

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

In the matter of the proposed)
adoption of New Rules I through VI,)
pertaining to activities that are, and)
those activities that are not, included)
in the practice of land surveying)

NOTICE OF PUBLIC HEARING ON
PROPOSED ADOPTION

TO: All Concerned Persons

1. On December 18, 2008, at 1:00 p.m., a public hearing will be held in room 489, 301 South Park Avenue, Helena, Montana to consider the proposed adoption of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Professional Engineers and Professional Land Surveyors (board) no later than 5:00 p.m., on December 12, 2008, to advise us of the nature of the accommodation that you need. Please contact Brooke Jasmin, Board of Professional Engineers and Professional Land Surveyors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2351; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2309; e-mail dlibsdpels@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY The board determined it is reasonably necessary to adopt the proposed new rules to address requests from within and outside the profession of land surveying for clarification regarding whether certain activities (mostly arising as a consequence of developing technologies) require licensure as a professional land surveyor. In particular, there have been a number of questions and complaints regarding whether individuals using readily available consumer technologies were engaging in the unauthorized practice of land surveying. The board responded by forming an advisory group comprised of land surveyors, state and local government agencies involved in land surveying issues, developers of geographic information systems (GIS), and global positioning system (GPS) users. Over the course of more than 18 months, the advisory group produced a consensus document, which formed the basic text of the proposed rules. The board concluded that there is reasonable necessity for the proposed new rules to provide clarification and guidance to licensees and the public regarding the scope of practice for licensed land surveyors.

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

NEW RULE I PURPOSE (1) This subchapter is an effort by the Board of Professional Engineers and Professional Land Surveyors to clarify whether the performance of certain activities require licensure as a professional land surveyor. The rules in this subchapter were developed with advice from representatives from the land surveying profession, state of Montana government agency representatives, geographic information system (GIS) developers, and global positioning system (GPS) users.

(2) The rules in this subchapter are designed to advise and inform licensed professional land surveyors and unlicensed individuals regarding certain permissible and prohibited activities that relate to the practice of land surveying.

(3) These rules do not preclude surveys performed by professional engineers or other legally recognized professions or trades, as allowed by state law or administrative rule.

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

IMP: 37-1-131, 37-67-101, MCA

NEW RULE II DEFINITIONS For the purpose of this subchapter, the following definitions apply:

(1) "Accuracy" means spatial accuracy, which is an indication of how close a measurement is to the true value of the quantity that has been measured.

(2) "Authoritative" means information for which there has been a certification of accuracy by a person or entity empowered by law to make such a certification.

(3) "Certification" means a written assurance, warranty, guarantee, or official representation that some act has or has not been done, or some event has occurred, or some legal formality has been complied with.

(4) "Control" means establishing horizontal or vertical positions of arbitrary points.

(5) "Expressed accuracy" means designating a numerical value for accuracy or spatial relationship between objects or data.

(6) "Implied accuracy" means designating things such as equipment, equipment operating procedures, field procedures, analysis, methodologies, etc. to support an accuracy expectation.

(7) "Photogrammetry and remote sensing" means the art, science, and technology of obtaining reliable information from noncontact imaging and other sensor systems about the earth and its environment, and other physical objects and processes through recording, measuring, analyzing, and representation.

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

IMP: 37-1-131, 37-67-101, MCA

NEW RULE III DETERMINING WHETHER INFORMATION IS CONSIDERED TO BE AUTHORITATIVE (1) Whether information is considered to be authoritative often depends on the intent of the person or entity that supplies the information.

(a) In some cases, the supplier's intent is clear because the supplier makes an express statement to the effect that the information is (or is intended to be) authoritative.

(b) In some cases, the supplier's intent is clear because the supplier expressly states that the information is not intended to be considered authoritative.

(c) In other cases, the supplier's intent can only be inferred from the context in which the information is furnished.

(2) Examples of situations where a person can reasonably infer that the supplier's intent is that the information be considered authoritative include, but are not limited to, the following:

(a) the collection and evaluation of evidence, with the intent to determine land boundary locations;

(b) the collection, analysis, and evaluation of measurements, with the intent to certify the positional relationship of data sets to property boundaries, an elevation datum, or a geodetic control network;

(c) the collection, analysis, and subsequent publication of positional information related to geodetic control; and

(d) meeting or offering to meet a contractual accuracy requirement, express or implied.

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

IMP: 37-1-131, 37-67-101, MCA

NEW RULE IV CERTIFICATION (1) As provided in [NEW RULE II], "certification" provides a statement or warranty attesting to the correctness of a document, product, or act.

(2) Certification requires special knowledge, expertise, and/or legal authority. Such legal authority is generally held by a responsible governmental official. Only those persons or entities having specific authority, licensure, or jurisdiction granted by law may provide certification.

(3) Examples of certification include, but are not limited to, the following:

(a) the certification that a professional land surveyor applies to a certificate of survey; and

(b) the certification of the locational accuracy of a GIS product.

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

IMP: 37-1-131, 37-67-101, MCA

NEW RULE V CERTAIN ACTIVITIES FOR WHICH A LAND SURVEYOR'S LICENSE IS REQUIRED (1) The following specific activities are part of the practice of land surveying, and the performance of, or offer to perform, these activities in Montana requires a license as a land surveyor:

(a) authoritatively locating a line (including a boundary line), a point (including a boundary corner), or a physical feature on the earth;

(b) making an authoritative description of the location of a given point, physical feature, or parcel of real estate. Such a description is often referred to as a "legal description" of a parcel of real estate;

- (c) monumenting a boundary location, as defined in ARM 24.183.1101;
 - (d) performing an engineering survey, as defined in 37-67-101, MCA;
 - (e) preparing a certificate of survey or subdivision plat;
 - (f) making an authoritative computation of acreage contained within a legal description of a given parcel of real property, including within an easement or other legal interest in the parcel of real property;
 - (g) making an authoritative computation of the volume (sometimes referred to as "pay quantity") of a specifically identified portion of the earth;
 - (h) making the representation that one can personally provide an authoritative location of a line, a point, or physical feature;
 - (i) representing that information provided as survey control is authoritative;
- and
- (j) rendering a professional opinion as a land surveyor.
- (2) The following are examples of activities which involve authoritatively locating a line, point, or physical feature, as provided in (1)(a):
- (a) construction staking from engineering plans;
 - (b) determining the alignment of a right of way, easement, or other legal interest in real property; and
 - (c) preparing an "as-built" survey.
- (3) The following are examples of situations which involve the rendering of a professional opinion as a land surveyor, as provided in (1)(j):
- (a) stating whether the description of a given point's location is authoritative;
 - (b) identifying which, if any, of competing descriptions or competing representations that purport to be authoritative, actually and accurately represent the true location of a given line, point, or physical feature;
 - (c) stating the positional accuracy of a map is accurate;
 - (d) stating the positional accuracy of measured survey data; and
 - (e) determining whether position information offered as survey control is authoritative.

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

IMP: 37-1-131, 37-67-101, 37-67-103, 37-67-301, MCA

NEW RULE VI ACTIVITIES FOR WHICH A LAND SURVEYOR'S LICENSE IS NOT REQUIRED (1) A distinction must be made between making and documenting original measurements in the creation of land survey products, versus the copying, interpretation, or representation of those measurements. Further, a distinction must be made according to the intent, use, or purpose of measurement products to determine an authoritative location versus the use of those products as a locational reference for planning, infrastructure management, and general information.

(2) The production of the following items or performance of the following activities do not require licensure as a land surveyor:

(a) those items and activities specifically exempted in 60-2-209 and 76-3-209, MCA;

(b) the creation of any maps used for nonauthoritative purposes such as those:

- (i) used to locate parcels;
 - (ii) used to represent the shape or contour of the earth;
 - (iii) used to locate fixed works of engineering;
 - (iv) prepared by private firms or government agencies for use as guides to motorists, boaters, aviators, or pedestrians;
 - (v) prepared for publication in a gazetteer or atlas as an educational tool or reference publication;
 - (vi) prepared for or by educational institutions for use in the curriculum of any course of study;
 - (vii) produced by any electronic or print media firm as an illustrative guide to the geographic location of any event; and
 - (viii) prepared by laypersons for conversational or illustrative purposes including advertising material and users guides.
- (c) the transcription of previously georeferenced data into a GIS or land information system (LIS) by manual or electronic means, and the maintenance thereof, provided the data are clearly not intended to indicate the authoritative location of:
- (i) property or administrative boundaries;
 - (ii) easements, rights of way, or other legal interest in real property;
 - (iii) the definition of the shape or contour of the earth; or
 - (iv) the location of fixed works of engineering.
- (d) the transcription of public record data into a GIS- or LIS-based cadastre (tax maps and associated records) by manual or electronic means, and the maintenance of that cadastre, provided the data are clearly not intended to authoritatively represent property or administrative boundaries, or easements, rights of way, or other legal interests in real property. Examples of such items include, but are not limited to:
- (i) tax maps;
 - (ii) zoning maps; and
 - (iii) school district maps.
- (e) GIS based parcel or cadastral mapping not used for authoritative boundaries, where land title, zoning, development, or similar legal or regulatory rights for the parcels are not controlled by the GIS map but are instead controlled by a separate document;
- (f) the preparation of any document by any federal government agency that does not define real property boundaries, which include, but are not limited to:
- (i) civilian and military versions of quadrangle topographic maps;
 - (ii) military maps;
 - (iii) satellite imagery;
 - (iv) aerial photography; and
 - (v) orthoimagery.
- (g) the incorporation or use of documents or databases prepared by any federal agency into a GIS/LIS, which include, but are not limited to, the following:
- (i) census and demographic data;
 - (ii) quadrangle topographic maps; and
 - (iii) military maps.
- (h) original data acquisition, inventory maps, and databases created by any

individual or organization, in either hardcopy or electronic form, of physical features, facilities, or infrastructure that are wholly contained within properties to which they have rights or for which they have management or regulatory responsibility;

(i) data acquisition, maps, and databases depicting the distribution of natural resources or phenomena, prepared by:

- (i) foresters;
- (ii) geologists;
- (iii) soil scientists;
- (iv) geophysicists;
- (v) biologists;
- (vi) archeologists;
- (vii) historians;
- (viii) geodesists; or
- (ix) other similar occupations.

(j) maps and georeferenced databases depicting physical features and events prepared by any government agency where the access to that data is restricted by law, including georeferenced data generated by law enforcement agencies involving crime statistics and criminal activities;

(k) engineering surveys performed by a professional engineer as allowed by state law or administrative rule;

(l) the preparation of documents that create, assign, reference, or transfer interests in real property by reference to a legal description prepared by a professional land surveyor, which include, but are not limited to, the following:

- (i) contracts;
- (ii) deeds;
- (iii) easements;
- (iv) certificates of location for mining claims;
- (v) rights of way; and
- (vi) similar documents, which may incorporate or make reference to:
 - (A) subdivision plats;
 - (B) certificate of survey;
 - (C) narrative legal descriptions; or
 - (D) exhibits prepared by a professional land surveyor.

(m) operating and publishing data from a continuously operating reference station (CORS);

(n) original data acquisition by contract or second parties for nonauthoritative purposes; and

(o) the acquisition, preparation, processing, manipulation, or certification of final products or original data developed or collected by remote sensing or photogrammetric methods. Control may be derived from existing sources for remote sensing or photogrammetric products, where accuracy is not critical and specific map accuracy standards are not required.

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

IMP: 37-1-131, 37-67-101, 37-67-103, 37-67-301, MCA

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Professional Engineers and Professional Land Surveyors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2309, or by e-mail to dlibsdpels@mt.gov, and must be received no later than 5:00 p.m., December 26, 2008.

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

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

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

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

BOARD OF PROFESSIONAL ENGINEERS
AND PROFESSIONAL LAND SURVEYORS
CASEY JOHNSTON, PRESIDING OFFICER

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

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

Certified to the Secretary of State November 17, 2008