

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

In the matter of the adoption of NEW ) NOTICE OF ADOPTION  
RULES I, II, III, and IV pertaining to )  
Public Access Land Agreements )

TO: All Concerned Persons

1. On January 31, 2020, the Department of Fish, Wildlife and Parks (department) published MAR Notice No. 12-525 pertaining to the public hearing on the proposed adoption of the above-stated rules at page 129 of the 2020 Montana Administrative Register, Issue Number 2.

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

NEW RULE I (12.2.605) DEFINITIONS (1) through (4) remain as proposed.  
(5) "Public land" means FWP lands, and state and school trust lands as defined in 77-1-101, MCA, or federal land managed by the U.S. Department of the Interior or the U.S. Department of Agriculture.

(5) remains as proposed but is renumbered (6).

(7)(6) "Under accessible public land" means public land wholly surrounded by private land by for which there is no other legal access point within two miles via public road, trail, right of way or easement; public waters; adjacent federal, state, county, or municipal land that is open to public use. Access via public waters may also be considered under accessible if there are safety concerns which limit access by boat (due to rapids, boulders, log jams) and/or by foot while remaining within the high water mark (due to swift currents, deep water along banks, slippery substrate).

AUTH: 87-1-297, MCA  
IMP: 87-1-295, 87-1-296, MCA

NEW RULE II (12.2.606) APPLICATION FOR PUBLIC ACCESS LAND AGREEMENT (1) The PALA application must include the following information:

(a) ~~legal or detailed~~ land description of public land to which access is being proposed;

(b) through (d) remain as proposed.

(e) ~~indication~~ evidence, such as a copy of the lease or permit, as to whether the public land to be accessed is public land that is leased by the landowner; and

(f) through (4) remain as proposed.

AUTH: 87-1-297, MCA  
IMP: 87-1-295, 87-1-296, MCA

NEW RULE III (12.2.607) PUBLIC ACCESS LAND AGREEMENTS

(1) Before approving a PALA the department must exercise reasonable due diligence to verify that:

(a) remains as proposed.

(b) the private lands, or any right of way, road, or trail to be utilized are wholly owned by the applicant(s) and there is open access across the designated access route;

(c) the public has no existing right of access over the proposed route;

(c) remains as proposed but is renumbered (d).

~~(d)~~(e) access routes available to motorized vehicles must be safe and passable during dry conditions for two-wheel drive vehicles. capable of accommodating typical road use vehicles under normal conditions.

(2) through (5) remain as proposed.

(6) The department may not enter a PALA where there is an existing right of public access over the proposed access route. If the department is uncertain whether the proposed access route is public or private, or if a controversy exists over whether the proposed access route is public or private, the department shall present its findings to the PL/PW for its consideration in its recommendation.

~~(6)~~(7) Priority consideration for PALA enrollment will be given for lands to those sites that are open during commission-established hunting and or fishing seasons, or both.

(7) through (11) remain as proposed but are renumbered (8) through (12).

AUTH: 87-1-297, MCA

IMP: 87-1-295, 87-1-296, MCA

NEW RULE IV (12.2.608) LANDOWNER COMPENSATION (1) In negotiating for the annual payment to a landowner, the department shall consider:

~~(a) acres of private land over which access is provided;~~

(b) remains as proposed but is renumbered (a).

(b) the quality of fish or wildlife habitat that may be provided by the public land to be accessed;

(c) remains as proposed.

(d) mode of transportation allowed; ~~and~~

(e) whether closures can be expected; and

(e) remains as proposed but is renumbered (f).

~~(2) Higher compensation will be provided to landowners who allow access during commission-established hunting and fishing seasons.~~

(3) remains as proposed but is renumbered (2).

AUTH: 87-1-297, MCA

IMP: 87-1-295, 87-1-296, MCA

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

COMMENT #1: The department received a few comments suggesting that there be a definition for "public land" to clarify if it includes both state and federal lands.

RESPONSE #1: In response to this comment, the department has amended the proposed language to define public lands eligible for agreements.

COMMENT #2: A comment was received questioning how and why the two-mile accessibility standard was reached in the definition of "Under Accessible Public Land." The commenter also questioned how and why the one linear mile standard was reached in New Rule III(1)(c)(ii).

RESPONSE #2: Regarding the two-mile accessibility standard, this measurement is relative to security areas for elk movement and hunting pressure from FWP elk research. FWP research recommends defining elk security areas as having  $\geq 13\%$  canopy cover that are  $\geq 1.71$  miles from a motorized route during the archery season, with no minimum block size requirement, and as having  $\geq 9\%$  canopy cover that are  $\geq 0.95$  miles from a motorized route, that are at least 5,000 acres during the rifle season. This also helps to restrict the number of agreements to not having multiple access agreements for a 1-mile x 1-mile 640-acre section.

Regarding the one-mile linear standard, this language mirrors existing program ARM language for the Unlocking Public Lands program (ARM 12.2.601). This restriction applies only to those agreements which are restricted only to walk-in foot traffic only.

COMMENT #3: The department received a comment suggesting striking "or detailed" from New Rule II(1)(a), as a legal description would be adequate and should be the standard.

RESPONSE #3: In response to this comment, the department has amended the proposed language to utilize the legal land description.

COMMENT #4: A few comments were received suggesting that the term "reasonable diligence" in New Rule III(1) be replaced with the term "due diligence."

RESPONSE #4: The department acknowledges that the term "due diligence" is the standard term used to describe what a reasonable person would do in a particular circumstance. The department has amended the proposed language to utilize the term "due diligence" instead of "reasonable diligence".

COMMENT #5: The department received a comment questioning what "normal ambulatory travel" means.

RESPONSE #5: Normal ambulatory travel is the language used in ARM 12.2.601 and means a person who has the ability to move around and walk up to a 1-mile distance to reach the start of the public land should a PALA be walk-in only access.

COMMENT #6: A comment was received suggesting adding "or any right of way, road, or trail to be utilized" to New Rule III(1)(b).

RESPONSE #6: In response to this comment, the department has amended the proposed language to include rights of way, roads, or trails.

COMMENT #7: Several comments were received stating that New Rule III(5) needs to be clearer and more specific. Commenters offered concerns regarding the potential for agreements to be used as evidence of permissive use to defeat historic and existing public access. Commenters stated that this was a concern brought up during the enactment of SB 341 and that Governor Bullock issued a statement directing the department enact rules that require the department to determine if the public already has access before finalizing an agreement. Comments stated that as written, New Rule III(5) is not explicit enough to offer this protection.

RESPONSE #7: In response to this comment, the department has amended the proposed language to better explicitly state the department will exercise due diligence so as not to enter into any agreements for which a right to public access already exists. In its exercise of due diligence, the department intends to use a checklist of questions and criteria to ensure that there is no existing public access. The department's checklist would include things such as checking county records to make sure the proposed route is not a county or public road and that the county does not do maintenance on it, checking with FWP field staff along with staff of the agency that manages the public land to be accessed to see if they are aware of any asserted claims or controversies related to public access, checking newspaper articles and press, and checking with local or area leaders.

COMMENT #8: A comment was received suggesting that New Rule III(6) was not necessary since the funding for the program comes out of general license dollars. It should be implicit that priority is given to lands open to hunting and fishing. Another comment was received that stated appreciation that the rule specifies that lands accessible during hunting and fishing seasons is prioritized.

RESPONSE #8: The department believes that while it may be implicit that priority is given to lands open to hunting and fishing, that it is best to make it clear and explicit in the rule so that there is no question. The department made amendments to (6) in an effort to make it as clear as possible.

COMMENT #9: A comment was received suggesting that New Rule III(8) include that the department or landowner may also deny use in addition to access due to violation of PALA rules and of FWP rules and statutes.

RESPONSE #9: A landowner, in collaboration with the department, may decide under which terms an individual(s) cannot use the PALA site. A violation of fish and wildlife game rules or statutes on public lands are generally outside the scope of a landowner denying access for a PALA unless the member of the public violated terms of the PALA.

COMMENT #10: The department received a comment suggesting that New Rule IV, Landowner Compensation, is too vague and gives no standard to how compensation will be evaluated.

RESPONSE #10: Section 87-1-295, MCA provides the terms under which the department may negotiate a PALA agreement. Negotiable terms include:

- (a) the amount of compensation and the duration of the agreement;
- (b) improvements to the land provided by the department that may facilitate public access;
- (c) the location of the access and the transportation mode by which the public may use the access;
- (d) time periods when the access may and may not be used; and
- (e) penalties for trespassing on private land not covered by the agreement.

The department will continue to work with the Private Land/Public Wildlife Advisory Committee to establish scoring and compensation criteria that will help to provide a more standardized approach to how compensation and scoring of a PALA will be conducted.

COMMENT #11: A comment was received requesting clarification on whether general recreation access outside of hunting and fishing seasons will be considered.

RESPONSE #11: Due to the funding source for PALA, other general recreation will be considered if the landowner also allows for hunting or fishing, or both. General recreation such as hiking, camping, etc., as a standalone activity for a PALA will not be considered. Since PALAs that do not allow for hunting or fishing will not be considered, the department has stricken New Rule IV(2) as this section is confusing and unnecessary.

COMMENT #12: A few comments were received regarding concerns or suggestions of language in SB 341.

RESPONSE #12: SB 341 passed in the 2019 Legislature and was codified in 87-1-295, 87-1-296, and 87-1-297, MCA. Comments regarding SB 341 are outside the authority and scope of this rulemaking.

COMMENT #13: A comment was received suggesting that the department should require a description of any known encumbrances on the private land over which a PALA would allow access in New Rule II and on the application form itself.

RESPONSE #13: The department believes that requiring PALA applicants to list any known encumbrance on their land is too broad of a request and too cumbersome on the applicant. Many common encumbrances have no impact on access and may not even be associated with that area of the property.

COMMENT #14: The department received a comment suggesting adding criteria that the department must consider when negotiating compensation, including quality of habitat for wildlife provided by the public land to be accessed, the uniqueness of the habitat, the quality of wildlife habitat on adjacent private land, whether the land to be accessed will likely be inaccessible during certain time periods due to anticipated operations or environmental factors, and extent of improvements that may need to be made to facilitate public access.

RESPONSE #14: In response to this comment, the department has amended the proposed language to include consideration for whether closures will be expected, and the quality of fish or wildlife habitat that may be provided by the public land to be accessed.

COMMENT #15: A comment was received suggesting that the department look at the extent of improvements that need to be made to facilitate access and prioritize PALAs that would require minimum improvement in order to lessen the cost and get public access available sooner.

RESPONSE #15: In the evaluation of each PALA, the department will consider the extent and cost of improvements to be negotiated as it relates to the facilitation of public access. The department will also consider the duration of the agreement as to not provide for improvements that go beyond the scope and duration of the agreement.

COMMENT #16: A comment was received questioning what the definition of "typical road use vehicles" was and if it included snow machines, ATVs, and UTVs.

RESPONSE #16: The department has amended the rule to clarify that typical road use vehicles are those that are highway capable motorized, two-wheel drive vehicles.

The landowner can also identify, through the application process, if they want to have ATV/OHV, off road motorcycles, snowmobiles, rafts, and/or electric bikes.

COMMENT #17: A comment was received seeking clarification between "under accessible" and "inaccessible."

RESPONSE #17: In response to the comment, the department has amended the definition for "under accessible public land" to clarify the definition.

COMMENT #18: The department received a comment that stated that the department should not have to purchase access, but rather, that the department has access by necessity to manage Montana's wildlife.

RESPONSE #18: The PALA program's function is to provide access to the general public, not to the department. The program is designed to compensate private

landowners who are willing to allow the general public access across their private land in order to access public lands that may otherwise not be accessible.

COMMENT #19: A comment was received that stated that these temporary access agreements that are not permanent or recordable could adversely impact efforts to obtain recordable permanent easements.

RESPONSE #19: The department will take into consideration and work with other entities that may be trying to secure perpetual public access to public lands including other programs within the department. However, the landowner who would be considering a PALA has the right to determine which program or type of access they would like to provide the public.

COMMENT #20: A comment was received that suggested that the definition for "inaccessible public land" might be too limited as it does not provide a discretionary option for situations not listed.

RESPONSE #20: The department is looking to utilize the term "under accessible" public lands in order to meet the needs of the public where legal access may exist (e.g., stream access law) but also provide improved access through an under accessible situation. The department has amended the definition of "under accessible" for clarity.

COMMENT #21: The department received a comment that suggested that annual meetings be held between the department and the U.S. Forest Service.

RESPONSE #21: The department will continue to meet with the U.S. Forest Service and other federal or state entities who may be impacted by the implementation of a PALA.

COMMENT #22: The department received a comment suggesting that there be a requirement in New Rule II that requires the landowner to include the lease or permit with their application.

RESPONSE #22: In response to this comment, the department has amended the proposed language to require the landowner to provide or include documentation that they are the leaseholder, if the public land has a lease.

COMMENT #23: A comment was received suggesting requirements be added to the rules to determine if conflicting access acquisition is apparent. Suggested language included that there be a requirement on the application that the landowner must describe any current or prior access discussions with state or federal agencies, and that the department must contact the U.S. Forest Service (USFS) before issuing a PALA.

RESPONSE #23: The department believes it is important to work with other entities who may be attempting to secure public access. If the PALA affects the USFS, the department will work with the USFS.

COMMENT #24: The department received a comment suggesting issuance of long-term commitments and avoiding annual renewals to help reliability of access and maps.

RESPONSE #24: Section 87-1-295, MCA authorizes the department to pay a maximum of up to \$15,000 dollars per year. The department recognizes the need to conduct multi-year agreements. However, payments shall not exceed \$15,000 per year.

COMMENT #25: A comment was received asking the department to look into access onto a specific piece of private land.

RESPONSE #25: The department appreciates the efforts that went into identifying specific parcels that may be considered for this program. However, it is outside the scope of this rulemaking process. The respective parcels would need to be identified and a landowner would need to make an application for these parcels to be considered for a PALA.

COMMENT #26: A few comments were received stressing the importance of promotion of the program, especially to landowner groups.

RESPONSE #26: The department will look for opportunities to promote this program, in particular to the landowner community.

COMMENT #27: The department received a comment urging that the first PALAs issued be great agreements with strong support from both the public and the landowners to ensure the program starts off strong.

RESPONSE #27: The department is committed to working diligently to try to do its best to ensure that all PALAs issued are successful agreements with both public and landowner support.

/s/ Zach Zipfel  
Zach Zipfel  
Rule Reviewer

/s/ Martha Williams  
Martha Williams  
Director  
Department of Fish, Wildlife and Parks

Certified to the Secretary of State April 21, 2020.