



Montana Department of
LABOR & INDUSTRY

To: Montana Board of Professional Engineers and Professional Land Surveyors

From: Brenda Nordlund, Acting Commissioner

Date: December 4, 2020

Re: Active Supervision of Proposed Amendment to Admin. R. Mont. 24.183.303(11)

I. Introduction

Mont. Code Ann. §§ 37-1-121 and -122, authorize the Commissioner of the Montana Department of Labor & Industry to provide oversight and supervision of the duties and authority of the boards administratively assigned to the department. Pursuant to § 37-1-121(1)(d), the Commissioner shall exercise:

active supervision authority to approve or disapprove any board action identified by the department as restraining or potentially restraining competition in trade or commerce. Subject to the provisions of 37-1-122(6), the commissioner shall determine if the board action is made or taken pursuant to a clearly articulated state policy and if the restraint or potential restraint of trade or commerce is reasonable and necessary to protect the public health, safety or welfare. Any approval or disapproval under this subsection (1)(d) must be in writing, comply with the provisions in 37-1-122, and set forth the particular reasons supporting the determination. A disapproval may include the commissioner's recommended modifications, if any, for the board's consideration.

Mont. Code Ann. § 37-1-122 sets forth the procedural requirements for active supervision, including the requirement that the Commissioner notify the affected board of the review to be undertaken, permit the board the opportunity to provide written comments and materials regarding the review, and meet with the board.

Pursuant to this statutory authority and obligation, I initiated review of a proposed amendment by the Montana Board of Professional Engineers and Professional Land Surveyors (Board) to Admin. R. Mont. 24.183.303(11). The proposed amendment states:

24.183.303 DEFINITIONS (1) through (10) remain the same.

(11) "Progressive land survey experience" means experience obtained under the supervision of a licensed professional land surveyor, on land surveying projects, which, over time, are of increasing quality and require greater responsibility, and which must include experience with the Public Land Survey

System (PLSS) and Bureau of Land Management Manual of Survey Instructions,
and may include one or more of the following:

~~(a) experience on land surveying projects which, over time, are of increasing quality and require greater responsibility of the applicant;~~

(b) and (c) remain the same but are renumbered (a) and (b).

(12) through (15) remain the same.

Based on a thorough review of the documentation received and careful consideration of the facts, and for the reasons set forth herein, I approve the proposed rule.

II. Procedure for Active Supervision

On July 13, 2020, I notified the Board and the Economic Affairs Interim Committee that supervision of the proposed rule would be undertaken. That notification informed the Board of its opportunity to meet with me and invited written comments.

In addition, I initiated publication in the Montana Administrative Register of a Notice of Public Hearing. MAR Notice No. 24-2-361; August 7, 2020. This MAR notice was also sent to the Board's interested party list and published in the Billings Gazette on August 12, 2020. The notice set a public hearing on September 2, 2020 at 10 am. No comments were received from any member of the public or any other interested party during the September 2, 2020 hearing held by the Office of Administrative Hearings nor by separate written transmittal.

On August 31, the Board submitted its response to active supervision. On October 9, further information was requested from the Board. The Board provided response on November 2. On November 4, I met with the Board on this matter and received further information. After that meeting, additional written information was provided by Board staff.

III. Analysis

At issue here is whether the Board may require experience with the Public Land Survey System (PLSS) and the Bureau of Land Management Manual of Survey Instructions (BLM Manual) as part of its licensure requirement. The history and purpose of the PLSS and BLM Manual are extensively detailed in the BLM Manual and will not be repeated here. Suffice it to say, the origin of PLSS and the BLM Manual goes back to the 18th century and was integral to territorial acquisitions and their subsequent development. BLM Manual at 1-17. Thirty states, including Montana, use PLSS and the BLM Manual for land surveying. BLM Manual at 15. The PLSS and Manual were developed to ensure consistency, uniformity, and clarity of surveys.

The Montana Subdivision and Platting Act, codified at Mont. Code Ann. § 76-3-101, *et seq.*, requires that: “[a]ll division of sections into aliquot parts and retracement of lines must conform to United States bureau of land management instructions, and all public land survey corners must be filed in accordance with Corner Recordation Act of Montana....” Mont. Code Ann. § 76-3-402(3). Simply, the PLSS is the survey system used in Montana and is legislatively mandated.

There are 445 professional land surveyors currently licensed by the Board. Pursuant to Board Rule, applicants may apply for licensure by transfer of licensure from another state (comity) or by examination. The Board considered 18 land surveyor applications in the past year. Six of these applicants obtained licensure by exam. A substantial portion of the exam tests knowledge of the PLSS. The remaining twelve applicants applied by comity. All twelve were licensed in at least one other PLSS state.

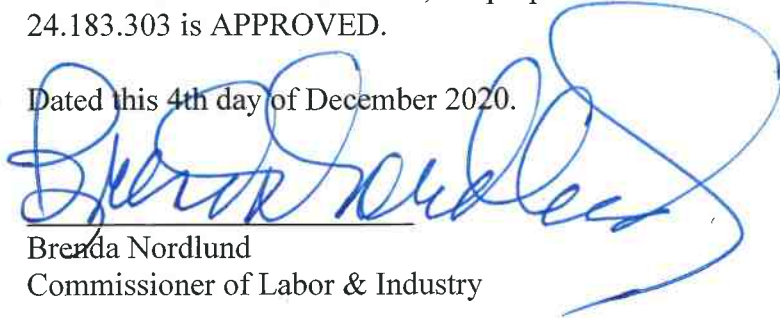
Three factors weigh heavily in support of approval of the proposed rule. First, utilization of the PLSS appears to be outside of the discretion of the Board—it has been codified by the Legislature. Second, the modification is *de minimis*. The PLSS system is already tested by the Board, and most states utilize the same system. As such, attaining experience in with the system as a predicate for licensure in Montana is readily achievable. Further, expressly codifying the knowledge requirement merely provides clarity for licensure applicants regarding a subject already tested. Third, of last year's applicants, two-thirds applied based on experience in other states—which also utilize the PLSS. Separately, I note the lack of any expressed concern from members of the public or other interested parties regarding the proposed rule amendment.

I am obligated by Mont. Code Ann. § 37-1-121 and -122 to consider whether the Board is acting pursuant to clearly articulated state policy, is acting to protect the public's health, safety, and welfare, or whether the Board is acting unreasonably to restrain trade. It is my conclusion that the Board's action is in direct furtherance of the historical and legislative determination to be a PLSS state. The Board's proposed rule clarifies for applicants an essential area of knowledge for practice as a Professional Land Surveyor in the state. As such, the proposed rule seeks to ensure that licensees of the Board have the knowledge necessary successfully to perform the obligations of the occupation.

IV. Conclusion

For the reasons set forth above, the proposed amendment of the Board to Admin. R. Mont. 24.183.303 is APPROVED.

Dated this 4th day of December 2020.



Brenda Nordlund
Commissioner of Labor & Industry