defined within the statutes as "wages" and is therefore treated as deferred compensation. *See SCI Indiana Funeral Service L.P. v. Musgrave*, 2008 Ind. App. Unpub. LEXIS 514 (Ind. App. 2008) (unpublished opinion); and *South Bend Sch. Dist. v. White*, 23 P.3d 546 (Wash. App. 2001).

It is my opinion that a public employee who supplements workers' compensation benefits by converting accrued sick leave credits into pay during a period of disability, as allowed under Montana law and the CBA here, is in a "leave-with-pay" status as to the sick leave hours converted to pay.

II.

BSB contends that employees supplementing their workers' compensation benefits as described are entitled to only a prorated accrual of sick and vacation benefits, to the extent that the employee is "in pay status" by virtue of spending accrued sick

[1] For purposes of this Opinion, I am assuming that all the sick leave hours used were earned by the employee. The analysis may change if the sick leave was donated by coworkers. *See Williams v. State Fund*, 1996 MTWCC 10, WCC No. 9505-7304 (Feb. 1, 1996) ("wages" does not encompass sick leave donated by coworkers).

leave. The Union contends, on the other hand, that the employee is entitled to full accrual of sick and vacation benefits during the period of supplementation because the CBA provides that "[d]uring this period of sick leave supplementation, the employee's other benefits will be maintained for the period that sick leave supplementation is available to the employee."

However, BSB Policy 323 prohibits an employee from accruing sick and vacation leave credits while on workers compensation leave. This conforms with Montana law, which defines "wages" as not including "sickness or accident disability under a workers' compensation policy." Mont. Code Ann. § 39-71-123(2)(b)(ii); *see also* Mont. Code Ann. §§ 2-18-611(4) and -618(2) (prohibiting accrual of leave when employee is in "leave-without-pay" status). The employee, therefore, is entitled to leave accrual for the hours of sick leave converted, but is not entitled to leave accrual for workers' compensation benefits received.

This situation is analogous to a part-time employee. Mont. Code Ann. §§ 2-18-611(3) and 2-18-618(3) both provide that a permanent part-time employee is entitled to prorated leave benefits. Therefore it is my opinion that an employee supplementing workers' compensation benefits with sick leave is entitled to accrue vacation and sick leave on a prorated basis for the sick leave hours converted.

THEREFORE, IT IS MY OPINION:

> Public employees on workers compensation leave who are supplementing workers compensation benefits with accrued sick leave pursuant to the terms of a collective bargaining agreement are in a leave-with-pay status for the sick leave hours converted to pay, and are entitled to accrue vacation and sick leave credits on a prorated basis.

Sincerely,

/s/ Timothy C. Fox
TIMOTHY C. FOX
Attorney General

tcf/jss/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.

Water Policy Interim Committee (where the primary concern is the quality or quantity of water):

- 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, 2015. This table includes those rules adopted during the period October 1, 2015, through December 31, 2015, 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, 2015, this table, and the table of contents of this issue of the Register.

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 2015/2016 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.

I-XI Deferred Retirement Option Plan (DROP) for Members of the Highway Patrol Officers' Retirement System, p. 1778, 2244
2.43.1306 Actuarial Rates and Assumptions, p. 1226, 1893
2.43.3501 and other rules - Adoption by Reference of the State of Montana Public Employee Defined Contribution Plan Document and the State of Montana Public Employee Deferred Compensation (457) Plan Document, p. 1223, 1891
2.43.3502 and other rule - Investment Policy Statement for the Defined Contribution Retirement Plan - Investment Policy Statement for the 457 Deferred Compensation Plan, p. 1220, 1889
2.43.3504 and other rule - Defined Contribution Plan Default Investment Fund - Deferred Compensation Plan Investment Options, p. 1229, 1894

AGRICULTURE, Department of, Title 4

4.3.407 and other rules - Student Loans - Public Participation - Mint Committee, p. 1571, 2136
4.5.206 and other rules - State Noxious Weed List - Regulated Plant List, p. 612, 1042
4.5.308 and other rule - Noxious Weed Seed Free Forage Fees, p. 784, 1479
4.6.101 and other rules - Commodity Advisory Committees - Corn Crop Advisory Committee - Commodity Assessment, p. 1574, 2137
4.9.301 and other rule - Wheat and Barley Committee Grants, p. 1568, 2135
4.17.105 and other rules - Organic Application Procedures and Fees - Fees for Services - Annual Report and Assessment Fees, p. 602, 1041

STATE AUDITOR, Office of, Title 6

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