

# Water Rights Bureau

# New Appropriations Rules

***Updated***

***October 1, 2011***

*If there is any discrepancy between the administrative rules contained within this publication and the official Administrative Rules of Montana as maintained by the Secretary of State's Office, the official, legal version is that which is maintained by the Secretary of State's Office.*

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## Subchapter 1 Montana Water Use Act

### **36.12.101 DEFINITIONS**

Unless the context requires otherwise, to aid in the implementation of the Montana Water Use Act and as used in these rules:

- (1) "Act" means the Montana Water Use Act, Title 85, chapter 2, parts, 1-4, MCA.
- (2) "Amount" refers to both a flow rate in gallons per minute (gpm), or cubic feet per second (cfs), and a volume of water in acre-feet (af).
- (3) "Animal unit month (AUM)" means a measurement of livestock numbers:
  - (a) one beef cow = 1 AUM
  - (b) one dairy cow = 1.5 AUM
  - (c) one horse = 1.5 AUM
  - (d) three pigs = 1 AUM
  - (e) five sheep = 1 AUM
  - (f) 300 chickens = 1 AUM
- (4) "Applicant" means the person, as defined in 85-2-102(14), MCA, who files a permit or change application with the department.
- (5) "Application" for purposes of ARM 36.12.120 through 36.12.122, 36.12.1301, 36.12.1401, 36.12.1501, and 36.12.1601 means an application for beneficial water use permit, Form No. 600, or an application to change a water right, Form No. 606.
  - (a) For the purposes of ARM 36.12.117 "application" means an application filed under 85-2-302, 85-2-316, 85-2-402, 85-2-407, and 85-2-408, MCA.
- (6) "Appropriation right" means any right to the use of water which would be protected under the law as it existed prior to July 1, 1973, and any right to the use of water obtained in compliance with the provisions and requirements of the act.
- (7) "Associated right" means multiple water rights filed by the same or different appropriators that share the same point of diversion, place of use, or place of storage.
- (8) "Basin closure area" means a hydrologic drainage basin area within which applications for certain water use permits cannot be accepted. Basin closure areas can be designated by statute, administrative rule, or in compacts.
- (9) "Certificate of survey number" means the official number given a parcel of land created by a registered land survey as filed with the county clerk and recorder.
- (10) "Cfs" means a flow rate of water in cubic feet per second and is equivalent to 448.8 gallons per minute. Applications for a flow rate of less than one cfs will be converted to gallons per minute.
- (11) "Change authorization" or "change" means an approval by the department to make a change in appropriation right as defined by 85-2-102, MCA, and allowed by 85-2-402, MCA.
- (12) "Claim" means a statement of claim filed pursuant to 85-2-221, MCA, for a water right established prior to July 1, 1973.
- (13) "Combined appropriation" means an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system.
- (14) "Cone of depression" means a cone-shaped depression of water table or pressure surface developing around a pumping well.

(15) "Consumptive use" means the annual volume of water used for a beneficial purpose, such as water transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products that does not return to ground or surface water.

(16) "Controlled groundwater area" means an area that has additional management controls applied to new groundwater uses pursuant to 85-2-506 through 85-2-508, MCA.

(17) "Criteria addendum" means that additional portion of an application on which substantial credible information must address the criteria listed in 85-2-311 and 85-2-402, MCA.

(18) "Dam" means an artificial barrier created by man-made means designed to form a basin to hold water and create a pond or reservoir.

(19) "Deep percolation" means water that percolates below the root zone and infiltrates a deeper aquifer that is not used by other appropriators or connected to a surface water source.

(20) "Department" means the Montana Department of Natural Resources and Conservation (DNRC).

(21) "Domestic use" means those water uses common to a household including:

- (a) food preparation;
- (b) washing;
- (c) drinking;
- (d) bathing;
- (e) waste disposal;
- (f) cooling and heating; and
- (g) garden and landscaping irrigation up to five acres.

(22) "Drainage device" means a mechanism capable of draining or releasing substantially the full capacity of a reservoir.

(23) "Element" means the factors which describe a water right including, but not limited to:

- (a) the priority date;
- (b) source of supply;
- (c) point of diversion;
- (d) means of diversion;
- (e) period of diversion;
- (f) flow rate;
- (g) volume;
- (h) acreage;
- (i) purpose;
- (j) place of use;
- (k) period of use;
- (l) storage capacity; and
- (m) storage location.

(24) "Existing right", in addition to its definition in 85-2-102, MCA, includes any appropriation of water commenced prior to July 1, 1973, if completed according to the law as it existed when the appropriation was begun.

(25) "Evapotranspiration" means the loss of water from the soil both by evaporation and by transpiration from living plants.

(26) "Flow rate" is a measurement of the rate at which water flows or is diverted, impounded, or withdrawn from the source of supply for beneficial use, and commonly measured in cubic feet per second (cfs) or gallons per minute (gpm).

(27) "General abstract" means a department-generated document that reflects certain water right elements from the department's database.

(28) "Gpm" means a flow rate of water in gallons per minute.

(29) "Household" means the dwelling, house, or other domestic facilities where an individual, family, or social unit lives.

(30) "Hydraulically connected" means a saturated water-bearing zone or aquifer in contact with surface water or other water-bearing zone where rate of exchange of water between the two sources depends on the water level of the water-bearing zone or aquifer.

(31) "Hydrologic system" means the overall movement of water, including snow and ice, above, on, or below the earth's surface.

(32) "Irrigation use" means the controlled application of water to land to supply water requirements not satisfied by rainfall.

(33) "Means of diversion" means the type of structures, facilities, or methods used to appropriate, impound, or collect water. Examples include, but are not limited to the following:

- (a) dike;
- (b) dam;
- (c) ditch;
- (d) headgate;
- (e) infiltration gallery;
- (f) pipeline;
- (g) pump;
- (h) pit; or
- (i) well.

(34) "Median year" means that water flow would be at the 50th percentile. Half of the years would have had higher flows and the other half would have had lower flows.

(35) "Multiple domestic use" means a domestic use by more than one household or dwelling characterized by long-term occupancy as opposed to guests. Examples are domestic uses by:

- (a) colonies;
- (b) condominiums;
- (c) townhouses; and
- (d) subdivisions.

(36) "Municipal use" means water appropriated by and provided for those in and around a municipality or an unincorporated town.

(37) "Net depletion" for the purposes of 85-2-360, MCA, means the calculated volume, rate, timing, and location of reductions to surface water resulting from a proposed groundwater appropriation that is not offset by the corresponding accretions to surface water by water that is not consumed and subsequently returns to the surface water.

(38) "Notice area" means a geographic area determined by the department which may include water rights affected by an application.

(39) "Off-stream reservoir" means a reservoir that is not located on the source of supply and is supplied with water from a diversion means such as a pipe, headgate and ditch, or other means.

(40) "On-stream reservoir" means a reservoir that is located on the source of supply.

(41) "Owner of record" means a person who, according to the department's records, is the current owner of a water right.

(42) "Ownership update" means the updating of the department's water right ownership records by the filing of an ownership update form, Form No. 608, pursuant to 85-2-421 through 85-2-426, MCA. The department's form does not transfer water rights or legally determine water right ownership. It only updates the department's centralized ownership records as reflected by the legal documents that actually transfer water rights.

(43) "Period of diversion" means the period in a calendar year when water is diverted, impounded, or withdrawn from the source of supply. It is described by the earliest month and day and the latest month and day water is diverted during each year.

(44) "Period of use" means the period in a calendar year when water is used for specified beneficial use. It is described as the earliest month and day and the latest month and day the water is beneficially used during each year.

(45) "Place of use (POU)" means the land, facility, or site where water is beneficially used.

(46) "Point of diversion (POD)" means the location or locations where water is diverted from the source of supply.

(47) "Pit, pit-dam, or pond" means a body of water that is created by man-made means, which stores water for beneficial use.

(48) "Place of storage" means a reservoir, pit, pit-dam, or pond.

(49) "Potentially affected area" for the purposes of 85-2-361, MCA, means, as referred to in basin closure rules and in the context of a hydrogeologic assessment, the area or estimated area where groundwater will be affected by a proposed project. The identified area is not required to exceed the boundaries of the drainage subdivisions established by the Office of Water Data Coordination, United States Geological Survey, and used by the Water Court, unless the applicant chooses to expand the boundaries.

(50) "Possessory interest" means the right to exert some interest or form of control over specific land. It is the legal right to possess or use property by virtue of an interest created in the property, though it need not be accompanied by fee title, such as the right of a tenant, easement holder, or lessee.

(51) "Primary diversion" means the initial point from which a diversion means will remove or impound water from the source of supply.

(52) "Priority date" means the clock time, day, month, and year assigned to a water right application or notice upon department acceptance of the application or notice. The priority date determines the ranking among water rights.

(53) "Project" means a place of use that has its own identifiable flow rate, volume, and means of diversion.

(54) "Recreational use" includes but is not limited to swimming, boating, water sports, and fishing.

(55) "Reservoir" means a pond, pit, or pit-dam, created by man-made means that impounds and stores water.

(56) "Return flow" means that part of a diverted flow which is applied to irrigated land and is not consumed and returns underground to its original source or another source of water, and to which other water users are entitled to a continuation of, as part of their water right. Return flow is not wastewater. Rather, it is irrigation water seeping back to a stream after it has gone underground to perform its nutritional function. Return flow results from use and not from water carried on the surface in ditches and returned to the stream.

(57) "Secondary diversion" means a diversion that is not from the source of supply but is a diversion that is used after the water is diverted from the source of supply at the primary diversion. For example, a pump in a ditch or reservoir is a secondary diversion.

(58) "Seepage water" means that part of a diverted flow which is not consumptively used and which slowly seeps underground and eventually returns to a surface or groundwater source, and which other water users can appropriate, but have no legal right to its continuance. Typical examples of seepage water include underground losses from an irrigation ditch or pond.

(59) "Senior water right" means a water right with a priority date that is earlier in time than another water right.

(60) "Source aquifer" means the specific groundwater source from which water is diverted for a beneficial use.

(61) "Source of supply" means the specific surface or groundwater source from which water is diverted for a beneficial use.

(62) "Spring" means a hydrologic occurrence of water involving the natural flow of water originating from beneath the land surface and arising to the surface of the ground. A developed spring is groundwater if some physical alteration of its natural state occurs at its point of discharge from the ground, such as simple excavation, cement encasement, or rock cribbing. An undeveloped spring is surface water if no development occurs at its point of discharge and the appropriation is made from the waters flowing on the surface of the ground.

(63) "Stock use" means the use of water for livestock, including but not limited to cattle, horses, pigs, sheep, llamas, and animals owned and controlled on game farms. It does not include domestic animals such as dogs and cats or wild animals.

(64) "Surface water" means all water of the state at the surface of the ground, including but not limited to any river, stream, creek, ravine, coulee, undeveloped spring, lake, and other natural surface source of water regardless of its character or manner of occurrence.

(65) "Temporary authorization or temporary change" means an authorization to change granted pursuant to 85-2-407 and 85-2-408, MCA, for a specific period of time and with an automatic expiration date.

(66) "Temporary emergency appropriation" means the temporary beneficial use of water necessary to protect lives or property by reason of fire, storm, earthquake or other disaster, or unforeseen combination of circumstances which call for immediate action. An appropriation made necessary due to drought conditions is not a temporary emergency appropriation.

(67) "Temporary permit" means a permit to appropriate water granted pursuant to Title 85, chapter 2, part 3, MCA, for a specific period of time and with an automatic expiration date.

(68) "Transitory diversion" means a movable diversion that will divert water from several nonspecific points along a source of supply.

(69) "Tributary" means the following:

- (a) a surface water source feeding another surface water source; or
- (b) groundwater hydraulically connected to a surface water source.

(70) "Unnamed tributary" means a surface water stream, coulee, or draw, which is not named on a United States Geological Survey (USGS) or Water Resources Survey (WRS) map.

(71) "Use of water for the benefit of the appropriator" means:

- (a) the amount of water reasonably needed for the intended purpose;
- (b) the amount of water needed for conveyance to the intended purpose; and
- (c) water used for instream flow.

(72) "Volume" means the acre-feet of water. Twelve acre-inches or 325,851 gallons are equal to one acre-foot.

(73) "Wastewater" means that part of a diverted flow which is not consumptively used and which returns as surface water to any surface water source, and which other water users can appropriate, but have no legal right to its continuance. A typical example is an irrigator who turns into the individual furrows traversing the irrigator's field from the head ditch more water than can seep into the ground. The water that stays on the surface and is not absorbed into the earth and which remains at the end of the furrow and is collected in a wastewater ditch is wastewater.

(74) "Water flow estimating technique" means a mathematical method of estimating flow generally accepted by the department. This may be accomplished by correlating measurements of diversion system components with actual water use to estimate flow rate or volume of water used. An example is the use of measurements of power consumed by a pump to estimate the amount of water delivered by a pump. Another flow estimating technique would be to apply specific formulas developed by professional hydrologists based on climatic, basin, or stream channel characteristics to estimate stream flow.

(75) "Water measuring device" means equipment that directly measures water flow in open or closed channels and conduits. Examples would be flow meters, weirs, flumes, and bucket and stop watch.

(76) "Water Resources Survey (WRS)" means a survey by county of water resources and water rights in Montana by the former State Engineer's Office or Water Resources Board, predecessors of the department.

(77) "Water saving method" means a change to the actual water use system or management of water use in which the modification being made would decrease the amount of water needed to accomplish the same result. Water saving methods might include:

- (a) changing from a ditch conveyance to a pipeline;
- (b) lining an earthen ditch with concrete or plastic; and
- (c) changing management of a water system to decrease water consumption.

(78) "Zone of influence" means the horizontal extent of the cone of depression.

History: 85-2-113, 85-2-308, 85-2-370, MCA; IMP, 85-2-113, 85-2-301 through 85-2-319, 85-2-321 through 85-2-323, 85-2-329 through 85-2-331, 85-2-335 through 85-2-338, 85-2-340 through 85-2-344, 85-2-350, 85-2-351, 85-2-360 through 85-2-364, 85-2-368, 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-410 through 85-2-413, 85-2-415 through 85-2-419, 85-2-436, 85-2-437, 85-2-439, 85-2-501 through 85-2-514, 85-2-518, 85-2-520, MCA; NEW, Eff. 7/5/73; AMD, Eff. 2/4/75; AMD, 1987 MAR p. 1560, Eff. 9/11/87; AMD, 1992 MAR p. 1615, Eff. 7/31/92; AMD, 1993 MAR p. 1335A, Eff. 6/25/93; AMD, 2004 MAR p. 3036, Eff. 1/1/05; AMD, 2006 MAR p. 1387, Eff. 6/2/06; AMD, 2007 MAR p. 508, Eff. 3/26/07; AMD, 2007 MAR p. 1098, Eff. 8/10/07; AMD, 2008 MAR p. 140, Eff. 2/1/08; AMD, 2008 MAR p. 567, Eff. 3/28/08, AMD, 2011 MAR p. 2043, Eff. 10/1/11.

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### **36.12.102 FORMS**

(1) The following necessary forms for implementation of the act and these rules are available from the Department of Natural Resources and Conservation, P.O. Box 201601, Helena, Montana 59620-1601 and its Water Resources regional offices, or on the World Wide Web at <http://dnrc.mt.gov/wrd/default.asp>. The department may revise as necessary the following forms to improve the administration of these rules and the applicable water laws:

(a) Form No. 600, "Application for Beneficial Water Use Permit," which must be submitted for groundwater developments in excess of 35 gpm or ten acre-feet per year and surface water appropriations;

(b) Form No. 602, "Notice of Completion of Groundwater Development," which must be submitted for groundwater developments with a maximum use of 35 gpm or less, not to exceed ten acre-feet per year;

(c) Form No. 603, "Well Log Report";

(d) Form No. 605, "Application for Provisional Permit for Completed Stockwater Pit or Reservoir," which must be submitted for a pit or reservoir with a maximum capacity of less than 15 acre-feet and a total appropriation of less than 30 acre-feet per year;

(e) Form No. 606, "Application to Change a Water Right";

(f) Form No. 607, "Application for Extension of Time";

(g) Form No. 608, "Water Right Ownership Update";

(h) Form No. 611, "Objection to Application";

(i) Form No. 613, "Fee Schedule for Water Use in Montana";

(j) Form No. 615, "Water Conversion Table";

(k) Form No. 617, "Project Completion Notice for Permitted Water Development";

(l) Form No. 618, "Project Completion Notice for Change of a Water Right";

(m) Form No. 625, "Water Right Correction";

(n) Form No. 626, "Application to Renew a Temporary Water Right Change";

(o) Form No. 630, "Controlled Groundwater Area Petition";

(p) Form No. 631, "Petition for Closure of a Highly Appropriated Basin";

(q) Form No. 634, "Replacement Well Notice", which must be submitted for municipal wells that do not exceed 450 gpm, or for all other wells that do not exceed 35 gpm and ten acre-feet per year;

(r) Form No. 635, "Redundant Well Construction Notice", which must be submitted for redundant wells in a public water supply system as defined by 75-6-102, MCA);

(s) Form No. 636, "Interim Permit Request";

(t) Form No. 637, "Reinstatement Request", which must be submitted to reinstate a permit or change authorization);

(u) Form No. 638, "Water Reservation Application for Instream Flow", which must be submitted for instream flow water reservation applications allowed under the United States of America, Department of Agriculture, Forest Service-Montana Compact, Article VI, section B;

(v) Form No. 639, "Waiver of Statutory Timelines";

(w) Form No. 640, "Certification of Water Right Ownership Update", which must be completed and submitted to the county clerk and recorder with a Realty Transfer Certificate when a water right is being divided or exempted (reserved) from the property;

(x) Form No. 641, "DNRC Ownership Update, Divided Interest", which must be submitted for a water right that will be divided;

(y) Form No. 642, "DNRC Ownership Update, Exempt (Reserved) Water Right", which must be submitted for a water right that will be exempted (reserved) from a sale of land, and for which the seller will retain ownership of the water right;

(z) Form No. 643, "DNRC Ownership Update, Severed Water Right", which must be submitted where a water right will be severed from the land. A severed water right does not involve a land sale;

(aa) Form No. 644, "Notice of Replacement Point of Diversion", which must be submitted for replacement of surface water points of diversion under 85-2-402(18), MCA;

(ab) Form No. 645, "Permit Registration for Groundwater Use Within the National Park Service Compact Area", which must be submitted for groundwater developments with a maximum use of 35 gpm or less, not to exceed ten acre-feet per year;

(ac) Form No. 646, "Geothermal Heating/Cooling Notice of Completion", which must be submitted for groundwater developments for a geothermal purpose with a maximum use of 350 gpm;

(ad) Form No. 647, "Notice of Completion of Emergency Fire Protection Development", which must be submitted for groundwater developments by local governmental fire agencies organized under Title 7, chapter 33, MCA, for emergency fire protection; and

(ae) Form No. 648, "Petition to Subordinate a State Water Reservation".

History: 85-2-113, MCA; IMP, 85-2-113, 85-2-424, MCA; NEW, Eff. 7/5/73; AMD, Eff. 2/4/75; AMD, 1982 MAR p. 702, Eff. 4/16/82; AMD, 1984 MAR p. 882, Eff. 6/1/84; AMD, 1987 MAR p. 1560, Eff. 9/11/87; AMD, 1992 MAR p. 1615, Eff. 7/31/92; AMD, 1996 MAR p. 2430, Eff. 9/20/96; AMD, 2000 MAR p. 636, Eff. 2/25/00; AMD, 2003 MAR p. 1535, Eff. 7/18/03; AMD, 2008 MAR p. 326, Eff. 2/15/08; AMD, 2008 MAR p. 1820, Eff. 8/29/08; AMD, 2011 MAR p. 2043, Eff. 10/1/11.

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### **36.12.103 FORM AND SPECIAL FEES**

(1) A filing fee, if required, shall be paid at the time the permit, change, notice of completion, extension of time request, temporary change renewal, ownership update, or petition application (hereafter singularly or collectively referred to as application) is filed with the department.

(a) The department will not process any application without the proper filing fee.

(b) Failure to submit the proper filing fee within 30 days after notice shall result in a determination that the application is not correct and complete and it shall be terminated.

(2) The department will assess the following filing fees:

(a) For an Application for Beneficial Water Use Permit, Form No. 600, filed pursuant to 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344, MCA, or in an administratively closed basin pursuant to 85-2-319, 85-2-321, or 85-2-322, MCA, or a controlled groundwater area pursuant to 85-2-506 and 85-2-507, MCA, or filed under a compact pursuant to Title 85, chapter 20, MCA, for all surface water, or a groundwater appropriation of greater than 35 gallons per minute, there shall be a fee of \$800;

(b) For an Application for Beneficial Water Use Permit, Form No. 600, filed pursuant to 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344, MCA, or in an administratively closed basin pursuant to 85-2-319, 85-2-321, or 85-2-322, MCA, or a controlled groundwater area pursuant to 85-2-506 and 85-2-507, MCA, or filed under a compact pursuant to Title 85, chapter 20, MCA, for a groundwater appropriation of 35 gallons per minute or less, there shall be a fee of \$200;

(c) For an Application for Beneficial Water Use Permit, Form No. 600, not filed pursuant to 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344, MCA, nor in an administratively closed basin pursuant to 85-2-319, 85-2-321, or 85-2-322, MCA, nor a controlled groundwater area pursuant to 85-2-506 and 85-2-507, MCA, nor filed under a compact pursuant to Title 85, chapter 20, MCA, for all surface water, or a groundwater appropriation of greater than 35 gallons per minute there shall be a fee of \$600;

(d) \$150, in addition to the fees in either (a), (b), or (c) for an Interim Permit Request, Form No. 636;

(e) \$125 for a Notice of Completion of Groundwater Development, Form No. 602, filed for groundwater developments with a maximum use of 35 gpm or less, not to exceed ten acre-feet per year;

(f) \$125 for an Application for Provisional Permit for Completed Stockwater Pit or Reservoir, Form No. 605, filed for a pit or reservoir with a maximum capacity less than 15 acre-feet;

(g) \$700 for an Application to Change a Water Right, Form No. 606, except in the following instances, where there shall be a \$200 fee:

(i) if the change application concerns a replacement well greater than 35 gpm or ten acre-feet, or a municipal well that does not exceed 450 gpm, or replacement reservoir located on the same source; or

(ii) if the change application concerns only moving or adding stock tanks to an existing system.

(h) \$200 for an Application for Extension of Time, Form No. 607;

(i) \$50, plus \$10 for each water right transferred after the first water right, for a Water Right Ownership Update, Form No. 608. The total amount shall not exceed \$300;

(j) \$25 for an Objection to Application, Form No. 611;

(k) \$200 for an Application to Renew a Temporary Water Right Change, Form No. 626;

(l) \$1500 for a Controlled Groundwater Area Petition, Form No. 630. The petitioner shall also pay:

(i) publication costs of the proposed rules in the Montana Administrative Register;

(ii) photocopy and postage costs for copying and mailing the Administrative Rule Proposal Notice and appointment of the hearing examiner to all land owners and water right owners located within the proposed boundaries and other persons as required by 85-2-319, MCA;

(iii) photocopy and postage costs for copying and mailing the Notice of Adoption and other documents as needed;

(iv) newspaper publication of the Notice of Rulemaking Hearing;

(v) actual rental costs for the hearing location and required sound equipment as determined by the hearing examiner; and

(vi) other costs of holding the hearing, conducting investigations or studies, and making records pursuant to 85-2-319, MCA, except the cost of salaries of the department personnel;

(m) \$1500 for a Petition for Closure of a Highly Appropriated Basin, Form No. 631. The petitioner shall also pay:

(i) publication costs of the proposed rules in the Montana Administrative Register;

(ii) photocopy and postage costs for copying and mailing the Administrative Rule Proposal Notice and appointment of the hearing examiner to all land owners and water right owners located within the proposed boundaries and other persons as required by 85-2-319, MCA;

(iii) photocopy and postage costs for copying and mailing the Notice of Adoption and other documents as needed;

(iv) newspaper publication of the Notice of Rulemaking Hearing;

(v) actual rental costs for the hearing location and required sound equipment as determined by the hearing examiner; and

(vi) other costs of holding the hearing, conducting investigations or studies, and making records pursuant to 85-2-319, MCA, except the cost of salaries of the department personnel;

(n) \$100 for a Replacement Well Notice, Form No. 634;

(o) \$50 for a Redundant Well Construction Notice, Form No. 635;

(p) \$200 for a Reinstatement Request, Form No. 637;

(q) \$800 for a Water Reservation Application for Instream Flow, Form No. 638. The applicant shall also pay:

(i) photocopy and postage costs for copying and mailing the appointment of the hearing examiner and notice of hearing;

(ii) photocopy and postage costs for copying and mailing the hearing examiner's proposal for decision, final order, and other orders as needed;

(iii) newspaper publication of the notice of hearing and orders as required by statute and the hearing examiner; and

(iv) actual rental costs for the hearing location and required sound equipment as determined by the hearing examiner;

(r) \$50 for each divided water right on Form No. 641, DNRC Ownership Update, Divided Interest;

(s) \$50 for each exempted water right on Form No. 642, DNRC Ownership Update, Exempt (Reserved) Water Right;

(t) \$50 for each severed water right for Form No. 643, DNRC Ownership Update, Severed Water Right;

(u) \$400 for Form No. 644, Notice of Replacement Point of Diversion;

(v) \$200 for Form No. 645, Permit Registration for Groundwater Use Within the National Park Service Compact Area;

(w) \$200 for Form No. 646, Geothermal Heating/Cooling Notice of Completion; and

(x) \$125 for Form No. 647, Notice of Completion of Emergency Fire Protection Development.

(3) There shall be no fees charged for filing the following forms:

(a) Form No. 617, Project Completion Notice of Permitted Water Development;

- (b) Form No. 618, Project Completion Notice for Change of a Water Right;
- (c) Form No. 625, Correction to a Water Right;
- (d) Form No. 639, Waiver of Timelines;
- (e) Form No. 640, Certification of Water Right Ownership Update; and
- (f) Form No. 648, Petition to Subordinate a State Water Reservation.

(4) The department will charge special service fees not to exceed reasonable amounts, including, but not limited to the following:

- (a) costs associated with contracting for professional hearing officer services;
- (b) costs for computer data reports; and

(c) reasonable public information access fees including copies, blueprints or tracings, audio copies of a hearing, and other requests as per 2-6-110, MCA, and department public information policy.

History: 85-2-113, MCA; IMP, 85-2-113, 85-2-312, MCA; NEW, Eff. 7/5/73; AMD, Eff. 2/4/75; AMD, 1982 MAR p. 702, Eff. 4/16/82; AMD, 1984 MAR p. 882, Eff. 6/1/84; AMD, 1985 MAR p. 1242, Eff. 8/30/85; AMD, 1987 MAR p. 1560, Eff. 9/11/87; AMD, 1991 MAR p. 1009, Eff. 6/28/91; AMD, 1992 MAR p. 1615, Eff. 7/31/92; AMD, 1993 MAR p. 1335A, Eff. 6/25/93; AMD, 1996 MAR p. 2430, Eff. 9/20/96; AMD, 1997 MAR p. 2084, Eff. 11/18/97; AMD, 2000 MAR p. 636, Eff. 2/25/00; AMD, 2003 MAR p. 1535, Eff. 7/18/03; AMD, 2008 MAR p. 326, Eff. 2/15/08; AMD, 2008 MAR p. 1820, Eff. 8/29/08; AMD, **2011 MAR p. 2043, Eff. 10/1/11.**

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### **36.12.104 ISSUANCE OF INTERIM PERMITS**

(1) Pending final approval or denial of an application for a provisional permit, the department may, in its discretion and upon proper application, issue an interim permit authorizing an applicant to begin appropriating water immediately.

(a) The department may issue an interim permit, unless there is substantial information available to the department that the criteria for issuing a provisional permit under 85-2-311 , MCA, cannot be met.

(b) An interim permit may be issued subject to any terms and conditions the department considers necessary to protect the rights of prior appropriators. Violation of a term or condition shall automatically void an interim permit.

(2) The issuance of an interim permit does not entitle an applicant to a provisional permit, and approval of the application for a provisional permit is subject to the procedures and criteria set out in the act.

(3) A person may not obtain any vested right to an appropriation obtained under an interim permit by virtue of the construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the provisional permit is denied or is modified from the terms of the interim permit.

History: 85-2-113, MCA; IMP, 85-2-113, 85-2-311 through 85-2-314, MCA; NEW, Eff. 7/5/73; AMD, Eff. 2/4/75; AMD, 1987 MAR p. 1560, Eff. 9/11/87; AMD, 1993 MAR p. 1335A, Eff. 6/25/93.

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### **36.12.105 TEMPORARY EMERGENCY APPROPRIATIONS**

(1) A temporary emergency appropriation may be made without prior approval from the department, but the use must cease immediately when the water is no longer required to meet the emergency.

(2) A temporary emergency appropriation does not include the use of water for the ordinary operation and maintenance of any trade or business.

**History:** 85-2-113, MCA; IMP, 85-2-113, MCA; NEW, Eff. 7/5/73; AMD, Eff. 2/4/75; AMD, 2003 MAR p. 1535, Eff. 7/18/03.

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### **36.12.106 TESTING AND MONITORING**

(1) Water testing or monitoring is not a beneficial use of water requiring the filing of a permit application.

(2) A permit is not required if the intent of a person is to conduct aquifer tests, water quality tests, water level monitoring or other testing or monitoring of a water source.

History: 85-2-113, MCA; IMP, 85-2-113, MCA; NEW, 1993 MAR p. 1335A, Eff. 6/25/93.

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### **36.12.107 FILING FEE REFUNDS**

(1) An applicant may be entitled to a refund if the applicant withdraws an application prior to public notice or a deadline set by the department for the applicant to make an application correct and complete.

(2) No refund will be authorized if substantial direct processing costs have been accrued in making the application correct and complete prior to publication or department waiver of publication.

(3) No refund will be authorized upon termination of an application due to an applicant's failure to provide additional information necessary to make an application correct and complete within the deadlines provided by the department.

(4) No refund will be authorized once the public notice of the application has been initiated.

(5) If an applicant inadvertently files the wrong form, the applicant may apply the fee paid to the fee required for the correct form, pay the difference due, or be entitled to a refund if overpayment is made.

(6) If a water right application is withdrawn within 30 days after the objection deadline, the Objection to Application filing fee will be refunded.

(7) A refund of the Objection to Application filing fee will not be authorized if a person objecting to a proposed application under 85-2-308, MCA, does not correct the deficiencies identified in the Objection Deficiency Notice by the deadline specified in the notice.

(8) With the exception of (6), a refund of the Objection to Application filing fee will not be authorized.

**History:** 85-2-113, 85-2-302, MCA; IMP, 85-2-113, 85-2-302, MCA; NEW, 2003 MAR p. 1535, Eff. 7/18/03; AMD, 2008 MAR p. 567, Eff. 3/28/08.

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### **36.12.108 PUBLIC NOTICE COSTS**

This rule has been repealed.

History: 85-2-113, MCA; IMP, 85-2-113, 85-2-307, MCA; NEW, 2003 MAR p. 1535, Eff. 7/18/03; REP, 2008 MAR p. 1820, Eff. 8/29/08.

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### **36.12.110 LEGAL LAND DESCRIPTION STANDARDS**

(1) Primary or secondary points of diversion must be described as one or more of the following:

- (a)  $\frac{1}{4}\frac{1}{4}\frac{1}{4}$  section, section, township, range and county;
- (b) lot, block, subdivision,  $\frac{1}{4}$  section, section, township, range and county;
- (c) government lot,  $\frac{1}{4}$  section, section, township, range and county; or
- (d) certificate of survey number with or without a lot number,  $\frac{1}{4}$  section, section, township, range and county.

(2) The point of diversion legal description of an on-stream reservoir must be described as the point where the dam or pit crosses the source of supply.

(3) Transitory diversions must be described as the most upstream diversion point and a measurement in stream miles downstream from the upstream point. For example the transitory diversion will extend from the upstream point to approximately one mile downstream.

(4) If secondary diversions are described, they must be identified as "secondary".

(5) The legal land description for the place of use must be listed to the nearest reasonable and concise legal land description. For example, it would be appropriate to describe 20 acres in the N $\frac{1}{2}$ NWNW rather than ten acres in the NWNWNW and ten acres in the NENWNW. For a subdivision covering most of the SW, it would be appropriate to describe the place of use as the SW rather than the NWSW, NESW, SWSW, and SESW.

**History: 85-2-113, MCA; IMP, 85-2-301 through 85-2-319, 85-2-321 through 85-2-323, 85-2-329 through 85-2-331, 85-2-335 through 85-2-338, 85-2-340 through 85-2-344, 85-2-350, 85-2-351, 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-410 through 85-2-413, 85-2-415 through 85-2-419, 85-2-436, 85-2-437, 85-2-439, 85-2-501 through 85-2-512, 85-2-601 through 85-2-606, 85-2-608, 85-2-804 through 85-2-806, MCA; NEW, 2005 MAR p. 162, Eff. 1/1/05.**

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### **36.12.111 MAP STANDARDS**

(1) A United States geological survey (USGS) quadrangle map or United States Department of Agriculture (USDA) aerial photo must be included with the application and the following items must be clearly identified on the map:

- (a) north arrow;
- (b) scale bar;
- (c) section corners and numbers;
- (d) township and range numbers;
- (e) all past and proposed points of diversion;
- (f) all past and proposed places of use;
- (g) past and proposed reservoir locations; and
- (h) past and proposed ditch or pipeline locations.

(2) Maps must reflect the place of use of all associated water rights.

(3) Additional maps must be submitted if the information on one map cannot convey the required information clearly and must be of the same scale so that they can be overlain.

(4) For change applications to irrigation water rights, in addition to the map required in (1) and (2) , a copy of the Water Resources Survey map, if available for the land affected by the change, shall be submitted with the historically irrigated acreage identified.

(5) For change applications, all historically irrigated acreage must be identified on an aerial photograph that shows the date the aerial photo was taken.

(6) In addition, a county plat map obtained from the county office may be submitted. The county plat map must show the same information as required under (1) .

History: 85-2-113, MCA; IMP, 85-2-301 through 85-2-319, 85-2-321 through 85-2-85 85-2-329 through 85-2-331, 85-2-335 through 85-2-338, 85-2-340 through 85-2-344, 85-2-350, 85-2-351, 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-410 through 85-2-413, 85-2-415 through 85-2-419, 85-2-436, 85-2-437, 85-2-439, 85-2-501 through 85-2-512, 85-2-601 through 85-2-606, 85-2-608, 85-2-804 through 85-2-806, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.

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### **36.12.112 PERIOD OF DIVERSION AND PERIOD OF USE STANDARDS**

(1) Deviations from the standards listed below require information supporting the period of diversion or use requested in an application:

(a) domestic January 1 to December 31  
(b) stock January 1 to December 31

(c) irrigation based on the climatic area designated by the USDA Natural Resources and Conservation Service (NRCS) which is generally as follows:

(i) climatic area I March 15 to November 15  
(ii) climatic area II April 1 to October 31  
(iii) climatic area III April 15 to October 15  
(iv) climatic area IV April 20 to October 10  
(v) climatic area V April 25 to October 5

(2) Applications for diversions into a storage reservoir for later use must include the period of diversion for when water will be diverted into the reservoir and the period of use when water will be used from the reservoir.

(3) Applications for temporary permits must identify the beginning and ending month, day, and year.

(4) The basis for the requested periods for other uses must be explained.

History: 85-2-113, MCA; IMP, 85-2-301 through 85-2-319, 85-2-321 through 85-2-323, 85-2-329 through 85-2-331, 85-2-335 through 85-2-338, 85-2-340 through 85-2-344, 85-2-350, 85-2-351, 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-410 through 85-2-413, 85-2-415 through 85-2-419, 85-2-436, 85-2-437, 85-2-439, 85-2-501 through 85-2-512, 85-2-601 through 85-2-606, 85-2-608, 85-2-804 through 85-2-806, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.

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### **36.12.113 RESERVOIR STANDARDS**

(1) An application project involving a new or existing reservoir must include the annual volume of water that will evaporate from the reservoir water surface.

(2) The application must include information explaining how the storage reservoir will be managed to satisfy senior water rights. Senior water users are not entitled to water that has been legally stored.

(3) If applicable, preliminary design specifications for a reservoir's primary and emergency spillways must be included.

(4) If a reservoir is located off-stream:

(a) the conveyance means to and from the reservoir must be identified; and

(b) any losses that may occur with the means of conveyance must be calculated and identified.

(5) For on-stream reservoirs, no flow rate is required. If a flow rate is requested for an on-stream reservoir, documentation must show why a flow rate is needed and reasonable.

(6) Place of storage does not include:

(a) reservoirs, pits, pit-dams, or ponds with a capacity of less than 0.10 acre-feet; or

(b) the use of a temporary or permanent diversion structure within a canal or ditch designed to raise water surface elevation for primary diversions or to direct flows to a secondary conveyance facility.

(7) Water tanks or cisterns that are a part of a water system are not considered storage reservoirs and a water right application is not needed to add a water storage tank or cistern as long as the flow rate and volume of a water right is not being increased.

(8) If the application is for a reservoir for which the above standards are not applicable, the applicant must explain the reason why the standard is not applicable.

History: 85-2-113, MCA; IMP, 85-2-301 through 85-2-319, 85-2-321 through 85-2-323, 85-2-329 through 85-2-331, 85-2-335 through 85-2-338, 85-2-340 through 85-2-344, 85-2-350, 85-2-351, 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-410 through 85-2-413, 85-2-415 through 85-2-419, 85-2-436, 85-2-437, 85-2-439, 85-2-501 through 85-2-512, 85-2-601 through 85-2-606, 85-2-608, 85-2-804 through 85-2-806, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05; AMD, 2007 MAR p. 1098, Eff. 8/10/07.

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### **36.12.114 SOURCE NAME STANDARDS**

(1) A source name must adhere to one of the following, which are shown in order of preference:

- (a) USGS map;
- (b) water resource survey book; or
- (c) DNRC water rights database.

(2) Waste and seepage is not an accepted source name. Waste and seepage must be described as an unnamed tributary (UT) to the next named source into which the UT flows.

History: 85-2-113, MCA; IMP, 85-2-301 through 85-2-319, 85-2-321 through 85-2-323, 85-2-329 through 85-2-331, 85-2-335 through 85-2-338, 85-2-340 through 85-2-344, 85-2-350, 85-2-351, 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-410 through 85-2-413, 85-2-415 through 85-2-419, 85-2-436, 85-2-437, 85-2-439, 85-2-501 through 85-2-512, 85-2-601 through 85-2-606, 85-2-608, 85-2-804 through 85-2-806, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.

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### **36.12.115 WATER USE STANDARDS**

(1) A water right has several elements, one of which is the amount of water that is used for each purpose described in the right. A reasonable amount of water will vary with the type and location of the use and will depend on various circumstances such as:

- (a) soil conditions;
- (b) method of conveyance;
- (c) topography;
- (d) climate;
- (e) system efficiency; or
- (f) other conditions affecting the particular use.

(2) The department will use the following standards when reviewing notices or applications for new uses of water:

- (a) for domestic use, for one household, 1.0 acre-foot per year of water for year-round use;
- (b) for lawn, garden, shrubbery, and shelterbelts, 2.5 acre-feet per acre per year;
- (c) for stockwater, a consumptive use of 15 gallons per day or .017 acre-foot per year per animal unit. Animal unit equivalencies for water consumption are set out in ARM 36.12.101 and the water conversion table, Form No. 615;
- (d) fire protection water needs shall be determined by the type of equipment used, diversion rate, the size of the area to be covered, the frequency of the water use and must be explained and documented.

(e) For irrigation, the following table applies:

**Irrigation Standards**

	Climatic Area <sup>1</sup> Acre Feet per Acre				
	I	II	III	IV	V
Sprinkler Irrigation 70% Efficiency	2.63 - 3.04	2.30 - 2.69	2.08 - 2.41	1.76 - 2.07	1.26 - 1.48
Level Border 60% Efficiency Design Slope Level	3.07 - 3.55	2.69 - 3.15	2.43 - 2.81	2.06 - 2.41	1.47 - 1.73
Graded Border 70% Efficiency Slope Group Design Slope .10% Design Slope .20% Design Slope .40%	2.63 - 3.04	2.30 - 2.69	2.08 - 2.41	1.76 - 2.07	1.26 - 1.48
Graded Border 65% Efficiency Design Slope .75% Design Slope 1.5%	2.84 - 3.28	2.48 - 2.90	2.24 - 2.59	1.90 - 2.23	1.36 - 1.60
Graded Border 60% Efficiency Design Slope 3.0%	3.07 - 3.55	2.69 - 3.15	2.43 - 2.81	2.06 - 2.41	1.47 - 1.73
Furrow 70% Efficiency Design Slope .10% Design Slope .20% Design Slope .40%	2.36 - 2.74	2.11 - 2.44	1.87 - 2.16	1.39 - 1.70	NA
Furrow 65% Efficiency Design Slope .75%	2.54 - 2.95	2.27 - 2.63	2.02 - 2.33	1.50 - 1.83	NA
Furrow 60% Efficiency Design Slope 1.5%	2.75 - 3.19	2.46 - 2.85	2.19 - 2.52	1.62 - 1.98	NA
Contour Ditch 60% Efficiency Design Slope .75%	3.07 - 3.55	2.69 - 3.15	2.43 - 2.81	2.06 - 2.41	1.47 - 1.73
Contour Ditch 55% Efficiency Design Slope 1.5% Design Slope 3.0%	3.35 - 3.87	2.93 - 3.43	2.65 - 3.07	2.24 - 2.63	1.60 - 1.88
Contour Ditch 45% Efficiency Design Slope 6.0%	4.10 - 4.73	3.58 - 4.19	3.24 - 3.75	2.74 - 3.22	1.96 - 2.30

<sup>1</sup> The irrigation climatic areas are identified in the 1986 Irrigation Climatic Areas of Montana map. Climatic area I is high consumptive use, climatic area II is moderately high consumptive use, climatic area III is moderate consumptive use, climatic area IV is moderately low consumptive use, and climatic area V is low consumptive use.

(3) A permit is required when a reservoir is proposed to include fire protection purposes and the volume of water reasonably needed for fire protection must be explained and must reference reliable industry sources.

(4) For fire protection reservoirs located within a basin closure area, evaporation losses must be made up from nontributary water sources or addressed in a mitigation plan.

(5) The flow rate and volume of water for any uses not listed in this rule must be calculated, explained, and documented based on the beneficial use and operation of the project.

(6) Deviations outside the standards will require information supporting the requested amount.

**History:** 85-2-113, MCA; IMP, 85-2-301 through 85-2-319, 85-2-321 through 85-2-323, 85-2-329 through 85-2-331, 85-2-335 through 85-2-338, 85-2-340 through 85-2-344, 85-2-350, 85-2-351, 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-410 through 85-2-413, 85-2-415 through 85-2-419, 85-2-436, 85-2-437, 85-2-439, 85-2-501 through 85-2-512, 85-2-601 through 85-2-606, 85-2-608, 85-2-804 through 85-2-806, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05; AMD, 2008 MAR p. 1820, Eff. 8/29/08.

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### **36.12.116 EVAPORATION STANDARDS**

- (1) The following reports contain acceptable methods for estimating evaporation losses:
- (a) Joint Technical Working Group Report, Water Rights Compact Between the State of Montana and the Department of the Interior, Bureau of Land Management, November 1998;
  - (b) Estimation of Evaporation from Shallow Ponds and Impoundments in Montana, Donald E. Potts, Miscellaneous Publication No. 48, Montana Conservation and Experiment Station School of Forestry, University of Montana, Missoula, March 1988;
  - (c) Evaporation Pond Design for Agricultural Wastewater Disposal, USDA Soil Conservation Service, Montana Technical Note: Environment No. 7, February 1974;
  - (d) Evaporation from Lakes and Reservoirs, a study based on 50 years of weather bureau records, Minnesota Resource Commission, June 1942; and
  - (e) A standard USGS evaporation pan is acceptable. The standard pan is four feet in diameter and ten inches deep and measured daily.
- (2) Deviations from the acceptable standards in (1) require additional information supporting the volume requested for evaporation losses.
- (3) The department will determine the acceptability of other evaporation loss estimates on a case-by-case basis.

History: 85-2-113, MCA; IMP, 85-2-301 through 85-2-319, 85-2-321 through 85-2-323, 85-2-329 through 85-2-331, 85-2-335 through 85-2-338, 85-2-340 through 85-2-344, 85-2-350, 85-2-351, 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-410 through 85-2-413, 85-2-415 through 85-2-419, 85-2-436, 85-2-437, 85-2-439, 85-2-501 through 85-2-512, 85-2-601 through 85-2-606, 85-2-608, 85-2-804 through 85-2-806, MCA; NEW, 2005 MAR p. 101, Eff. 1/1/05.

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### **36.12.117 OBJECTION TO APPLICATION**

(1) A person objecting to a proposed application under 85-2-308, MCA, must file an objection to an application on Form No. 611, Objection to Application, which can be obtained from the department, and must comply with the requirements set forth in this rule.

(2) A separate Objection to Application must be filed for each water right application.

(3) Persons owning separate water rights must each file an Objection to Application form. For example, if person A owns a water right and B owns a different water right and both want to file an objection to the same application, owner A and owner B must each file a separate Objection to Application form.

(4) Co-owners (owners of a water right that is not split between the owners) of an undivided water right may file one Objection to Application form.

(5) Each objector who wants to participate in the department's contested case hearing must sign the Objection to Application form.

(6) An Objection to Application is timely if the postmark date on the form is on or before the objection deadline stated in the public notice of the application. A fax of the Objection to Application form will be accepted, provided the original Objection to Application form is postmarked or hand-delivered timely. Electronic mail (e-mail) submissions of the Objection to Application will not be accepted.

(7) An Objection to Application filed with the department before an application has been published will not be accepted and will be returned.

(8) Upon receipt of an Objection to Application or response to an Objection Deficiency Notice, the department will place the envelope postmark date on the form. If the postmark date is not legible, the department will assign the date as two days prior to the department's receipt of the objection form. An objector is solely responsible for ensuring timeliness, a legible postmark, and filing of the objections.

(9) An Objection to Application is correct and complete if it includes the following legible information:

(a) filing fee;

(b) objector's name and mailing address;

(c) name of the water right applicant;

(d) water right application number;

(e) if an objector is claiming the objector's water right will be adversely affected if the application were granted, the objector must provide the department-assigned water right number. If the water right was exempt from the statewide water right filing requirements and is not on record with the department, the objector must provide the following information:

(i) date of first use;

(ii) source;

(iii) means of diversion;

(iv) type of use (stock or domestic);

(v) the flow rate and volume of water used;

(vi) the point of diversion; and

(f) facts indicating that the application does not meet one or more of the applicable criteria set forth in 85-2-302, 85-2-311, 85-2-316, 85-2-402, 85-2-407, or 85-2-408, MCA. The facts provided must specifically describe why or how one or more of the criteria are not met;

(g) facts explaining how the person has standing to object. To have standing, a person must have property, water rights, or other interests that would be adversely affected were the application to be granted. The objection must describe how the person's property, water rights, or interests will be adversely affected if the water right application were granted; and

(h) signature of the objector or the objector's legal representative. If a representative of the objector other than objector's attorney signs the Objection to Application affidavit, the representative shall state the relationship of the representative to the objector and provide documentation demonstrating the authenticity of that relationship.

(10) An objection that is deemed correct and complete and valid pursuant to 85-2-308(3) and (6), MCA, may proceed to an administrative hearing. The administrative hearing will be limited to the criteria objected to in the objection. An objector may participate in the administrative hearing only on the criteria to which the objector specifically objected and which is determined valid by the department.

(11) The department will mail notice to the objector of the Objection to Application of any deficiencies in the objection. The objector must address the information requested in the Objection Deficiency Notice and must have the response postmarked or hand delivered to the department within 15 calendar days from the date on the Objection Deficiency Notice. A fax submission of the deficiency letter response will be accepted provided the original response is postmarked timely. Electronic mail (e-mail) submissions of a response will not be accepted.

(12) If the objector does not correct the deficiencies as determined by the department by the deadline, the objection will be terminated without further notice.

(13) The department will document a valid objection by completing an objection validity form.

(14) The department will determine on which criteria the objector has filed a valid objection.

(15) An objection may be withdrawn at any time in writing. A party withdrawing an objection will not be considered a party by the department to any hearing that may be held by the department.

(16) An applicant is not required to meet a water quality criterion when a valid water quality objection is not raised or is withdrawn.

(17) Private agreements between applicants and objectors which provide for the withdrawal of objections and include conditions that must be met by an applicant or objector may not be recognized by the department or included in a granted application. The department will only place a condition on a granted application if the department determines the condition is necessary to meet the application criteria.

**History: 85-2-308, MCA; IMP, 85-2-308, MCA; NEW, 2008 MAR p. 567, Eff. 3/28/08.**

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### **36.12.120 BASIN CLOSURE AREA EXCEPTIONS AND COMPLIANCE**

(1) In the numerous basin closure areas in Montana, the department cannot process an application unless it qualifies as a basin closure exception.

(2) An applicant must provide a written summary of their application information explaining how their application meets the basin closure exceptions and why their application located in a basin closure area can be processed.

(3) The department will determine whether an application in a basin closure area can be processed based on the information received from the applicant and will document its findings before it will review the application to determine whether it is correct and complete.

(4) While the department may determine that an application located in a basin closure area can be processed, an objector is able to refute the department's determination.

(5) An applicant must identify the potentially affected area and provide a map depicting that area.

(6) A net depletion analysis must be submitted with the water right application and must include but is not limited to analysis of the following factors within the potentially affected area:

(a) evidence addressing the hydraulic connection between the source aquifer and all surface water. Surface water means, in addition to ARM 36.12.101(64) and for the purposes of 85-2-360 through 85-2-362, MCA, includes but is not limited to irrigation canals and drains;

(b) evidence of propagation of drawdown from pumping a proposed well or other groundwater diversion and volume, rate, timing, and location of any resulting surface water effects;

(c) evidence of the comparison of the proposed flow rate and period of diversion to similar types of existing water uses;

(d) estimates of the monthly volume of water consumed by a proposed project through evaporation, evapotranspiration, and all other forms of consumption associated with the proposed project;

(e) an assessment of potential return flows to a source aquifer or surface water source and the volume, rate, timing, and location of return flows;

(f) in addition to ARM 36.12.101(56) and for the purposes of 85-2-361, MCA, return flow includes but is not limited to any treated wastewater if the treated wastewater will be used as part of an aquifer recharge plan;

(g) the volume, rate, timing, and locations of accretions to surface water that is not consumed and subsequently returns to surface water; and

(h) a water balance table must be included that describes the monthly and total annual water balance for the proposal.

(7) An applicant must provide a list and map of the points of diversion of surface water appropriation rights and groundwater rights on record with the department that are located within the potentially affected area.

(8) Information required by the hydrogeologic assessment may not be sufficient to meet applicable criteria under 85-2-311, MCA, including but not limited to adverse effect to a prior appropriator. The applicant for a beneficial water use permit pursuant to 85-2-311, MCA, is responsible for providing sufficient evidence to meet all applicable criteria.

History: 85-2-113, 85-2-370, MCA; IMP, 85-2-301 through 85-2-319, 85-2-321 through 85-2-323, 85-2-329 through 85-2-331, 85-2-335 through 85-2-338, 85-2-340 through 85-2-344, 85-2-350, 85-2-351, 85-2-360 through 85-2-364, 85-2-368, 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-410 through 85-2-413, 85-2-415 through 85-2-419, 85-2-436, 85-2-437, 85-2-439, 85-2-501 through 85-2-512, 85-2-601 through 85-2-606, 85-2-608, 85-2-804 through 85-2-806, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05; AMD, 2008 MAR p. 140, Eff. 2/1/08.

### **36.12.121    AQUIFER TESTING REQUIREMENTS**

(1) There are numerous tests that can be performed on wells and aquifers, with a variety of objectives and procedures. An adequate aquifer test will depend on factors such as whether the well is located in a basin closure area (see ARM 36.12.120) , the expected pumping schedule of the well, the potential interference with existing water rights and the characteristics of the aquifer in which the well is completed.

(2) Applicants are encouraged to confer with department staff prior to designing an aquifer test to ensure that the test will not have to be repeated, which may require additional expense.

(a) Department staff will provide guidance on testing procedures, monitoring, and reporting, but will not provide technical support or assistance.

(3) Aquifer testing must follow standard procedures that are discussed in hydrogeology textbooks and professional literature. The following are preferred aquifer testing procedures:

(a) A hydrogeologist, hydrologist, or engineer familiar with aquifer testing procedures must supervise the aquifer test, however, the supervisor does not need to be on site.

(b) Aquifer test data Form No. 633, or equivalent, must be used to record the data required for the test.

(c) Pumping must be maintained at a constant discharge rate equal to or greater than the proposed pumping rate for the entire duration of the test. If the discharge rate varies, the applicant must note the clock time and discharge rate.

(d) Minimum duration of pumping during an aquifer test must be 24 hours for a proposed use or discharge of 150 gpm or less and a proposed volume of 50 acre-feet or less.

(e) Minimum duration of pumping during an aquifer test must be 72 hours for a proposed use or discharge of greater than 150 gpm and proposed volume greater than 50 acre-feet.

(f) Discharge of the pumped well must be measured with a reliable measuring device, which can include a barrel, in-line flow meter, flume, or weir.

(g) Discharge rate must be monitored and recorded with clock time and adjusted if necessary at 15-minute intervals during the first three hours of the aquifer test and at frequent intervals until the end of the test to maintain a constant discharge.

(h) Discharged water must be conveyed a sufficient distance from the production and observation wells to prevent recharge to the aquifer during the test. Adequate water conveyance devices include pipe, large-diameter hose (e.g., fire hose) , lined ditch or canal, or an existing irrigation system.

(4) The following procedures are preferred to ensure monitoring is adequate:

(a) One or more observation wells must be completed in the same water-bearing zone(s) or aquifer as the proposed production well and close enough to the production well so that drawdown is measurable and far enough that well hydraulics do not affect the observation well.

(b) One or more observation wells must be completed in the overlying water-bearing zone(s) or aquifer if the proposed production well is purported to be completed in a hydraulically disconnected deeper aquifer.

(c) An observation well can be an existing well. An existing well should not be pumped, or if pumped should be monitored at a frequency necessary to separate the effects of its pumping.

(d) New observation wells must be constructed as described in ARM Title 36, chapter 21, subchapter 6. However, observation wells less than ten feet deep are not subject to those rules. In those cases, observation wells might be constructed by simple excavation, or installing PVC pipe, perforated black pipe, or a sand point.

(e) Electronic pressure transducer/data logger instrumentation, electric well probes, pressure gauges on turbine pumped wells, or graduated steel tapes are acceptable methods of measuring groundwater levels.

(f) Groundwater levels in the production, at least one of the observation wells in the source aquifer, and at least one observation well in the overlying water-bearing zone or aquifer must be monitored at frequent intervals for at least two days prior to beginning the aquifer test to evaluate background water-level trends and the prepumping hydraulic gradient. An applicant must evaluate and correct for background water-level trends.

(g) Groundwater-level drawdown in the production well and monitored observation well(s) during the pumping phase of the aquifer test must be measured with 0.01-foot precision according to the schedule specified on Form No. 633.

(h) Groundwater-level recovery in the production and monitored observation well(s) must be measured with 0.01-foot precision according to the schedule specified on Form No. 633 or at a minimum, according to the specified schedule on Form No. 633 for the first 24 hours of recovery and four times per day until end of the recovery test.

(5) A report describing the testing and monitoring procedures and presenting analyses, interpretations, and conclusions must be submitted with the application. The following reporting requirements are preferred:

(a) a topographic map with labeled locations of production and observation wells, discharge point, surface water monitoring sites, and a scale bar and north arrow;

(b) if available, a geologic map, stratigraphic, geomorphic, or lithologic descriptions, and drilling logs;

(c) distances between the pumping well and the observation well, and depths, dimensions, and perforated intervals of each well as specified on Form No. 633;

(d) surveyed wellhead elevations and staff gage elevations if basin closure testing is required;

(e) a narrative description or conceptual model that describes the aquifer system;

(f) a description of testing methods;

(g) groundwater level and surface water monitoring data;

(h) aquifer-testing data, transmissivity and storage coefficient determinations and effects to groundwater and surface water availability;

(i) analyses, interpretations, and conclusions; and

(j) all pumping schedules and drawdown and recovery data must be submitted in electronic format.

**History:** 85-2-113, MCA; IMP, 85-2-302, 85-2-311, 85-2-330, 85-2-337, 85-2-341, 85-2-343, 85-2-402, 85-2-419, 85-2-506, 85-2-508, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.

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### **36.12.122 CONTACTS**

(1) If communication about a water right application filing or objection filing is to be conducted through an individual other than the applicant, the name address, and phone numbers must be supplied.

(2) If a contact person is identified as legal counsel, all communication will be sent only to the attorney unless the attorney provides written instruction to the contrary.

(3) If a contact person is identified as a consultant, employee, or lessee, the individual filing the water right form or objection form will receive all correspondence and a copy will be sent to the contact person.

(4) A contact cannot represent an applicant at a hearing unless the contact is an attorney.

History: 85-2-113, MCA; IMP, 85-2-301 through 85-2-319, 85-2-321 through 85-2-323, 85-2-329 through 85-2-331, 85-2-335 through 85-2-338, 85-2-340 through 85-2-344, 85-2-350, 85-2-351, 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-410 through 85-2-413, 85-2-415 through 85-2-419, 85-2-436, 85-2-437, 85-2-439, 85-2-501 through 85-2-512, 85-2-601 through 85-2-606, 85-2-608, 85-2-804 through 85-2-806, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.

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## Subchapter 2

### Procedural Rules for Water Right Contested Case Hearings

#### **36.12.201 SCOPE AND PURPOSE**

(1) The procedures contained herein shall govern the contested case proceedings conducted by the department of natural RESOURCES AND CONSERVATION pursuant to Montana Code Annotated (MCA) Title 85, chapter 2. The attorney general's model rules for conducting contested case proceedings, adopted by the department at ADMINISTRATIVE RULES OF MONTANA (ARM) 36.2.101, shall not apply to proceedings conducted by the department pursuant to Title 85, chapter 2, MCA and are superseded for that purpose only. These rules do not govern any proceedings conducted by the board of natural RESOURCES AND CONSERVATION pursuant to Title 85, chapter 2, MCA.

History: 2-4-201(2) and 85-2-113(2), MCA; IMP, 2-4-201(2) and 85-2-113(2), MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84.

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### **36.12.202 DEFINITIONS**

As used in these rules, the following definitions apply:

- (1) "Applicant" means a person who filed an application.
- (2) "Application" means any application which has been filed pursuant to Title 85, chapter 2, MCA for appropriating water or changing appropriation rights.
- (3) "Department" means the department of natural RESOURCES AND CONSERVATION.
- (4) "Director" means the director of the department or the director's designee.
- (5) "Final decision-making" means all events after the issuance of a proposal for decision necessary to the completion of a final order.
- (6) "Hearing examiner" means the person or persons assigned by the director to hear the contested case and to participate in the final decision-making process.
- (7) "Notice of application" means the notice prepared and published by the department pursuant to 85-2-307 , MCA.
- (8) "Objection" means an objection to an application filed in accordance with Title 85, chapter 2, MCA.
- (9) "Objector" means a person who filed an objection.
- (10) "Party" means those persons who are applicants, timely objectors, petitioners or permittees under Title 85, chapter 2, parts 3, 4, 5 and 8, MCA and are entitled as of lawful right to a contested case hearing.
- (11) "Permit" means a permit to appropriate water issued by the department under Title 85, chapter 2, part 3, MCA.
- (12) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity. 85-2-102 (10) , MCA.
- (13) "Petition" means the document filed with the department pursuant to 85-2-505 (2) , MCA.
- (14) "Proceeding" means all events, including prehearing conferences, hearings, orders, and proposals for decision, necessary to the completion of the hearing process.
- (15) "Service; serve" means personal service or service by first class United States mail, postage prepaid and addressed to a person's last known address. Proof of service shall be made by the person making such service. Service by mail is complete upon the placing of the item to be served in the mail. Agencies of the state of Montana may also serve by depositing the item to be served with the mail and distribution section, general services DIVISION, department of administration.
- (16) "Staff" means a person employed or retained by the department.
- (17) "Timely objector" means a person who filed an objection to an application with the department by the date specified in the notice of application. Objections that are postmarked on or before or personally delivered by the date specified in the notice of application shall be deemed as timely filed.
- (18) "Untimely objector" means a person who did not file an objection to an application by the date specified in the notice of application, but who objects to an application sometime thereafter.

**History: 2-4-201 and 85-2-113, MCA; IMP, 2-4-201 and 85-2-113, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94; AMD, 2000 MAR p. 636, Eff. 2/25/00.**

### **36.12.203 HEARING EXAMINERS**

(1) When the department orders a contested case hearing, the director shall assign a hearing examiner to hear the case. The file that is submitted to the hearing examiner, subsequent to the assignment of the case, shall contain the parties' applications, notices of applications, petitions, objections to applications, or permits under consideration to be modified or revoked. After reviewing the file, the hearing examiner shall contact the parties and advise them as to the location and time during which a hearing should be held. Except as required under the circumstances of ARM 36.12.232, no hearing shall be scheduled on a Saturday, Sunday or legal holiday.

(2) Consistent with law, the hearing examiner shall perform the following duties:

(a) regulate the course of the hearing, including the scheduling, recessing, reconvening and adjournment thereof;

(b) grant or deny motions for discovery including the taking of depositions;

(c) receive and act upon requests for subpoenas where appropriate;

(d) hear and rule on motions;

(e) preside at the contested case hearing;

(f) administer oaths and affirmations;

(g) grant or deny requests for continuances;

(h) examine witnesses where the hearing examiner deems it necessary to make a complete record;

(i) rule upon offers of proof and receive evidence;

(j) make preliminary, interlocutory or other orders as he deems appropriate;

(k) recommend a summary disposition of any part of the case where there is no genuine issue as to any material fact or recommend dismissal where the case or any part thereof has become moot or for other reasons;

(l) require testimony, upon the motion of a party or upon the hearing examiner's motion, to be prefiled in whole or in part when prefiling will expedite the hearing and the interests of the parties will not be prejudiced substantially;

(m) hold conferences for settlement, simplification of the issues, or any other proper purpose;

(n) appoint a staff expert;

(o) prepare a proposal for decision or a final order containing findings of fact, conclusions of law and a proposed or final order;

(p) after issuing a proposal for decision, participate in the final decision-making process;

(q) do all things necessary and proper to the performance of the foregoing; and

(r) as authorized by law and rule, perform such other duties as well as any that may be delegated by the director.

History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-611, 2-4-612, and 2-4-621, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.

### **36.12.204 COMMENCEMENT OF A CONTESTED CASE**

A contested case is commenced, subsequent to the assignment of a hearing examiner, by the service of a notice of and order for hearing by the director.

(1) The notice and order. A notice of and order for hearing, which shall be a single document, shall be served upon all parties and shall contain, but not be limited to, the following:

(a) the time, date, place, and nature of the hearing;

(b) name, address and telephone number of the hearing examiner;

(c) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(d) a reference to the particular sections of the statutes and rules involved;

(e) a short and plain statement of the matters asserted; for an application or petition, the matters asserted shall be whether the application or petition meets the statutory requisites. For revocation or modification of a permit, the matters asserted are the grounds for revocation or modification;

(f) notification of the right of the parties to be represented by legal counsel or appear on their own behalf;

(g) a citation to these procedural rules and to the contested case provisions of MCA Title 2, chapter 4, part 6;

(h) a statement that a formal proceeding may be waived pursuant to MCA § 2-4-603 ;

(i) a statement advising parties that if any party fails to appear at the hearing, the party will be in default; and a statement which explains the possible results of a default;

(j) a statement advising the parties that communication with the hearings examiner containing obscene, lewd, profane, or abusive language which terrifies, intimidates, threatens, or harasses the hearing examiner will be returned. Any communication returned shall be conclusively presumed to have not been served or filed with the department for purposes of these rules.

(2) The notice of and order for hearing shall be served not less than 30 days prior to the hearing unless all parties agree in writing to a shorter notice time period. Provided, however, that a shorter time period may be allowed when the hearing examiner determines, on the basis of the parties' applications and objections to applications, that the parties will not be substantially prejudiced by a shorter time.

(3) When a party is represented by an attorney, service upon the attorney shall constitute service upon the party. (Note: § § (1) (a) (c) (d) (1st sentence) (e) (h) of this rule are codified at MCA § 2-4-601 (2) (a-e) .)

**History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, 2-4-601, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.**

### **36.12.205 DEFECTIVE NOTICE OF APPLICATION**

(1) When the notice of application is republished, scheduled hearings shall be continued until the time period for filing objections (as set forth in the republished notice of application) has expired.

(2) The cost of republishing the notice of application shall be paid by the applicant. However, if the department fails to send a notice of application to the applicant for review the department shall pay for said costs. No hearings shall be held until the applicant has paid all costs incurred under this rule.

**History: Sec. 2-4-201(2) and 85-2-113(2) MCA; IMP, Sec. 2-4-105, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.**

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### **36.12.206 REPRESENTATION**

(1) Any party may be represented by legal counsel throughout the proceedings in a contested case or an individual may appear on his/her own behalf. This rule shall not be construed to sanction the unauthorized practice of law.

History: Sec. 2-4-201(2) and 85-2-113(2) MCA; IMP, Sec. 2-4-105, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.

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### **36.12.207    INFORMAL DISPOSITION**

(1) Informal disposition may be made of any contested case or any issue therein at any point in the proceedings by agreed settlement, stipulation or default. The parties may mutually agree to be bound by the terms of such settlement, stipulation, or default as a private contractual agreement; provided, however, that to the extent such settlement, stipulation, or default is based on conditions which the parties agree must be included in any permit to be issued, the parties' agreement shall not be binding on the department. The parties shall submit such proposed conditions to the department for review, but the department shall include them in the permit only if the conditions are designed to further compliance with the applicable statutory criteria.

(2) Department staff may propose conditions for settlement of a contested case which further compliance with the statutory criteria. Any proposed conditions which are sent to the parties in a contested case shall be accompanied by written notification that agreeing to the proposed condition(s) will not necessarily obviate the need for a hearing.

History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-603, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.

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### **36.12.208    DEFAULT**

(1) A default occurs when a party fails to appear at a hearing or fails to comply with any interlocutory orders of the hearing examiner. Upon default, the defaulting party's claim or interest in the proceeding may be dismissed (with or without prejudice) , denied, disregarded or disposed of adverse to the defaulting party. An applicant is not relieved of the duty to present evidence to satisfy the applicant's substantive burden of proof when all objectors to a proceeding default.

History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-603 and 85-2-311, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.

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### **36.12.209 TIME**

(1) The time within which an act is to be done as provided in these rules shall be computed by excluding the first day and including the last, except that if the last day be Saturday, Sunday, or a legal holiday, the act may be done on the next succeeding regular business day. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(2) Computing time when serving by mail. Whenever a party has the right or is required to do some act or take some action within a prescribed period after the service of a notice or other paper upon him, or whenever such service is required to be made within a prescribed period before a specified event, and the notice or paper is served by mail, postmarking of the notice or paper on or before the prescribed period shall satisfy this rule.

**History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, 2-4-611, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.**

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### **36.12.210 CONSOLIDATION**

(1) Whenever it is determined, either on the hearing examiner's motion or upon motion by any party, that two or more contested cases present substantially the same issues of fact or law, that a holding in one case would affect the rights of parties in another case, and that consolidation would not substantially prejudice any party, the hearing examiner may order such cases consolidated for a single hearing on the merits. In every case, all objections to a single application shall be consolidated without requirement of order. Applications by the same applicant may be consolidated without requirement of an order.

(2) Following an order for consolidation, the hearing examiner shall serve on all parties a copy of the order for consolidation. The order shall contain, among other things:

- (a) a description of the cases for consolidation;
- (b) the reasons for consolidation;
- (c) notification of a consolidated prehearing conference if one has been requested.

(3) (a) Any party may object to consolidation by filing, at least 10 days prior to the hearing in the case, a motion for severance from consolidation, setting forth the party's name and address, the title of the case prior to consolidation, and the reasons for that party's motion.

(b) If the hearing examiner finds that consolidation would prejudice the party, the hearing examiner may, without hearing, order such severance or other relief as the hearing examiner deems necessary.

**History:** Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 85-2-309, MCA; AMD, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.

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### **36.12.211 DISQUALIFICATION OF HEARING EXAMINER**

(1) Upon the filing in good faith by a party of an affidavit of disqualification of hearing examiner, the director shall determine the matter as a part of the record provided the affidavit is filed no later than 10 days prior to the original date set for hearing, and states the facts and reasons for the belief that the hearing examiner should be disqualified.

History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-611, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84.

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### **36.12.212 PREHEARING CONFERENCE**

(1) The purpose of the prehearing conference is to simplify the issues to be determined, to fix hearing dates, to obtain stipulations in regard to foundation for testimony or exhibits, to hear and rule upon evidentiary objections to prefiled testimony, to identify the proposed witnesses for each party, to schedule discovery, to discuss the procedure at the hearing, to consider such other matters that may be necessary or advisable, and, if possible, to reach a final settlement without the necessity for further hearing.

(2) Upon written request of any party or upon the hearing examiner's motion, a prehearing conference may be ordered prior to each contested case hearing. The hearing examiner may require the parties to file a prehearing statement prior to the prehearing conference which shall contain such items as the hearing examiner deems necessary to promote a useful prehearing conference. A prehearing conference shall be an informal proceeding conducted expeditiously following written notice to all parties or their attorneys. Agreements on the simplification of issues, amendments, stipulations or other matters may be entered on the record or may be the subject of an order by the hearing examiner. A party who fails (without having made prior arrangements with the hearing examiner) to appear at a prehearing conference shall have waived the right to object to any matters agreed upon by other parties in attendance at the prehearing conference. Following a prehearing conference, the hearing examiner may issue a procedural order which fixes any dates which are appurtenant to the disposition of the case, and which sets out the procedures to be followed by the parties. The procedural order may include a description of the matters discussed at and the actions taken pursuant to the prehearing conference.

**History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-611, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.**

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### **36.12.213 MOTIONS TO HEARING EXAMINER**

(1) Any application to the hearing examiner for an order shall be by motion which, unless made during a hearing, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. Written motions or responses to motions shall first be served on all parties, and then filed with the hearing examiner with a certificate of service attached. A written motion shall give notice to other parties that should they wish to contest the motion they must file a written response with the hearing examiner (after first serving all parties) , and that the written response, with a certificate of service attached, must be filed within 10 days after service of the motion. Requests for disqualification of a hearing examiner, prehearing conferences, and subpoenas are not governed by the requirements of this rule. The hearing examiner may require a hearing or telephone conference call before issuing an order on the motion. All orders on such motions, other than those made during the course of the hearing, shall be in writing, and shall be served upon all parties of record. In ruling on motions where these rules are silent, the hearing examiner shall apply the Montana Rules of Civil Procedure to the extent the hearing examiner determines is appropriate to do so in order to promote a fair and expeditious proceeding.

**History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-611, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.**

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### **36.12.214 MOTIONS TO DIRECTOR**

(1) No motions shall be made directly to or be decided by the director subsequent to the assignment of a hearing examiner and prior to the completion and filing of the hearing examiner's proposal for decision except as provided by ARM 36.12.211 or except when the motion is certified to the director by the hearing examiner. Any party may request that a pending motion, or a motion decided adversely to that party by the hearing examiner before or during the course of the hearing be certified by the hearing examiner to the director. In deciding what motions should be certified, the hearing examiner shall consider the following:

(a) whether the motion involves a controlling question of law, which if finally determined, would materially advance the ultimate termination of the hearing; or

(b) whether certifying the motion is necessary to promote the development of the full record and avoid a remand.

(2) The director may require the parties to file briefs before ruling upon a certified motion. Certified motions shall be decided in the manner provided for in ARM 36.12.229(2) . Uncertified motions shall be ruled upon by the hearing examiner and reviewed during the final decision-making process.

**History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-611, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.**

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### **36.12.215 DISCOVERY**

(1) Discovery under this rule may commence following the department's acknowledgement of receipt of valid objections.

(2) Each party shall, within 10 days of a demand by another party, disclose the following:

(a) The names and addresses of all witnesses that a party intends to call at the hearing together with a brief summary of each witness's testimony. All witnesses unknown at the time of said disclosure shall be disclosed, together with a brief summary of their testimony, as soon as they become known.

(b) Any relevant written or recorded statements made by the party or by witnesses on behalf of the party shall be permitted to be inspected and reproduced by the demanding parties.

(3) Any party unreasonably failing upon demand to make the disclosure by this rule, may be foreclosed from presenting any evidence at the hearing through witnesses not disclosed or through witnesses whose statements are not disclosed.

(4) A party may serve upon any other party a written request for the admission of relevant facts or opinions, or of the application of law to relevant facts or opinions, including the genuineness of any document. The written answer shall either admit or deny the truth of the matters contained in the request, or shall make a specific objection thereto. Failure to make a written answer may result in the subject matter of the request being deemed admitted.

(5) A demand or request for admission made pursuant to (1) or (3) hereof must be served at least 15 days prior to the hearing, and shall be answered in writing by the party to whom the demand or request is directed within 10 days of the service of the demand or request.

(6) Any means of discovery available pursuant to the Montana Rules of Civil Procedure, excepting Rule 37(b) (1) and 37(b) (2) (D) , is allowed provided such discovery is needed for the proper presentation of a party's case, is not for purposes of delay, and the issues in controversy are significant enough to warrant such discovery. Copies of all requests for discovery under this subsection must be filed with the hearings examiner. Objection for a demand for discovery may be made by motion to quash, and the form, filing, and disposition of such motion shall be governed by the provisions of ARM 36.12.213. If a party fails to reasonably comply with a proper demand for discovery, the hearing examiner may:

(a) order that the subject matter of the order for discovery or any other relevant facts be taken as established for the purposes of the case in accordance with the claim of the party requesting the order; or

(b) refuse to allow the party failing to comply to support or oppose designated claims or defenses, or prohibit that party from introducing designated matters into evidence.

(7) Any demand for discovery made pursuant to (6) must be made so as to allow all responses to be completed at least 5 days prior to the hearing.

**History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-602, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/1/94.**

### **36.12.216 DEPOSITIONS TO PRESERVE TESTIMONY**

(1) Upon the motion of any party, the hearing examiner may order that the testimony of any witness be taken by deposition to preserve that witness' testimony in the manner prescribed by law for depositions in civil actions, which includes the right of other parties to attend the deposition and cross-examine the witness. The motion shall indicate the relevancy and shall make a showing that the witness will be unable or cannot be compelled to attend the hearing or show other good cause. No part of a deposition shall constitute a part of the record unless received in evidence by the hearing examiner.

History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-602 and 2-4-611, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.

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### **36.12.217 SUBPOENAS**

(1) Requests for subpoenas for the attendance of witnesses or the production of documents shall be made in writing to the hearing examiner and shall contain a brief statement demonstrating the potential relevance of the testimony or evidence sought and shall identify any documents sought with specificity, and shall name all persons to be subpoenaed.

(a) A subpoena shall be served in the manner provided by the Montana Rules of Civil Procedure.

(b) The cost of service, fees, and expenses of any witnesses subpoenaed shall be paid at the rates prescribed by Montana law by the party at whose request the witness appears.

(c) The person serving the subpoena shall make proof of service by filing the subpoena together with a certificate of service with the hearing examiner.

(2) Upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance therewith, the subpoena may be quashed or modified if the hearing examiner finds it is unreasonable or oppressive.

(3) The party seeking the subpoena may seek enforcement of the same by applying to a judge of any district court of the state of Montana for an order to show cause why the subpoena should not be enforced against any witness who fails to obey the subpoena.

History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-104 and 2-4-611, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.

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### **36.12.218 RIGHTS OF PARTIES**

(1) All parties shall have the right to present evidence, rebuttal testimony and argument with respect to the issues and to cross-examine witnesses. MCA 2-4-612 (1) .

History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-612, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84.

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### **36.12.219 UNTIMELY OBJECTORS**

(1) Untimely objectors do not have the status of parties in a contested case. Such nonparties have no right to participate in the contested case process.

History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-611 and 2-4-612, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.

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### **36.12.220 WITNESSES**

(1) Any party may be a witness and may present witnesses at the hearing. All oral testimony at the hearing shall be under oath or affirmation.

(2) Upon the hearing examiner's motion or, upon the motion of a party, the hearing examiner may order that the testimony to be given upon direct examination by experts or other witnesses shall be prepared in advance in either question and answer or narrative format. Such prefiled testimony shall be served upon the hearing examiner and all parties at least 7 days prior to the first hearing date. The prefiled testimony will be part of the record in each proceeding as if read, but all of the witnesses whose substantive testimony is prefiled must be available for cross-examination at the hearing. Evidentiary objections (such as motions to strike) to such direct testimony may be made by any party at any time during the hearings conducted pursuant to these rules. At the hearing, the party presenting the testimony may, if they deem it appropriate, briefly summarize the prefiled testimony prior to the start of cross-examination. Nothing contained herein shall be deemed to foreclose any party from presenting rebuttal testimony or from presenting testimony in response to reasonably unforeseen areas without the necessity of prefiling.

(3) All parties shall be advised of a staff expert witness' findings, if any, based on any prepared written testimony filed by the parties pursuant to ARM 36.12.220(2) , site observations taken pursuant to ARM 36.12.225, materials noticed pursuant to ARM 36.12.221(4) and ARM 36.12.228(1) (b) , or testimony or other documents introduced during the proceeding. A staff expert witness' deposition may be taken by any party and the expert may be called to testify by any party and/or by the hearing examiner. The expert witness shall be subject to cross-examination by all parties. Nothing in this rule shall prevent any of the parties from producing other expert evidence on the same fact or matter to which the testimony of the staff expert witness appointed by the hearing examiner relates.

**History:** Sec. 2-4-201(2) and 85-2-113(2), MCA; **IMP**, Sec. 2-4-611 and 2-4-612, MCA; **NEW**, 1984 MAR p. 697, Eff. 4/27/84; **AMD**, 1994 MAR p. 307, Eff. 2/11/94.

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### **36.12.221 RULES OF EVIDENCE**

(1) The common law and statutory rules of evidence shall apply only upon stipulation of all parties to the hearing. Otherwise, the hearing examiner may admit all evidence that possesses probative value, including hearsay if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. The hearing examiner shall give effect to the rules of privilege recognized by law. Evidence which is irrelevant, immaterial, or unduly repetitious may be excluded.

(2) The department file shall be deemed part of the record in its entirety unless objections are made to a specific portion thereof upon review by the parties. If the objection is sustained, that portion of the file will not be made a part of the record. All other evidence to be considered in the case, including all records and documents in the possession of a party (or a true and accurate photocopy thereof), shall be offered and made a part of the record in the case. No other factual information or evidence shall be considered in the determination of the case.

(3) Documentary evidence in the form of copies or excerpts may be received or incorporated by reference. Upon request, parties shall be given an opportunity to compare copies with the originals.

(4) The hearing examiner may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the department's specialized knowledge. Parties shall be notified, either before or during the hearing or by reference in the proposal for decision of the material noticed. Each party shall be afforded an opportunity to contest the materials so noticed.

(5) A party may call an adverse witness who may be a party's managing agent or employees, or an officer, director, managing agent, or employee of the state or any political subdivision thereof, or of a public or private corporation or of a partnership or association or body politic which is an adverse party, and interrogate the adverse witness by leading questions and contradict and impeach the adverse witness on material matters in all respects as if the adverse witness had been called by the adverse party. The adverse witness may be examined by counsel for the adverse witness upon the subject matter of the examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted, and impeached by any other party adversely affected by the adverse witness' testimony.

**History:** Sec. 2-4-201(2) and 85-2-113(2), MCA; **IMP**, Sec. 2-4-612 and 85-2-121, MCA; **NEW**, 1984 MAR p. 697, Eff. 4/27/84; **AMD**, 1994 MAR p. 307, Eff. 2/11/94.

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### **36.12.222 CONTINUANCES**

(1) A motion for continuance of a hearing shall be made pursuant to the requirements of ARM 36.12.213.

(2) A motion for continuance filed not less than 10 days prior to the hearing may be granted upon showing of good cause.

(3) A motion for continuance filed less than 10 days prior to the hearing shall be denied unless good cause exists and the reason for the request could not have been ascertained earlier and cannot be avoided.

(4) "Good cause" for purposes of this rule includes but is not limited to:

(a) death or incapacitating illness of a party or member of a party's immediate family or attorney of a party or witness to an essential fact;

(b) a court order requiring a continuance;

(c) lack of proper notice of the hearing;

(d) a substitution of the attorney of a party if the substitution is shown to be required;

(e) unavailability of counsel due to engagement in court or another administrative proceeding provided counsel submits copies of documents requiring counsel's presence at said proceeding;

(f) a change in the parties or pleading requiring postponement;

(g) unavailability of a party or a witness to an essential fact for serious and compelling reasons where the conflict could not be anticipated and cannot be avoided; or

(h) agreement for a continuance by all parties upon a showing that:

(i) more time is clearly necessary to complete discovery authorized pursuant to ARM 36.12.215(3) or other mandatory preparation for the case, and the parties have agreed to a new hearing date; or

(ii) the parties have agreed to a settlement of the case; or

(iii) all the parties have agreed to a new hearing date and the agreed upon date is convenient for the hearing examiner.

(5) "Good cause" for purposes of this rule shall not include:

(a) intentional delay;

(b) unavailability of an expert witness if the witness' deposition could have been taken prior to the hearing;

(c) failure of a party or their counsel to properly utilize the notice period to prepare for the hearing;

(d) failure of a party to act with due diligence in acquiring counsel within the notice period.

(6) During a hearing, if it appears in the interest of justice that further testimony should be received, the hearing examiner may continue the hearing to a future date and oral notice of such continuance on the record shall be sufficient.

**History:** Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-611, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.

### **36.12.223 HEARING PROCEDURE**

(1) Unless the hearing examiner determines otherwise the hearing shall be conducted substantially in the following manner:

(a) After opening the hearing, the hearing examiner shall, unless all parties are represented by counsel, state the procedural rules for the hearing including the following:

(i) All parties may present evidence and argument with respect to the issues and cross-examine witnesses. At the request of the party or the attorney for the party whose witness is being cross-examined, the hearing examiner may make such rulings as are necessary to prevent repetitive or irrelevant questioning and to expedite the cross-examination to the extent consistent with disclosure of all relevant testimony and information.

(ii) All parties have a right to be represented at the hearing.

(iii) The rules of evidence are set forth in ARM 36.12.221(1) .

(2) Any stipulation agreements entered into by any of the parties prior to or during the hearing shall be entered into the record.

(3) The party with the burden of proof may make an opening statement. All of the parties may make such statements in a sequence determined by the hearing examiner.

(4) After any opening statements, unless otherwise determined by the hearing examiner, the applicant shall begin the presentation of evidence. The applicant shall be followed by the other parties and/or expert witness in a sequence determined by the hearing examiner.

(5) Cross-examination of witnesses shall be conducted in a sequence determined by the hearing examiner.

(6) When all parties and witnesses have been heard, opportunity shall be offered to present final argument in a sequence determined by the hearing examiner. Such final argument may be in the form of written memoranda or oral argument, or both.

(7) After final argument, the hearing shall be closed or continued. If continued, it shall be either continued to a certain time and day, announced at the time of the hearing and made a part of the record, or continued to a date to be determined later, which must be upon not less than 10 days written notice to the parties.

(8) The hearing examiner may require all parties of record to file proposed findings of fact or briefs, or both, at the close of testimony in the hearing. The proposed findings and briefs may be submitted simultaneously or sequentially and within such time periods as the hearing examiner may prescribe. Any party may volunteer to file proposed findings and briefs, and the hearing examiner may receive them even if the other parties choose not to so file.

(9) The record of the contested case proceeding shall be closed upon receipt of the final written memorandum, transcript, if any, or late filed exhibits that the parties and the hearing examiner have agreed should be received into the record, whichever occurs latest.

**History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-611 and 2-4-612, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.**

### **36.12.224 DISRUPTION OF HEARING**

(1) It is the duty of the hearing examiner to conduct a fair and impartial hearing and to maintain order. All parties to the hearing, their counsel and any other persons present shall conduct themselves in a respectful manner. Any disregard by parties or their attorneys of the rulings of the hearing examiner on matters of order and procedure may be noted on the record. If the applicant is responsible for disrespectful, disruptive, or disorderly conduct which interferes with the proper and orderly holding of the hearing, the hearing examiner may recess or continue the hearing. If a party or person other than the applicant is disrespectful, disorderly or disruptive, the hearing examiner may bar that party or person from the proceeding and may strike all evidence presented by that party or person if the applicant's case is not prejudiced by the absence of the offending party or person. Before taking action under this rule, the hearing examiner shall first read this rule to those parties or attorneys causing such interference or disruption.

**History:** Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-611, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.

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### **36.12.225 SITE VISIT**

(1) Upon the hearing examiner's motion or upon the motion of any party, a site visit to the lands involved in the proceeding may be made at any time during the proceeding. The hearing examiner may enter upon lands to view proposed works, sources of water, location of proposed uses, construction of works and such other views that are deemed relevant by the hearing examiner to gain a proper understanding of the issues involved in the proceeding. Before making any site visit, the hearing examiner shall give the parties at least 5 days written notice to participate, unless the motion is made during a hearing and then oral notice on the record shall be sufficient. During the final decision-making process, the final decision-makers may, upon their own motion or upon the motion of any party, make a site visit of the lands involved in the proceeding provided that the parties are given written notice as stated above.

**History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 85-2-115, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.**

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### **36.12.226 THE RECORD**

(1) The hearing examiner shall maintain the official record in each contested case until the issuance of the final order.

(2) The record in a contested case shall contain:

(a) all pleading, motions and intermediate rulings;

(b) all evidence received or considered, including a verbatim record of oral proceedings;

(c) a statement of matters officially noticed;

(d) questions and offers of proof, objections and rulings thereon;

(e) proposed findings and exceptions;

(f) any decision, opinion or report by the hearing examiner; and

(g) the department file and all staff memoranda or data submitted to the hearing examiner as evidence in connection with the case. (Note substantially the same as MCA 2-4-614 .)

**History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-614, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.**

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### **36.12.227 VERBATIM RECORD**

(1) The verbatim record consisting of tape recordings of the contested case hearing shall be transcribed if requested by the hearing examiner. If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the department for ordering and payment of preparation cost of a written transcript. If no request is made the department will transmit a copy of the tape(s) of the proceedings to the district court. Any party may request copies of the tape recordings and shall pay the charge set by the board. All monies received for copies of the tapes shall be payable to the department and shall be deposited in the department's water right appropriation account in the state treasury.

**History:** Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-614, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.

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### **36.12.228 THE DECISION**

(1) The hearing record shall be the basis for the decision.

(a) No factual information or evidence which is not a part of the record shall be considered by the hearing examiner in the preparation of the decision.

(b) The hearing examiner may take official notice of judicially cognizable facts and generally recognized technical or scientific facts within the department's specialized knowledge, in conformance with the requirements of MCA § 2-4-612 (6) .

(2) Following the close of the record, the hearing examiner shall make a decision pursuant to MCA § 2-4-621 , and upon completion a copy of the decision shall be served upon all parties by personal service, by first class mail or by depositing it with the mail and distribution section, general services DIVISION, department of administration.

History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-612, 2-4-621, and 2-4-623, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.

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### **36.12.229 EXCEPTIONS TO THE HEARING EXAMINER'S PROPOSAL FOR DECISION AND THE FINAL DECISION-MAKING PROCESS**

(1) Any party adversely affected by the hearing examiner's proposal for decision may file exceptions. Such exceptions shall be filed with the hearing examiner within 20 days after the proposal is served upon the party. A written request for additional time to file exceptions may, in the discretion of the hearing examiner, be granted upon a showing of good cause. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the transcript if one was prepared. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record (e.g., to exhibits or to specific testimony) will be accorded little attention. Any exception that contains obscene, lewd, profane or abusive language shall be returned to the sender.

(a) After the 20-day exception period has expired, the director or the director's designee shall:

(i) adopt the proposal for decision as the final order;

(ii) reject or modify the findings of fact, interpretation of administrative rules, or conclusions of law in the proposal for decision; or

(iii) hold an oral argument hearing if requested, then adopt the proposal for decision as the final order or reject or modify the findings of fact, interpretation of administrative rules, or conclusions of law in the proposal for decision.

(2) The final decision in any contested case hearing shall be rendered in accordance with MCA § § 2-4-621 to 2-4-623 . Only factual information or evidence which is a part of the contested case hearing record shall be considered in the final decision-making process.

(3) A copy of the final order shall be served upon all parties by personal service, by first class mail, or by depositing it with the mail and distribution section, general services DIVISION, department of administration.

**History:** Sec. 2-4-201(2) and 85-2-113(2), MCA; **IMP**, Sec. 2-4-621, 2-4-622, and 2-4-623, MCA; **NEW**, 1984 MAR p. 697, Eff. 4/27/84; **AMD**, 1994 MAR p. 307, Eff. 2/11/94.

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### **36.12.230 EX PARTE COMMUNICATIONS**

(1) Except as provided in (2) no party or representative of a party shall communicate, in connection with any issue of law or fact in a pending contested case, with any person serving as a hearing examiner or as a final decision-maker without notice and opportunity for all parties to participate in the communication. The prohibitions of this subsection shall apply beginning at the time at which a contested case is noticed for hearing and shall continue until a final order has been issued unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of that person's acquisition of such knowledge.

(2) A hearing examiner or a final decision-maker may respond to questions of any party or representative of a party if it relates solely to procedures to be followed during the pendency of the contested case. A communication made for this purpose is not an ex parte communication.

(3) A hearing examiner or final decision-maker who receives a communication prohibited by (1) shall decline to listen to such communication and shall explain that the matter is pending for determination, and that the hearing examiner may not listen to information or allegation when other parties are not present to respond. If unsuccessful in preventing such communication, the recipient shall advise the communicator that the hearing examiner will not consider the communication and that the other parties will be notified of it. The recipient shall then place on the record of the pending matter any written communications received (other than those allowed pursuant to (2) or a memorandum stating the substance of all oral communications received and all responses made and the identity of each person from whom the recipient received an ex parte communication. The recipient shall then notify all parties of the communication and its substance either orally on the record at the contested case hearing or, if no hearing is held, in a written memorandum. The recipient shall inform the parties that the substance of the communication is not part of the record in the pending matter, and will not be used as a basis for any part of the decision made therein.

(4) Upon receipt of a communication knowingly made in violation of (1) , a hearing examiner or final decision-maker may require, to the extent consistent with the interests of justice and the policy of underlying statutes, the communicator to show cause why the communicator's claim, objection or interest in the contested case should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

**History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-613, MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84; AMD, 1994 MAR p. 307, Eff. 2/11/94.**

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### **36.12.231 REHEARING**

(1) A rehearing proceeding is expressly prohibited under these rules, except as otherwise required under 2-4-703 , 2-4-621 and 2-4-622 , MCA.

History: Sec. 2-4-201(2) and 85-2-113(2), MCA; **IMP**, Sec. 2-4-703, 2-4-621, and 2-4-622, MCA; **NEW**, 1984 MAR p. 697, Eff. 4/27/84.

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### **36.12.232 EMERGENCY PROCEDURES**

(1) Nothing contained in these rules is intended to preempt, repeal or be in conflict with any rule or statute which provides for acts by the department in an emergency or procedure for conduct by the department in such a situation.

History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-201(2) and 85-2-113(2), MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84.

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### **36.12.233 SEVERABILITY**

(1) If any provision of these rules is held invalid, such invalidity shall not affect any other provisions of the rules which can be given effect without the invalid provision, and to this end the provisions of these rules are declared to be severable.

History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-201(2) and 85-2-113(2), MCA; NEW, 1984 MAR p. 697, Eff. 4/27/84.

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### **36.12.234 REOPENING RECORD**

(1) Upon motion of a party to the proceeding filed prior to issue of a final order, the record may be reopened for receipt of evidence. Such motion must be received by the hearing examiner within 15 days after the issuance of the proposal for decision. Additional evidence may be received only if it is shown to the satisfaction of the hearing examiner to be material and there were good reasons for the failure to present it in the hearing.

History: Sec. 2-4-201(2) and 85-2-113(2), MCA; IMP, Sec. 2-4-703, 2-4-621, and 2-4-622, MCA; NEW, 1994 MAR p. 307, Eff. 2/11/94.

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## Subchapter 5

### Extensions of Time for Permit and Change Authorizations

#### **36.12.501 DEFINITIONS**

In addition to the definitions in 85-2-102 , MCA the following definitions apply to these rules:

(1) "Applicant" means a person who filed an application for an extension of time.  
(2) "Application" means an application for an extension of time, Form No. 607.  
(3) "Change authorization" means an authorization to change the point of diversion, place of use, purpose of use, or place of storage of an existing water right issued by the department pursuant to Title 85, chapter 2, MCA.

(4) "Project completion due date" means the date on the permit, change authorization or an authorized extension when the project completion notice is to be received by the department. The postmark on the envelope, if the notice is mailed, must be on or before the project completion due date.

History: 85-2-312(3), MCA; IMP, 85-2-312(3), MCA; NEW, 1997 MAR p. 2084, Eff. 11/18/97; AMD, 2000 MAR p. 636, Eff. 2/25/00.

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### **36.12.502 FILING AN APPLICATION FOR EXTENSION OF TIME**

(1) When an appropriator cannot complete the project under a permit or change authorization by the project completion due date specified, an application for extension of time may be filed. The application must be postmarked by the project completion due date.

(2) A complete application must include the following:

(a) name, mailing address, and telephone number of applicant;

(b) identification number of the permit or change authorization;

(c) project completion due date;

(d) a chronological narrative describing how the applicant has diligently worked to complete the project, and a description of the work completed on the project prior to the deadline date;

(e) the reasons the project was not completed as scheduled which must include a discussion of how the information provided prior to the issuance of the permit or change authorization has changed concerning the following:

(i) the cost of the project;

(ii) the magnitude of the project;

(iii) the engineering of the project;

(iv) the physical features encountered during development of the project;

(v) the time line for completion of the project.

(f) a notarized signature; and

(g) the required filing fee.

(3) An application postmarked after the project completion due date is void.

**History: 85-2-312(3), MCA; IMP, 85-2-312(3), MCA; NEW, 1997 MAR p. 2084, Eff. 11/18/97; AMD, 2000 MAR p. 636, Eff. 2/25/00.**

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### **36.12.503 ACTION ON THE APPLICATION**

(1) Upon receipt of a timely application, the department will determine whether to grant or deny the extension based on the applicant's diligence in attempting to complete the project and the reasons which prevented project completion as documented in the application for extension of time. The department may gather additional information from the applicant and conduct a field investigation.

(2) When the department determines the applicant has proceeded with diligence and has established that the reasons stated in the application justify an extension based on a consideration of the cost and magnitude of the project, the engineering and physical features encountered during development of the project, and the time reasonably necessary for the project, an extension shall be granted. The extension of time must state the new project completion due date and any conditions to ensure completion.

(3) When the department determines there has been no diligence and a lack of good cause for the extension, the application must be denied. The department shall notify the applicant of its decision and reasons, and shall provide the applicant opportunity to be heard. An applicant must request a hearing in writing, within 30 days after the date of the notice. When an applicant requests a hearing, it shall be the applicant's burden to show cause why the application should not be denied.

History: 85-2-312, MCA; IMP, 85-2-312, 85-2-314, MCA; NEW, 1997 MAR p. 2084, Eff. 11/18/97; AMD, 2000 MAR p. 636, Eff. 2/25/00.

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## Subchapter 10 Petitions for Rule Closure in Highly Appropriated Basins

### **36.12.1010 DEFINITIONS**

For the purposes of these rules, the following definitions shall apply:

(1) "Application" means an application for beneficial water use permit, form no. 600, or application for provisional permit for completed stockwater pit or reservoir, form no. 605.

(2) "Consumptive use" means a use of water which removes water from the source of supply, such that the quality or quantity is reduced or the timing of return delayed, making it unusable or unavailable for use by others.

(3) "Department" means the department of natural RESOURCES AND CONSERVATION.

(4) "Infiltration gallery" means a collection system consisting of one or more perforated pipes, culverts, or screens, placed horizontally beneath the streambed or vertically adjacent to the streambed, by which surface water is appropriated.

(5) "Nonconsumptive use" means a beneficial use of water which does not cause a reduction in the source of supply, and where substantially all of the diverted water returns to the source of supply with little or no delay and without adverse effect to the quality of water.

(6) "Supplemental irrigation" means additional water provided to lands which are already irrigated or to lands which will receive water through another water right.

(7) "Surface water" means all water at the surface of the ground including any river, stream, creek, ravine, coulee, undeveloped spring, or lake, regardless of its character or manner of occurrence, including but not limited to, diffused surface water, sewage effluent, waste water, and return flows and any subsurface water which is a part of the surface flows.

**History:** Sec. 85-2-112, 319, MCA; IMP, Sec. 85-2-319, MCA; NEW, 1990 MAR p. 228, Eff. 1/26/90; AMD, 1990 MAR p. 1896, Eff. 10/12/90; AMD, 1992 MAR p. 1396, Eff. 6/26/92.

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### **36.12.1011 GRANT CREEK BASIN CLOSURE**

(1) Grant Creek Basin means the Grant Creek drainage area, a tributary of the Clark Fork River, located in hydrologic basin 76M in Missoula County, Montana. The Grant Creek Basin designated as the closure area is all that drainage and head waters originating in the Rattlesnake Mountains of Township 15 North, Range 19 West, MPM, flowing southwesterly through Township 14 North, Range 19 West, MPM and into the main valley of the Clark Fork River in Township 13 North, Ranges 19 and 20 West, MPM. The entire Grant Creek drainage, from its headwaters to its confluence with the Clark Fork River, including Grant Creek, East Fork of Grant Creek, and all unnamed tributaries is contained in the closure area, as outlined on Exhibit "A" (a copy of which is available for review from the department) .

(2) The department shall reject applications for surface water permits within the Grant Creek Basin for any diversions, including infiltration galleries, for consumptive uses during the period from July 1 through September 30.

(3) Permits for nonconsumptive uses during the closure period shall be modified or conditioned to provide that there will be no decrease in the source of supply, no disruption in the stream conditions below the point of return, and no adverse effect to prior appropriators within the reach of stream between the point of diversion and the point of return. The applicant for a nonconsumptive use shall prove by substantial credible evidence its ability to meet the conditions imposed by this rule.

(4) These rules apply to all surface water within the Grant Creek Basin.

(5) Any application for a storage facility to impound water only outside the period from July 1 through September 30, and from which water could subsequently be used during any portion of the year, is exempt from these rules. Permit applications for storage, except applications for provisional permits for completed stockwater pits or reservoirs, form 605, will be received and processed. All form 605 permit applications will be rejected.

(6) Emergency appropriations of water as defined in ARM 36.12.101(6) and 36.12.105 shall be exempt from these rules.

(7) These rules apply only to applications received by the department after the date of adoption of these rules.

(8) The department may, if it determines changed circumstances justify it, reopen the basin to additional appropriations and amend these rules accordingly after public notice and hearing.

**History: Sec. 85-2-112, 85-2-319, MCA; IMP, Sec. 85-2-319, MCA; NEW, 1990 MAR p. 228, Eff. 1/26/90; AMD, 1990 MAR p. 1896, Eff. 10/12/90.**

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### **36.12.1013 ROCK CREEK BASIN CLOSURE**

(1) Rock Creek Basin means the Rock Creek drainage area located in hydrologic Basin 43D, a tributary of the Clarks Fork of the Yellowstone River in Carbon County, Montana. The entire Rock Creek drainage, from its headwaters to its confluence with the Clarks Fork of the Yellowstone, including Red Lodge Creek, Spring Creek, Dry Creek, Willow Creek, Clear Creek, West Fork of Rock Creek, and all unnamed tributaries is contained in the closure area, as outlined on Exhibit "A" (a copy of which is available for review from the department) .

(2) The department shall reject applications for surface water permits within the Rock Creek Basin for any diversions for consumptive uses, including infiltration galleries, during the period from June 1 through September 30.

(3) Permits for nonconsumptive uses during the closure period shall be modified or conditioned to provide that there will be no decrease in the source of supply, no disruption in the stream conditions below the point of return, and no adverse effect to prior appropriators within the reach of stream between the point of diversion and the point of return. The applicant for a nonconsumptive use shall prove by substantial credible evidence its ability to meet the conditions imposed by this rule.

(4) These rules apply to all surface water within the Rock Creek Basin.

(5) Any applications which would utilize a storage facility to impound water only outside the period from June 1 through September 30, and from which water could subsequently be used during any portion of the year, is exempt from these rules. Permit applications for storage, except applications for provisional permits for completed stockwater pits or reservoirs, form no. 605, will be received and processed. All form no. 605 permit applications will be rejected.

(6) Emergency appropriations of water as defined in ARM 36.12.101(6) and 36.12.105 shall be exempt from these rules.

(7) These rules apply only to applications received by the department after the date of adoption of these rules.

(8) The department may, if it determines changed circumstances justify it, reopen the basin to additional appropriations and amend these rules accordingly after public notice and hearing.

**History: Sec. 85-2-112, 319, MCA; IMP, Sec. 85-2-319, MCA; NEW, 1990 MAR p. 301, Eff. 2/9/90; AMD, 1990 MAR p. 1896, Eff. 10/12/90.**

### **36.12.1014 WALKER CREEK BASIN CLOSURE**

(1) Walker Creek Basin means the Walker Creek drainage area, located in hydrologic Basin 76LJ, a tributary of the Whitefish River in Flathead County, Montana. The entire Walker Creek drainage, from its headwaters in Section 10 of Township 31 North, Range 21 West, MPM to its confluence with the Whitefish River in Section 8 of Township 30 North, Range 21 West, MPM including all unnamed tributaries is contained in the closure area.

(2) The department shall reject consumptive use applications for surface water permits within the Walker Creek Basin for any development, including infiltration galleries within 50 feet of Walker Creek or any of its tributaries, requesting to appropriate water or use water during the period July 1 through March 31.

(3) Permits for nonconsumptive uses during the closure period shall be modified or conditioned such that there will be no decrease in the source of supply, no disruption in the stream conditions below the point of return, and no adverse affect to prior appropriators within the reach of stream between the point of diversion and the point of return. Any permit for a nonconsumptive use shall include at a minimum the following conditions:

(a) All nonconsumptive water uses shall be constructed such that the inflow and outflow can be measured.

(b) One set of inflow and outflow measurements shall be taken during both July and August in the first full year of operation. The permittee shall keep a written record of the flow rate, method of measurement, place of measurement, and date of measurement, and shall submit said records by November 30th to the Water Rights Bureau Field Office, P.O. Box 860, Kalispell, MT 59903.

(c) All ponds or other storage facilities shall be filled during spring runoff or before June 1st of each year, which ever occurs first.

(d) All ponds or other storage facilities shall be designed according to U.S. soil conservation service specifications or designed by a registered engineer to minimize seepage.

(e) All nonconsumptive water uses which do not utilize the natural stream channel shall be constructed such that water is conveyed to the use and returned to the stream by pipe to minimize loss due to seepage.

(4) The applicant for a nonconsumptive use shall prove by substantial credible evidence the applicant's ability to meet the conditions imposed by (3) above.

(5) Permit applications which would utilize an offstream storage facility to impound water outside the closure period of July 1 through March 31, and which is of sufficient size to store adequate water for use during the closure period, is exempt from these rules. All applications for provisional permit for completed stockwater pit or reservoir (form 605) will be rejected.

(6) These rules apply to all surface water within the Walker Creek Basin.

(7) The department will make periodic inspections to determine compliance with these rules and conditions.

(8) Emergency appropriations of water as defined in ARM 36.12.101(6) and 36.12.105 shall be exempt from these rules.

(9) These rules apply only to applications received by the department after the date of adoption of these rules.

(10) The department may, if it determines changed circumstances justify it, reopen the basin to additional appropriations and amend these rules accordingly after public notice and hearing.

**History: Sec. 85-2-112 and 85-2-319, MCA; IMP, 85-2-319, MCA; NEW, 1990 MAR p. 1837, Eff. 9/28/90.**

### **36.12.1015 TOWHEAD GULCH BASIN CLOSURE**

(1) Towhead Gulch basin means the Towhead Gulch drainage area, a tributary of the Missouri River at Upper Holter Lake, located in hydrologic basin 411 in Lewis and Clark County, Montana. The entire Towhead Gulch drainage, from its headwaters in Section 33, Township 14 north, Range 3 west, MPM to its confluence with the Missouri River, including Beartooth Creek, and all unnamed tributaries are contained in the closure area. Excluded from the basin closure are Rattlesnake Gulch, McLeod Gulch, and their unnamed tributaries.

(2) The department shall reject applications for surface water permits in Towhead Gulch, Beartooth Creek, and their unnamed tributaries for any diversions, including infiltration galleries, for consumptive uses during any time of the year.

(3) Applications for nonconsumptive purposes shall be received and processed. Any permit granted for nonconsumptive uses shall be modified or conditioned to provide that there will be no decrease in the source of supply, no disruption in the stream conditions below the point of return, and no adverse effect to prior appropriators within the reach of stream between the point of diversion and the point of return. The applicant for a nonconsumptive use shall prove by substantial credible evidence its ability to meet the conditions imposed by this rule.

(4) Emergency appropriations of water as defined in ARM 36.12.101(6) and 36.12.105 shall be exempt from these rules.

(5) These rules apply only to applications received by the department after the date of adoption of these rules.

(6) The department may, if it determines changed circumstances justify it, reopen the basin to additional appropriations and amend these rules accordingly after public notice and hearing.

**History: Sec. 85-2-112, 85-2-319, MCA; IMP, Sec. 85-2-319, MCA; NEW, 1992 MAR p. 52, Eff. 1/17/92.**

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### **36.12.1016 MUSSELHELL RIVER CLOSURE**

(1) The Musselshell River is located in hydrologic basins 40A and 40C, running from the headwaters of the North Fork and South Fork in Meagher County through Wheatland, Golden Valley, and Musselshell counties, and forming the east-west boundary for Petroleum, Garfield, and Rosebud counties. The closure area contains the mainstems of the North and South Fork of the Musselshell River and the Musselshell River down to the mouth of Flatwillow Creek located at a point in the SW ¼ Section 33, Township 14 North, Range 30 East, Petroleum County, Montana.

(2) The department shall reject applications for surface water permits within the Musselshell River closure area for any diversions, including infiltration galleries, for consumptive uses of water during the period from July 1 through August 31. Applications for use from September 1 through September 30 shall be rejected, except, applications for supplemental irrigation during this period shall be accepted and processed.

(3) Any permits issued for nonconsumptive uses during the closure period shall be modified or conditioned to provide that there will be no decrease in the source of supply, no disruption in the stream conditions below the point of return, and no adverse effect to prior appropriators within the reach of stream between the point of diversion and the point of return. The applicant for a nonconsumptive use shall prove by substantial credible, evidence its ability to meet the conditions imposed by this rule.

(4) Emergency appropriations of water as defined in ARM 36.12.101(6) and 36.12.105 shall be exempt from these rules.

(5) These rules apply only to applications received by the department after the date of adoption of these rules.

(6) The department may, if it determines changed circumstances justify it, reopen the basin to additional appropriations and amend these rules accordingly after public notice and hearing.

**History: Sec. 85-2-112 and 85-2-319, MCA; IMP, Sec. 85-2-319, MCA; NEW, 1992 MAR p. 1396, Eff. 6/26/92.**

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### **36.12.1017 SHARROTT CREEK BASIN CLOSURE**

(1) Sharrott Creek Basin means the Sharrott Creek drainage area, a tributary of McCalla Creek located in the Bitterroot River hydrologic basin, 76H, in Ravalli County, Montana. The Sharrott Creek Basin designated as the closure area is all that drainage and head waters originating in the Bitterroot Mountains, Township 9 North, Range 21 West, MPM, and flowing easterly through Sections 19, 20, 28 & 29, Township 9 North, Range 20 West, MPM to its confluence with McCalla Creek at a point in Section 28, Township 9 North, Range 20 West, MPM Ravalli County, Montana. The entire Sharrott Creek drainage, from its headwaters to its confluence with McCalla Creek, including all tributaries is contained in the closure area, as outlined on file map labeled "1-B".

(2) The department shall reject all surface water applications to appropriate water within the Sharrott Creek Basin for any diversions, including infiltration galleries, for any consumptive uses of water during the period from January 1 through December 31.

(3) Applications for nonconsumptive uses during the closure period shall be received and processed. Any permit if issued shall be modified or conditioned to provide that there will be no decrease in the source of supply, no disruption in the stream conditions, and no adverse effect to prior appropriators within the reach of stream between the point of diversion and the point of return. The applicant for a nonconsumptive use shall provide sufficient factual information upon which the department can determine the applicants ability to meet the conditions imposed by this rule.

(4) Applications for groundwater shall be accepted, however the applicant shall provide sufficient factual information upon which the department can determine whether or not the source of the groundwater is part of or substantially or directly connected to surface water. If it is found that the proposed diversion of groundwater would cause a calculable reduction in the surface water flow during the closure period the application shall be rejected. A calculable reduction means a theoretical reduction based on credible information as opposed to a measured reduction. If the applicant fails to submit sufficient factual information as required, the application shall be considered defective and shall be processed pursuant to 85-2-302, MCA.

(5) Emergency appropriations of water as defined in ARM 36.12.101(3) and 36.12.105 shall be exempt from this rule.

(6) This rule applies only to applications received by the department after the date of adoption of this rule.

(7) The department may, if it determines changed circumstances justify it, reopen the basin to additional appropriations and amend this rule accordingly after public notice and hearing.

**History:** Sec. 85-2-112 and 85-2-319, MCA; **IMP**, Sec. 85-2-319, MCA; **NEW**, 1993 MAR p. 1515, Eff. 7/16/93.

### **36.12.1018 WILLOW CREEK BASIN CLOSURE**

(1) The Willow Creek Basin means the Willow Creek drainage area, a tributary of the Bitterroot River hydrologic basin, 76H, in Ravalli County, Montana. The Willow Creek Basin designated as the closure area is all that drainage and headwaters originating in the Sapphire Mountains, Township 6 North, Range 18 West, MPM and flowing westerly through Township 6 North, Range 19 West, to its confluence with the Republican Ditch, at a point in Section 4, Township 6 North, Range 20 West, MPM, Ravalli County, Montana. The entire Willow Creek drainage from its headwaters to its confluence with the Republican Ditch, including all tributaries, is contained in the closure area as outlined on file map page 5.

(2) The department shall reject all surface water applications to appropriate water within the Willow Creek Basin for any diversions, including infiltration galleries, for any consumptive uses of water during the period from May 1 through September 30.

(3) Applications for nonconsumptive uses during the closure period shall be received and processed. Any permit if issued shall be modified or conditioned to provide that there will be no decrease in the source of supply, no disruption in the stream conditions, and no adverse effect to prior appropriators within the reach of stream between the point of diversion and the point of return. The applicant for a nonconsumptive use shall provide sufficient factual information upon which the department can determine the applicants ability to meet the conditions imposed by this rule.

(4) Applications for groundwater shall be accepted, however the applicant shall provide sufficient factual information upon which the department can determine whether or not the source of the groundwater is part of or substantially or directly connected to surface water. If it is found that the proposed diversion of groundwater could cause a calculable reduction in the surface water flow during the closure period the application shall be rejected. A calculable reduction means a theoretical reduction based on credible information as opposed to a measured reduction. If the applicant fails to submit sufficient factual information as required the application shall be considered defective and shall be processed pursuant to 85-2-302, MCA.

(5) Temporary emergency appropriations of water as defined in ARM 36.12.101 and 36.12.105 shall be exempt from this rule.

(6) This rule applies only to applications received by the department after the date of adoption of this rule.

(7) The department may, if it determines changed circumstances justify it, reopen the basin to additional appropriations and amend this rule accordingly after public notice and hearing.

**History: Sec. 85-2-112 and 85-2-319, MCA; IMP, Sec. 85-2-319, MCA; NEW, 1994 MAR p. 2640, Eff. 9/23/94.**

### **36.12.1019 TRUMAN CREEK BASIN CLOSURE**

(1) The Truman Creek Basin means the Truman Creek drainage area, a tributary of Ashley Creek in hydrologic basin 76LJ, in Flathead County, Montana. The Truman Creek Basin designated as the closure area is all that drainage and headwaters originating in the Salish Mountains, Township 26 North, Range 21 and 22 West, MPM, and flowing northwesterly to its confluence with Ashley Creek at a point in Section 18, Township 27 North, Range 22 West, MPM, Flathead County, Montana. The entire Truman Creek drainage, from its headwaters to its confluence with Ashley Creek, including Bales Creek, Emmons Creek, Wild Bill Creek, and all unnamed tributaries, is contained in the enclosure area as outlined on file map page 6.

(2) The department shall reject all surface water applications to appropriate water within the Truman Creek Basin for any diversions, including infiltration galleries, for any consumptive uses of water during the period from July 15 through August 31.

(3) Applications for nonconsumptive uses during the closure period shall be received and processed. Any permit if issued shall be modified or conditioned to provide that there will be no decrease in the source of supply, no disruption in the stream conditions, and no adverse effect to prior appropriators within the reach of stream between the point of diversion and the point of return. The applicant for a nonconsumptive use shall provide sufficient factual information upon which the department can determine the applicant's ability to meet the conditions imposed by this rule.

(4) Applications for groundwater shall be accepted, however the applicant shall provide sufficient factual information upon which the department can determine whether or not the source of the groundwater is part of or substantially or directly connected to surface water. If it is found that the proposed diversion of groundwater would cause a calculable reduction in the surface water flow during the closure period the application shall be rejected. A calculable reduction means a theoretical reduction based on credible information as opposed to a measured reduction. If the applicant fails to submit sufficient factual information as required, the application shall be considered defective and shall be processed pursuant to 85-2-302, MCA.

(5) Any application which would utilize a storage facility to impound water only outside the period from July 15 through August 31 and from which water could subsequently be used during any portion of the year, is exempt from these rules. Permit applications for storage, except applications for provisional permits for completed stockwater pits or reservoirs, form no. 605, will be received and processed. All form no. 605 permit applications will be rejected.

(6) Temporary emergency appropriations of water as defined in ARM 36.12.101 and 36.12.105 shall be exempt from this rule.

(7) This rule applies only to applications received by the department after the date of adoption of this rule.

(8) The department may, if it determines changed circumstances justify it, reopen the basin to additional appropriations and amend this rule accordingly after public notice and hearing.

**History:** Sec. 85-2-112, MCA; IMP, Sec. 85-2-319, MCA; NEW, 1995 MAR p. 222, Eff. 2/10/95.

### **36.12.1020 SIXMILE CREEK BASIN CLOSURE**

(1) Sixmile Creek Basin means the Sixmile Creek drainage area, a tributary to the Clark Fork River located in hydrologic basin 76M, in Missoula County, Montana. The Sixmile Creek Basin designated as the closure area is all that drainage and headwaters originating in Township 16 North, Range 21 and 22 West, MPM flowing southwesterly through Township 15 North, Range 21 and 22 West, MPM to its confluence with the Clark Fork River in Section 27, Township 15 North, Range 22 West, MPM. The entire Sixmile Creek drainage, including the West Fork of Sixmile Creek and all unnamed tributaries, is contained in the closure area as outlined on file map page 4.

(2) The department shall reject all surface water applications to appropriate water within the Sixmile Creek Basin for any diversions, including infiltration galleries, for consumptive uses of water during the period from June 1 through September 15.

(3) Applications for nonconsumptive uses shall be accepted and processed. Any permit if issued shall be modified or conditioned to provide that there will be no decrease in the source of supply, no disruption in the stream conditions, and no adverse effect to prior appropriators within the reach of stream between the point of diversion and the point of return. The applicant for a nonconsumptive use shall provide sufficient factual information upon which the department can determine the applicant's ability to meet the conditions imposed by this rule.

(4) Applications for storage to appropriate water only outside the closure period from which water could subsequently be used during any portion of the year shall be received and processed except for form no. 605, application for provisional permit for completed stockwater pit or reservoir. Form no. 605 shall be rejected.

(5) Emergency appropriations of water as defined in ARM 36.12.101(6) and 36.12.105 shall be exempt from these rules.

(6) These rules apply only to applications received by the department after the date of adoption of these rules.

(7) The department may, if it determines changed circumstances justify it, reopen the basin to additional appropriations and amend these rules accordingly after public notice and hearing.

**History: 85-2-319, MCA; IMP, 85-2-319, MCA; NEW, 1995 MAR p. 2693, Eff. 12/8/95.**

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### **36.12.1021 HOULE CREEK BASIN CLOSURE**

(1) The Houle Creek Basin means the entire Houle Creek drainage area located in hydrologic basin 76M in Missoula County, Montana. The Houle Creek Basin designated as the closure area is all that drainage and headwaters originating in Sections 4 and 8, Township 15 North, Range 21 West, MPM flowing southwesterly to its confluence with the Frenchtown Irrigation District ditch in the SENENE Section 30, Township 15 North, Range 21 West, MPM. The entire Houle Creek drainage including all unnamed tributaries is contained in the closure area as outlined on file map page 4.

(2) The department shall reject all surface water applications to appropriate water within the Houle Creek Basin for any diversions, including infiltration galleries, for consumptive uses of water during any time of the year.

(3) Applications for nonconsumptive uses shall be accepted and processed. Any permit if issued shall be modified or conditioned to provide that there will be no decrease in the source of supply, no disruption in the stream conditions, and no adverse effect to prior appropriators within the reach of stream between the point of diversion and the point of return. The applicant for a nonconsumptive use shall provide sufficient factual information upon which the department can determine the applicant's ability to meet the conditions imposed by this rule.

(4) Applications for ground water shall be accepted however the applicant shall provide sufficient factual information upon which the department can determine whether or not the source of the ground water is part of or substantially or directly connected to surface water. If it is found that the proposed diversion of ground water would cause a calculable reduction in the surface water flow during the closure period the application shall be rejected. A calculable reduction means a theoretical reduction based on credible information as opposed to a measured reduction. If the applicant fails to submit sufficient factual information as required, the application shall be considered defective and shall be processed pursuant to 85-2-302, MCA.

(5) Temporary emergency appropriations of water as defined in ARM 36.12.101(6) and 36.12.105 shall be exempt from these rules.

(6) these rules apply only to applications received by the department after the date of adoption of these rules. (7) the department may, if it determines changed circumstances justify it, reopen the basin to additional appropriations and amend these rules accordingly after public notice and hearing.

**History: 85-2-319, MCA; IMP, 85-2-319, MCA; NEW, 1996 MAR p. 2432, Eff. 9/20/96.**

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Subchapter 12  
Yellowstone Controlled Ground Water Area

**36.12.1201 PURPOSE AND SCOPE**

(1) the purpose of these rules and the goal of the department is to provide for the preservation of the hydrothermal system and features by allowing no impact to them within the reserved land of Yellowstone National Park. These rules are necessary to effectuate the Compact and to establish criteria which are necessary to implement Article IV of the Compact.

(2) All ground water appropriations (wells or developed springs) with a priority date after January 31, 1994 are subject to the following rule provisions. A permit application must be filed with the department of natural RESOURCES AND CONSERVATION if the development will be located within the boundaries of the Yellowstone controlled ground water area. A map of the boundaries is available from the department upon request.

History: 85-20-401, MCA, Article IV; IMP, 85-20-401, MCA, Article IV. I. 5. ; NEW, 1997 MAR p. 469, Eff. 3/11/97.

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### **36.12.1202 DEFINITIONS**

As used in these rules, the following definitions apply:

(1) "Application" means Form No. 600, Application for Beneficial Water Use Permit, submitted to the department by an applicant for a provisional permit to appropriate ground water.

(2) "Appropriate" means to divert, impound or withdraw a quantity of water for beneficial use.

(3) "Appropriator" means a person who has a legal water right to divert, impound, or withdraw a quantity of water for beneficial use.

(4) "Beneficial use" means the use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, recreational, and stock uses.

(5) "Bozeman water resources regional office (BWRRO) " means the Montana water resources regional office of the department of natural resources and conservation, responsible for processing all applications under the Yellowstone Controlled Ground Water Area, Article IV of the Compact.

(6) "Category 3 or 4 streams" means streams with special importance as defined in the Compact.

(7) "Change application" means a Form No. 606, Application to Change a Water Right filed pursuant to 85-2-402 , MCA.

(8) "Compact" means the United States National Park Service-Montana Water Rights Compact, effective January 31, 1994 as provided in 85-20-401 , et seq., MCA.

(9) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all the necessary parts of the form requiring the information have been filled in with the required information.

(10) "Credible information or evidence" means evidence sufficient to support a prima facie basis for the theory asserted.

(11) "Department" means the Montana department of natural resources and conservation in Helena and Bozeman, Montana provided for in Title 2, chapter 15, part 33, MCA.

(12) "Developed spring" means ground water if some physical alteration of its natural state occurs at its point of discharge from the ground, such as simple excavation, cement encasement, or rock cribbing. An undeveloped spring is surface water if no development occurs at its point of discharge and the appropriation is made from the unenhanced natural surface flow.

(13) "Extension of time" means Form No. 607, Application for Extension of Time, that can be filed by a permittee with the BWRRO for the purpose of obtaining approval for additional time to complete the ground water development.

(14) "Ground water" means any water that is beneath the ground surface.

(15) "Hydrologically connected" for the purposes of Article IV of the Compact, means ground water that is considered to be connected to the hydrothermal system within the reserved land of Yellowstone National Park based on scientific evidence according to the procedures in Article IV.

(16) "Hydrothermal feature" means a surface manifestation of a hydrothermal system, including but not limited to: hot springs, geysers, mud pots, and fumaroles.

(17) "Hydrothermal system" means the ground water system, including cold water recharge, transmission and warm water discharge that is hydrologically connected to the hydrothermal features within the reserved land of Yellowstone National Park.

(18) "Meter" means a device provided by the department that must be installed and maintained by the permittee to record the volume of water appropriated and used by the permittee.

(19) "Montana bureau of mines and geology (MBM&G) " means the Montana bureau of mines and geology located at Butte, Montana.

(20) "National park service" means the U.S. department of the interior, national park service.

(21) "Project completion" means Form No. 617, Project Completion Notice for Permitted Water Development or Form 618, Project Completion Notice for Change of a Water Right, filed by permittee after completion of the ground water well or spring and beneficial use of the water granted under a provisional permit or changes granted under an authorization to change.

(22) "Objection" means Form No. 611, Objection to Application that may be filed with the department by the national park service or other persons opposing a permit application.

(23) "Permit" means the provisional permit to appropriate ground water as issued by the department.

(24) "Replacement well" means a new well to replace an old existing well with an established water right prior to January 31, 1994 or an issued provisional permit granted by the department after January 31, 1994 that is in the same source and the rate and volume have not increased.

(25) "Scientific evidence" means geologic, geophysical, geochemical and hydrologic information.

(26) "Specific conductance" means the unit of measurement of water to conduct an electrical current, expressed in mhos (pronounced mose) and reported in millionths of mhos or micromhos. Chemically pure water has a very low electrical conductance, meaning that it is a good insulator. Dissolved chemical constituents increase the conductance of water.

(27) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

(28) "Supplement" means a form provided by the BWRRO on which additional information is recorded concerning the development of a well or spring as required by Article IV.

(29) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(30) "Well log report" means Form No. 603, Well Log Report, that is completed by a licensed water well driller or contractor, detailing required information about the completed well.

(31) "Yellowstone controlled ground water area" means the land area around Yellowstone national park that lies within the state of Montana and within the boundaries identified in Appendix 3 of the Compact or as modified pursuant to Article IV, section J.

**History: 85-20-401, MCA, Article IV; IMP, 85-20-401, MCA, Article IV. I. 5. ; NEW, 1997 MAR p. 469, Eff. 3/11/97; AMD, 2000 MAR p. 636, Eff. 2/25/00.**

### **36.12.1203 APPLICATION TYPES**

(1) Type "A" ground water permit applications are for appropriations of 35 gpm or less, not to exceed 10 AF/yr. An applicant for an appropriation of water with a proposed use that does not require water with a temperature of 60°F or more, may drill the proposed well subject to state law and the terms of the Compact, but shall not put the water to beneficial use until receipt of a provisional permit. These applications follow an abbreviated application and notice process.

(2) Type "B" ground water permit applications are for appropriations of greater than 35 gpm or 10 AF/yr. An applicant for an appropriation of water with a proposed use that does not require water with a temperature of 60°F or more, may drill the proposed well subject to state law and the terms of the Compact, but shall not put the water to beneficial use until receipt of a permit. These applications must follow state law permit processing requirements in addition to certain Compact requirements.

History: 85-20-401, MCA, Article IV; IMP, 85-20-401, MCA, Article IV. I. 5. ; NEW, 1997 MAR p. 469, Eff. 3/11/97.

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### **36.12.1204 APPLICATION FILING REQUIREMENTS**

(1) All permit applications must be filed with the department's Bozeman water RESOURCES regional office. Form No. 600, Application for Beneficial Water Use Permit must be used and the appropriate fee must accompany the application.

(2) All applications must include a statement of whether the proposed use requires water with a temperature of 60°F or more.

(3) A type "A" permit applicant is not required to prove the 85-2-311 , MCA, permit issuance criteria.

(4) A type "B" permit applicant shall prove the criteria in 85-2-311 , MCA, prior to issuance.

(5) If an application, its corresponding well log or other verification indicates water of 60°F or more, the application must follow additional requirements set out in Article IV, section G.2.c.

(6) If an application is located in a basin tributary to a category 3 or 4 stream, the applicant must meet additional requirements set out in Article II, section B.2.b.

(7) Failure to meet the requirements in (2) , (4) , (5) or (6) renders the application defective and the application must be returned for completion according to state law.

History: 85-20-401, MCA, Article IV; IMP, 85-20-401, MCA, Article IV. I. 5. ; NEW, 1997 MAR p. 469, Eff. 3/11/97.

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### **36.12.1205 PROCESSING - NOTICE**

(1) the BWRRO shall review each type of permit application and determine if it is correct and complete.

(2) A copy of an "incorrect and incomplete" application must be returned to the applicant with a letter explaining the deficiencies. The BWRRO letter must contain a deadline for the applicant to correct the deficiencies and return the application copy.

(3) For type "A" permit applications no notice pursuant to 85-2-307 , MCA is required. The BWRRO shall only send notice to the national park service by means of a letter within 30 days after receipt of a correct and complete permit application. Enclosed with each letter must be a copy of the correct and complete permit application, a well location map, and a copy of the drillers well log report and supplement. A copy of each BWRRO letter must be sent to the following:

(a) the applicant;

(b) the MBM&G in Butte, Montana along with a copy of the well log report form.

(4) For type "B" permit applications the BWRRO shall send notice as in (3) and a copy of the general notice provided under 85-2-307 , MCA.

**History:** 85-20-401, MCA, Article IV; IMP, 85-20-401, MCA, Article IV. I. 5. ; NEW, 1997 MAR p. 469, Eff. 3/11/97.

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### **36.12.1206 WELL LOG REPORT AND SUPPLEMENT**

(1)An applicant shall provide a well log report and supplement no later than 60 days after drilling the well.

(2)All applicants, when filing a well log report and supplement, shall provide the following information:

- (a)2½ acre land description (¼¼¼¼, section, township and range) ;
- (b)ground elevation at well head;
- (c)well depth;
- (d)ground water level in well (static) ;
- (e)flow rate or maximum pump rate;
- (f)ground water temperature measured at well head; and
- (g)specific conductance of the wells ground water.

(3) the Compact requires that with each ground water development the specific conductance and temperature of the water encountered be measured and recorded on the well log report form, or supplement provided by the BWRRO.

(4) the temperature that must be reported on the well log report form is of the water produced when the well is completed. This should be taken at the end of an air test or pumping period and only after the temperature of the water has remained constant for several minutes. The water sample for specific conductance must be collected and recorded using the same procedure. The temperature of the water could increase during an air test if the air is hot and especially if the yield of the well is low. Therefore, if the water temperature is 60°F or more during an air test, it is recommended that the well be pumped to more accurately determine the water temperature.

(5)Water samples taken for the purpose of testing specific conductance should be placed in a clean plastic or glass container that holds at least 8 fluid ounces (250 ml) .The BWRRO has sample bottles available and will provide the sample bottles to water well drillers who operate in the area on a regular basis. The sample bottle must be filled and capped with as little air in the container as possible. The container must be labeled with a name and address, department permit application number, date collected, and who collected the sample. The samples should be delivered to the BWRRO or make other arrangements to get the sample tested.

**History: 85-20-401, MCA, Article IV; IMP, 85-20-401, MCA, Article IV. I. 5. ; NEW, 1997 MAR p. 469, Eff. 3/11/97.**

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### **36.12.1207 OBJECTIONS**

(1) Objections to type "A" permit applications must comply with the following procedures:

(a) the national park service may within 60 days from the date of the BWRRO's mailing of the well log report form, file an objection providing credible information that the proposed appropriation is of ground water with characteristics to which the Compact restrictions concerning temperatures of 60° or more apply.

(b) No other objection may be filed by any person or entity.

(c) An objection must be filed on Form No. 611, Objection to Application. The objection must be received or postmarked on or before the 60 day time limit provided in the Compact to constitute a timely objection, along with the proper filing fee. An untimely objection may not be considered.

(d) Any national park service objection must set forth credible information that the appropriation is of ground water with characteristics to which restrictions established pursuant to Article IV of the Compact apply, or must provide credible information that the ground water proposed to be appropriated is hydrologically connected to the hydrothermal system within the reserved land of Yellowstone National Park based on scientific evidence according to the procedures in Article IV of the Compact.

(2) Objections to type "B" permit applications must comply with the following procedures:

(a) Any objection filed by the national park service must be filed on Form No. 611, Objection to Application. The objection must be postmarked on or before the deadline date specified in the public notice or received within 60 days from the date of mailing a well log report to be timely. The objection must be accompanied by the proper filing fee. An untimely objection may not be considered.

(b) Any national park service objection must set forth credible information as described in (1) (d) .

(c) When the national park service files a proper objection, the applicant shall provide credible information addressing the issue identified in the objection and the requirements in Article IV, section G.2.c.

History: 85-20-401, MCA, Article IV; IMP, 85-20-401, MCA, Article IV. I. 5. ; NEW, 1997 MAR p. 469, Eff. 3/11/97.

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### **36.12.1208 HEARINGS**

(1) All objections to permit applications, if correct and complete, timely filed, and unsettled between the parties, must proceed to a hearing following the department's administrative procedural rules for water right contested case hearings as provided in ARM 36.12.201 through 36.12.234.

History: 85-20-401, MCA, Article IV; IMP, 85-20-401, MCA, Article IV. I. 5. ; NEW, 1997 MAR p. 469, Eff. 3/11/97.

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36.12.1209 PERMIT CONDITIONS

(1) All permits issued by the department must contain at a minimum the following specific conditions:

(a) U.S. National Park Service-Montana Compact requires this right be issued in accordance with the Yellowstone controlled ground water area provisions of the January 31, 1994, U.S. National Park Service-Montana Compact. The department may modify or revoke this permit if the provisions of the Compact are not met; the character of the ground water produced changes such that a restriction applies pursuant to Article IV; or new restrictions are imposed as a result of Article IV, section J. Further modification may occur to limit the total withdrawal by day, month or year; to require a system of rotation of use within the controlled area; or adjust the total withdrawal from two or more wells in the area used by the same appropriator. The appropriator shall allow access to the well by the Montana bureau of mines and geology for water sampling as provided by the Compact. Further, this right is subject to the condition that the appropriator install an adequate metering device to allow the volume of water diverted to be recorded. The type and location of the meter must be determined by the department. The appropriator shall keep a written record of the volume of all waters diverted including the period of time, and shall submit said records by January 15 of each year and upon request to the Montana Bureau of Mines and Geology, Montana Tech, 1300 W. Park St., Butte, MT 59701-8997.

(b) The deadline to complete this permit and file a Project Completion Notice for Permitted Water Development (Form No. 617) is December 31, (specify year) .

(i) For type "A" permit applications, the project completion notice must be filed 60 days after completion of the appropriation. If you cannot meet the deadline above, the permittee shall contact the Bozeman water RESOURCES regional office for a new deadline.

(ii) For type "B" permit applications, if you cannot meet the deadline, the permittee shall file a Form No. 607, Application for Extension of Time, at least 30 days before the above deadline, otherwise the permit is void.

(c) This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

(d) Pursuant to 85-2-505 , MCA, to prevent ground water contamination, an operational back flow preventor must be installed and maintained by the appropriator if a chemical or fertilizer distribution system is connected to the well.

(e) This right is subject to 85-2-505 , MCA, requiring a well to be constructed so it will not allow water to be wasted or contaminate other water supplies or sources, and a flowing well must be capped or equipped so the flow of the water may be stopped when not being put to beneficial use. The final completion of the well(s) must include an access port of at least .50 inch so the static level of the well may be accurately measured.

(f) This permit is subject to the authority of the department to revoke the permit in accordance with 85-2-314 , MCA, and to enter onto the premises for investigative purposes in accordance with 85-2-115 , MCA. Further, the United States may accompany the department for the purposes of confirming well log information pursuant to Article IV, section G.2.b.v. of the Compact.

(g) Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the department a Water Right Ownership Update, Form No. 608, pursuant to 85-2-424 , MCA.

(2) Additional permit conditions may be placed on the permit as agreed upon by the parties and approved by the department, as required by the department, the hearing examiner, or Article IV of the Compact.

**History: 85-20-401, MCA, Article IV; IMP, 85-20-401, MCA, Article IV. I. 5. ; NEW, 1997 MAR p. 469, Eff. 3/11/97; AMD, 2000 MAR p. 636, Eff. 2/25/00.**

### **36.12.1210 FILING OF PROJECT COMPLETION NOTICE**

(1) Permittee shall file a project completion notice on Form No. 617 with the department pursuant to state law and Article IV of the Compact.

(2) A photograph or legible sketch of the actual flow meter installation must accompany Form No. 617.

History: 85-20-401, MCA, Article IV; IMP, 85-20-401, MCA, Article IV. I. 5. ; NEW, 1997 MAR p. 469, Eff. 3/11/97; AMD, 2000 MAR p. 636, Eff. 2/25/00.

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### **36.12.1211 METERS**

- (1) Each ground water use must be metered to record the total volume of water used.
- (2) The department will provide the meter to be used at no cost to the permittee, but it is the responsibility of the permittee to properly install and maintain the meter. A meter will be provided after a provisional permit is issued.
- (3) A permittee may upon prior approval from the department purchase, install, and maintain a different type of meter than provided by the department, but only if the meter records the total volume of water used.
- (4) The following general guidelines should be followed to properly install a meter:
  - (a) install meter in a frost free location;
  - (b) place in a horizontal position for optimum performance;
  - (c) use leak tight connections;
  - (d) install shut-off valves before and after the meter to prevent excessive water loss during servicing;
  - (e) locate the meter in a supply line with a diameter as near to the meter size as possible;
  - (f) provide access to meter for reading and service;
  - (g) maintain a continuous electrical connection around the meter;
  - (h) locate meter after any sand traps in the system; and
  - (i) any hydrants or outside faucets should be located after the meter to allow for total water use recording.
- (5) The department shall determine the size of the meter and connections depending on water use in gallons per minute (gpm) and size of supply line into and from the pressure tank.
  - (a) Commonly used meter sizes are:
    - (i) 5/8" meter will accept up to a 3/4" pipe and a 20 gpm intermittent flow or 10 gpm continuous flow;
    - (ii) 3/4" meter will accept up to a 1" pipe and a 30 gpm intermittent flow or 15 gpm continuous flow;
    - (iii) 1" meter will accept up to a 1¼" pipe and a 50 gpm intermittent flow or 25 gpm continuous flow; and
    - (iv) 1½" meter will accept up to a 2" pipe and 100 gpm intermittent flow or 50 gpm continuous flow.
- (6) In cases where the meter is not installed to prevent freezing the meter, internal parts, or the base, the water meter must be removed, drained and later reinstalled. Gravity draining of the water lines is not sufficient to drain all the water from the bottom of the meter. Using air to blow out the water lines and meter, if done properly, may be sufficient to protect the meter from freezing.
- (7) On or before January 15 of each year and upon request, the permittee shall report the annual metered water use to the MBM&G. The water use must be recorded on a form provided by the MBM&G.

History: 85-20-401, MCA, Article IV; IMP, 85-20-401, MCA, Article IV. I. 5. ; NEW, 1997 MAR p. 469, Eff. 3/11/97.

### **36.12.1212 REPLACEMENT WELLS**

(1) All ground water appropriators shall file with the department a change application and obtain approval from the department prior to replacing an existing well or spring development.

(2) Approval to replace a well or spring development may only be to change the point of diversion, place of use, place of storage, or the use.

(3) Any well or spring development change must be from the same source and the rate and volume of water use may not increase.

(4) An increase in rate or volume of water used, period of appropriation or use, or change in source requires a new permit application and approval from the department in accordance with state law and the Compact provisions.

**History:** 85-20-401, MCA, Article IV; IMP, 85-20-401, MCA, Article IV. I. 5. ; NEW, 1997 MAR p. 469, Eff. 3/11/97.

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## Subchapter 13 Form Acceptance

### **36.12.1301 PERMIT AND CHANGE APPLICATION ACCEPTANCE**

(1) A permit application will not be assigned a priority date and will be returned to the applicant if any of the following is not completed on the application form or included with the application:

- (a) the name and address of the applicant;
- (b) the water source of supply;
- (c) the point of diversion;
- (d) the place of use;
- (e) the purpose for which the water will be used;
- (f) the flow rate or volume required;
- (g) the applicant's notarized signature; and
- (h) the appropriate filing fee found at ARM 36.12.103.

(2) A change application will be returned to the applicant if any of the following is not completed on the application form:

- (a) general abstracts of the water rights being changed reflecting the proposed changes;
- (b) applicant's notarized signature; and
- (c) the appropriate filing fee found at ARM 36.12.103.

History: 85-2-113, MCA; IMP, 85-2-310, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.

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## Subchapter 14 Form Modifications

### **36.12.1401 PERMIT AND CHANGE APPLICATION MODIFICATION**

(1) Any element of a permit or change application may be modified prior to or after an application has been published.

(2) An applicant may change the name on an application before publication by notifying the department in writing. For name changes after an application has been published and objections have been received, an applicant must notify the department and all parties in writing.

(3) If a modification requires republication, the priority date of a permit application or the date received of a change application will be changed to the date the last modification was made.

(4) Republication is required if a modification changes the nature or scope of the permit or change application information. The following require republication:

- (a) the flow rate is increased;
- (b) the volume is increased;
- (c) the acreage is increased;
- (d) the period of diversion is expanded;
- (e) the source of supply is changed;
- (f) the point of diversion is changed;
- (g) the place of use is changed;
- (h) the purpose is changed;

(i) the period of use is expanded, unless the application involves a use from a reservoir and the impact would not change; and

(j) any modification where the effect on the source of supply or its tributaries changes the impact described from the originally published information.

(5) For modifications made after an application has been published, the cost of republication and mailing of individual notices must be paid by the applicant.

(6) A new analysis of the application criteria must be submitted when an application modification requires republication and the department will make a new correct and complete determination on the modifications prior to republication.

(7) If an applicant decides at any point in the water right application process to complete a different application for the same project, the applicant must complete a new application form. The date received will be the date the new application is submitted to the department. The department will review the application based on the requirements for that type of application.

**History:** 85-2-113, MCA; IMP, 85-2-302 and 85-2-307, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.

Subchapter 15  
Deficiency Letters and Termination

**36.12.1501 PERMIT AND CHANGE APPLICATION DEFICIENCY LETTER AND TERMINATION**

(1) If the department determines the application does not contain the information requested in ARM 36.12.1601, the department will notify the applicant in one deficiency letter of any defects in a permit or change application within 180 days of receipt of the application. The defects and the administrative rule not met will be identified in the deficiency letter.

(2) If all of the requested information in the deficiency letter is postmarked and submitted to the department within 30 days of the date of the deficiency letter or an extension of time of no more than 15 days, the priority date on a permit application will not be changed, or for change applications, the date received will not be changed. A request for extension of time must be submitted in writing.

(3) If all of the requested information in the deficiency letter is postmarked or submitted within 31 to 90 days of the date of the deficiency letter unless extended under (2) , the permit application priority date will be changed to the date when the department receives all of the requested information, or for a change application, the date received will be changed.

(4) If all of the requested information in the deficiency letter is not postmarked or submitted within 90 days of the date of the deficiency letter, the permit or change application will be terminated and the application fee will not be refunded.

**History: 85-2-113, MCA; IMP, 85-2-302, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.**

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**Subchapter 16**  
**Correct and Complete Determination**

**36.12.1601 WATER RIGHT PERMIT AND CHANGE - CORRECT AND COMPLETE DETERMINATION**

(1) An application deemed correct and complete can advance to the next stage of the application process.

(2) An application deemed correct and complete does not entitle an applicant to a provisional permit or change authorization.

(3) Providing correct and complete information is not necessarily the same as proving the statutory criteria. The department, with or without receipt of objections can only grant an application if the criteria for issuance of a permit or change application are met.

(4) A water right permit application will be deemed correct and complete if a permit applicant's information, required to be submitted by ARM 36.12.110 through 36.12.116, 36.12.120, 36.12.121, 36.12.1301, 36.12.1401, 36.12.1701 through 36.12.1707, and 36.12.1802, conforms to the standard of substantial credible information and all the necessary parts of the application form requiring the information, including a criteria addendum, have been filled in with the required information.

(5) A water right change application will be deemed correct and complete if an applicant's information, required to be submitted by ARM 36.12.110 through 36.12.116, 36.12.121, 36.12.1301, 36.12.1401, 36.12.1801, 36.12.1802, 36.12.1901 through 36.12.1904, and 36.12.2001, conforms to the standard of substantial credible information and all the necessary parts of the application form requiring the information, including a criteria addendum, have been filled in with the required information.

**History:** 85-2-302, MCA; IMP, 85-2-302, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.

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Subchapter 17  
Permit Application Requirements

**36.12.1701 FILING A PERMIT APPLICATION**

(1) An application for beneficial water use permit (Form No. 600) must be filed when an applicant desires to use:

- (a) groundwater that exceeds 35 gallons per minute or a volume of 10 acre-feet;
- (b) groundwater developments that exceed 350 gallons per minute for nonconsumptive geothermal use;
- (c) groundwater sources within a controlled groundwater area, as required; or
- (d) all surface water appropriations.

(2) Separate applications are required for:

(a) each source of supply. For example, if an application is for two diversions, one on an unnamed source and another on a source to which it is tributary, two separate applications must be submitted, one for each source of supply; and

(b) multiple purposes supplied by different points of diversion on the same source. If the entire project is manifold into one system, then a single application is allowed. "Manifold" means two or more diversions from the same source, which are connected into a single system for the same project or development. An example of a manifold system is two pumps on one source or two wells pumping from the same aquifer which divert water into the same reservoir or cistern.

(3) One application is allowed for:

- (a) one purpose and multiple points of diversion on the same source; and
- (b) for several purposes, if all the points of diversion supply all of the same purposes.

(4) An application must contain sufficient factual documentation to constitute probable believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the application.

(5) Form No. 600 must be completed and must describe the details of the proposed project. The form must be filled in with the required information. The following must be included in the permit application materials:

(a) calculations, references, and methodologies used to determine flow rate, volume, or reservoir capacity must be included in the application materials;

(i) flow rate (in gallons per minute [gpm] or cubic feet per second [cfs]), volume (in acre-feet), or reservoir capacity (in acre-feet) figures will be rounded to the nearest tenth;

(b) the source name, which must be identified as per ARM 36.12.114;

(c) the legal descriptions for the point of diversion and place of use, which must be identified as per ARM 36.12.110;

(d) the period of diversion, which must be identified as per ARM 36.12.112;

(e) if an application involves a reservoir, the reservoir standards as per ARM 36.12.113 must be followed;

(f) a general project plan stating when and how much water will be put to beneficial use;

(i) for appropriations over 4000 af or more and 5.5 cfs or more, or for water marketing, additional information is required, as per 85-2-310, MCA;

(g) if photographs are included, they must include the name of the photographer, the date taken, and an explanation of what fact or issue the photograph is offered to verify;

(h) if there are associated water rights to the application, they must be identified and additional information may be required;

(i) if a permit application is to supplement another water right, the water right numbers and abstracts of the associated water rights;

(j) an explanation of why supplemental water is needed and how the associated water rights will be managed;

(k) the flow rate at which water will be diverted from the source of supply for each purpose, a reasonable volume of water for each purpose, and the period of time that water will be used for each purpose must be identified;

(l) an application that is only to increase the flow rate or volume must reflect a value of zero in the nonapplicable field. For example, if an applicant is applying to only increase the flow rate of water taken from a source, but no additional volume is needed, the application flow rate blank should be completed with the additional flow of water requested and the blank for acre-feet (volume) should reflect zero;

(m) information that explains why the time period for completion is requested. The explanation may include information about the cost and magnitude of the project and the complexity of the project or any other reason for the time period identified to complete the project; and

(n) an applicant shall explain why required information is not applicable to the applicant's proposed project.

History: **85-2-113** and **85-2-302**, MCA; **IMP**, **85-2-302**, MCA; **NEW**, 2004 MAR p. 3036, Eff. 1/1/05; **AMD**, 2011 MAR p. 2043, Eff. 10/1/11.

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### **36.12.1702 PERMIT APPLICATION CRITERIA - PHYSICAL SURFACE WATER AVAILABILITY**

(1) Substantial credible information must be provided showing there is surface water physically available at the flow rate and volume that the applicant seeks to appropriate for the proposed period of diversion.

(2) If actual stream gaging records are available, they should be used to estimate the flow rates and volumes at the source of supply in the amount the applicant seeks to appropriate, the following is required:

(a) the medians of the monthly average flow rates and volumes for the stream gaging station period of record during the proposed months of diversion;

(b) a legible copy or excerpt of the data source, study or report(s) used in documenting water availability in the source of supply; and

(c) a description of all conclusions, calculations, data, and assumptions used in estimating water availability.

(3) If actual flow rate and volume data are not available to estimate the monthly median flows, then the applicant will need to use an accepted method for estimating surface water flow rates and volumes in conjunction with discharge measurements to validate the estimation technique used. Some accepted methods are listed in (6) .

(4) When stream flow gaging station data are not available and monthly median flow estimation techniques are used, the following stream discharge data must be collected:

(a) Stream flow measurements in cfs or gpm must be collected at least once every month during the proposed period of diversion at the most suitable location on the source of supply, and at or directly upstream of the proposed point of diversion. Measurements taken and submitted under this method must include:

(i) a legible copy of the actual flow measurements;

(ii) calculations used to establish flow rates in cfs or gpm;

(iii) the dates measurements were taken, with a description of current weather conditions; Weather conditions include sky conditions, noting any rain and snow, approximate temperature, and approximate wind conditions, e.g., "partly cloudy, light wind, about 60 degrees" or "light rain, calm, about 65 degrees" or "clear, moderate wind, about 40 degrees".

(iv) the type of measuring device or method used; and

(v) a written legal land description or map clearly showing where the measurements were taken.

(5) If the application involves new storage of surface water such as a reservoir, pond or pit, or enlargement of a natural or manmade lake, the application must include the following information:

(a) that the source of supply has the volume of water physically available for the proposed beneficial use;

(b) information and data that show the amount of water to be stored is physically available during a median year and in the amount the applicant seeks to appropriate using the methods described in (2) and (3) ; and

(c) projected evaporation and seepage losses.

(6) The following reports may contain accepted methods for estimating surface water flow rates and volumes:

(a) "Methods for Estimating Monthly Stream Flow Characteristics at Ungaged Sites in Western Montana," USGS Open-file Report 89-40;

(b) "A Method for Estimating Mean and Low Flows of Streams in National Forests of Montana," USGS Water RESOURCES Investigation Report 85-4071;

(c) "Stream Flow Characteristics of Mountain Streams in Western Montana," USGS Open-File Report 84-244;

(d) "Estimated Monthly Percentile Discharges at Ungaged Sites in the Upper Yellowstone River Basin in Montana," USGS Water RESOURCES Investigation Report 86-4009;

(e) "A Method for Estimating Mean Annual Runoff of Ungaged Streams Based on Characteristics in Central and Eastern Montana," USGS Water RESOURCES Investigation Report 84-4143;

(f) "Estimates of Monthly Flow Characteristics at Selected Sites in the Upper Missouri River Basin, Montana, Base Period Water Years 1937 - 86," USGS Water RESOURCES Investigations Report 89-4082;

(g) "Mean Annual Runoff and Peak Flow Estimates Based on Channel Geometry of Streams in Southeastern MT," USGS Water RESOURCES Investigation Report 82-4092;

(h) "Mean Annual Runoff and Peak Flow Estimates Based on Channel Geometry of Streams in Northeast and Western Montana," USGS Water RESOURCES Investigation Report 83-4046; and

(i) "Estimates of Mean Monthly Stream Flow for Selected Sites in the Musselshell River Basin, Montana," USGS Water RESOURCES Investigation Report 89-4165.

(7) Other professionally documented hydrologic methods for estimating stream flow or annual runoff which may be applicable and acceptable to the department, including the Orsborn method, Mannings equation, U.S. natural RESOURCES AND CONSERVATION service-developed mean annual runoff data, and drainage area information paired to gaged streams in similar type basins may be acceptable. The department will determine the acceptability of other methods on a case-by-case basis.

(a) If one of these methods is used, the applicant must also include a brief description of the method used and assumptions and calculations used in estimating flow rates and volumes.

**History: 85-2-113 and 85-2-302, MCA; IMP, 85-2-302, MCA; NEW, 2005 MAR p. 264, Eff. 1/1/05.**

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### **36.12.1703 PERMIT APPLICATION CRITERIA - PHYSICAL GROUND WATER AVAILABILITY**

(1) Applicants for ground water must provide substantial credible information demonstrating that water is available for their use from the source aquifer in the amount the applicant seeks to appropriate during the proposed period of diversion.

(2) Information demonstrating physical ground water availability must include an evaluation of drawdown in the applicant's production well for the maximum pumping rate and total volume requested in the permit application.

(3) The drawdown projected for the proposed period of diversion must be compared to the height of the water column above the pump in the proposed production well to determine if the requested appropriation can be sustained.

(4) The requirements of ARM 36.12.121 must be followed.

History: 85-2-113 and 85-2-302, MCA; IMP, 85-2-302, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.

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### **36.12.1704 PERMIT APPLICATION - EXISTING LEGAL DEMANDS**

(1) Legal demands usually exist on the source of supply or its downstream tributaries and may be affected by a proposed water right application, including prior appropriations and water reservations. These existing legal demands will be senior to a new application and the senior rights must not be adversely affected:

(a) an applicant may use a plan for mitigation or aquifer recharge, as generally defined in 85-2-102, MCA, as a means of showing water is legally available.

(2) The applicant must identify the existing legal demands on the source of supply and those waters to which it is tributary and which the applicant determines may be affected by the proposed appropriation.

(3) The applicant must provide an abstract of those water rights identified.

(4) After an application is deemed correct and complete, for public notice purposes the department shall, independent of the information provided by the applicant under this chapter, identify existing water right owners that may be affected by the proposed application.

History: 85-2-113, 85-2-302, MCA; IMP, 85-2-302, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05; AMD, 2008 MAR p. 1979, Eff. 9/12/08.

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### **36.12.1705 PERMIT APPLICATION CRITERIA - COMPARISON OF PHYSICAL WATER AVAILABILITY AND EXISTING LEGAL DEMANDS**

(1) To determine if water is legally available, the applicant must compare the physical water supply at the proposed point of diversion and the legal demands within the area of potential impact. An applicant must become familiar with senior water rights operations to accurately evaluate the effect to the senior water right.

(2) Applicants must analyze the senior water rights on a source of supply and those waters to which it is tributary within the area of potential impact and provide a written narrative comparing the physical water supply at the point of diversion during the period of diversion requested and the legal demands that exist for the water supply during that same period.

(3) If known patterns of use differ from the legal water rights filings, an explanation may be submitted explaining the current water use operation. For example, if a water reservation has not been perfected, that information may help to explain water is legally available. .

History: 85-2-113 and 85-2-302, MCA; IMP, 85-2-302, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05

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### **36.12.1706 PERMIT APPLICATION CRITERIA - ADVERSE EFFECT**

(1) Adverse effect for permit applications is based on the applicant's plan showing the diversion and use of water and operation of the proposed project can be implemented and properly regulated during times of water shortage so that the water rights of prior appropriators will be satisfied.

(2) The applicant's plan may include the use of mitigation or aquifer recharge as defined in 85-2-102, MCA, as a means of offsetting any adverse effect.

(3) A written narrative must be provided addressing the potential adverse effect to the water rights identified in ARM 36.12.1704.

(4) For surface water applications, in addition to (1), (2), and (3), the applicant shall explain the rate and timing of depletions from the source of supply and its downstream tributaries and what effect that will have on other water rights.

(5) For groundwater applications, in addition to (1), (2), and (3), the applicant shall describe how water levels in wells of prior water rights will be lowered and the rate, timing, and location of any depletions from hydraulically connected surface waters.

**History: 85-2-113, 85-2-302, MCA; IMP, 85-2-302, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05; AMD, 2008 MAR p. 1979, Eff. 9/12/08.**

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### **36.12.1707 PERMIT APPLICATION CRITERIA - ADEQUATE DIVERSION MEANS AND OPERATION**

(1) The diversion works must be capable of diverting the amount of water requested to accomplish the proposed use without unreasonable loss through design or operation.

(2) The diversion works must conform to current industry design, construction, and operation standards.

(3) Wells must be constructed according to ARM Title 36, chapter 21, subchapter 6.

(4) The applicant shall describe how the proposed system will be operated, from point of diversion through the place of use and on through the discharge of water, if any.

(5) Preliminary design plans and specifications for the diversion and conveyance facilities and the equipment used to put the water to beneficial use must be submitted including the following:

(a) the proposed flow rate and volume design capacity;

(b) the expected overall efficiency, including diversion, conveyance, and system efficiencies;

(c) the proposed diversion schedule, such as number and timing of irrigation sets;

(d) system design, construction, or operation features which are intended to reduce or eliminate adverse effects on other water rights; and

(e) the flow rate and operation of diversions must be described.

(6) For developed springs, an explanation of how the spring will be developed must be included.

**History: 85-2-113 and 85-2-302, MCA; IMP, 85-2-302, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.**

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## Subchapter 18

### Permit and Change Applications

#### **36.12.1801 PERMIT AND CHANGE APPLICATIONS - BENEFICIAL USE**

- (1) Water may be appropriated for beneficial use:
  - (a) by a governmental entity for the public;
  - (b) by a person for the sale, rent, or distribution to others; or
  - (c) by a person for the person's own use, unless provided otherwise by statute.
  - (d) or for other person's use, according to law.
- (2) The applicant must explain the following:
  - (a) how the purpose for the water benefits the applicant; and
  - (b) that the requested flow rate and volume for each purpose is reasonably needed to accomplish that purpose.
- (3) An application to change must contain information explaining why the requested flow rate and volume to be changed are reasonable for the intended purpose.

History: 85-2-113 and 85-2-302, MCA; IMP, 85-2-302, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.

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### **36.12.1802 PERMIT AND CHANGE APPLICATIONS - POSSESSORY INTEREST**

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct; and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

**History:** 85-2-113 and 85-2-302, MCA; IMP, 85-2-302, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.

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## Subchapter 19 Change Applications

### **36.12.1901 FILING A CHANGE APPLICATION**

(1) An applicant who desires to change the point of diversion, place of use, purpose of use, or place of storage of a water right must file an application to change a water right (Form No. 606) and applicable addendum.

(2) An application for a temporary change must meet the same rule requirements as those for a permanent change application.

(3) In addition to the change application rules, a temporary change application for instream flow must submit the information required under 85-2-407 and 85-2-408, or 85-2-436, MCA.

(4) A change application must contain sufficient factual documentation to constitute probable believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the application.

(5) The department must consider historical use in determining whether changing the water right would constitute an enlargement in historic use of the original water right.

(6) Only an owner of record, as shown in the department's water right records, can apply to change a water right, except if a change application is for a water right lease pursuant to 85-2-436, MCA, the change applicant must be the state of Montana, Department of Fish, Wildlife, and Parks.

(7) A current detailed water right abstract of each water right being changed must be submitted with proposed changes noted on the abstract. The abstract should reflect how the water right would appear if the change application was granted.

(8) Multiple water rights may be changed on one application if upon completion of a project, all of the water rights being changed accomplish a single proposed project; if not, separate applications must be filed. The applicant shall provide a chart or table of the combined water rights demonstrating how each water right both individually and cumulatively contributes to the project.

(9) The legal descriptions for the point of diversion and place of use must be identified as required in ARM 36.12.110.

(10) Flow rate (in gpm or cfs), volume (in acre-feet), or reservoir capacity (in acre-feet) will be rounded to the nearest tenth.

(11) The application must contain a narrative explaining the specific details of the requested water right change and why it is being requested.

(12) The proposed diverted flow rate and diverted volume of water must be identified for each changed right.

(13) The time needed to complete and put the changed project into operation must be identified. Information must be included in the application materials that justify the requested time. The justification must include information that would lead a person not familiar with the project to conclude the period requested is reasonable and needed to complete the change and put the changed water right to use.

(14) For a change application that is only to add stock tanks to an existing stock water system, the following rules apply:

(a) Form No. 606 must be completed and must describe the details of the proposed project. Form No. 606 and applicable addendum must be filled in with the required information;

(b) a current department generated water right abstract of each water right being changed

must be submitted. The proposed changes must be noted on the abstract. The abstract should reflect how the water right would appear if the change application was granted;

(c) the applicant must show that each water right to be changed has been used and must explain the extent of the historic use including the flow rate and volume; and

(d) the applicant must provide information to show that the historic flow rate diverted will be adequate even though the additional stock tanks may be further away from the source of supply.

(15) An applicant shall explain why required information is not applicable to the applicant's proposed project.

**History:** 85-2-113, 85-2-302, MCA; IMP, 85-2-302, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05; IMP, 2009 MAR p. 2259, Eff. 11/26/09.

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### **36.12.1902 CHANGE APPLICATION - HISTORIC USE**

(1) The description of the historic information is related to a date that is dependent on the type of water right being changed. The following dates are applicable for each type of water right:

(a) historic information for a statement of claim must be described as it was used prior to July 1, 1973, unless the Water Right Claim was subject to a previous change in which case it is the date of completion of the change;

(b) historic information for a provisional permit must be described as it was used at the filing date of the completion notice;

(c) historic information for a certificate of water right must be described as it was used at the filing date of the completion notice; and

(d) historic information for an exempt or nonfiled water right must be described as it was completed prior to July 1, 1973.

(2) Final Water Court approved stipulations, master's reports, or examination information related to the water right being changed must be submitted with the application; however, this information or an abstract of a water right from the department or the Montana Water Court by itself is not sufficient to prove the existence or extent of the historical use.

(3) In addition to the change application rules, a temporary change application for instream flow must submit the information required under 85-2-407 and, 85-2-408, and or 85-2-436, MCA.

(4) An applicant shall compare historical acres irrigated to acres identified as irrigated in the Water Resources Survey, if available for the place of use. If the Water Resources Survey does not support the historical irrigation alleged in the application, the applicant shall explain why. Information from irrigation journals, logs, or old aerial photographs can be submitted for consideration.

(5) For an application to change multiple irrigation water rights, the total number of acres for each water right located within the place of use must be identified.

(6) For an application to change water rights that overlap the historic place of use, an applicant shall include those water rights in the change application or shall explain how each of the water rights has been historically used and how the unchanged water rights will be used if the change authorization were granted. If water will continue to be used at the historic place of use, the applicant shall explain how the continued use will not increase the combined historic maximum diverted flow rate, the historic diverted volume, and the historic consumptive volume.

(7) An applicant shall provide substantial credible information to corroborate the historic use, including the following of each water right being changed:

(a) water right number and the priority date;

(b) most recent year the water right was used;

(c) historic point of diversion;

(d) historic period of diversion;

(e) historic means of diversion;

(f) typical historic diversion schedule and operation pattern;

(g) means of conveyance;

(h) historic ditch capacity;

(i) maximum historic flow rate diverted from each point of diversion and how the amount was determined;

(j) historic place of use for each purpose;

(k) maximum number of acres historically irrigated;

(l) typical historic period of use for each purpose;

- (m) annual or monthly historic diverted volume and how this amount was determined;
  - (n) the annual or monthly historic consumptive volume for each purpose;
    - (i) for irrigation, an applicant may choose to use the methodology described in (16); and
    - (ii) for irrigation, an applicant who chooses not to use the methodology described in (16), shall provide the factual basis for the historic consumptive volume calculation and why the historic consumptive use is less than or greater than the methodology described in (16);
  - (o) the historic efficiency including the diversion, conveyance, and overall system;
  - (p) the legal land description of a reservoir;
  - (q) the maximum volume in acre-feet of stored water;
  - (r) evaporation loss of stored water (evaporation standards can be found in ARM 36.12.116);
  - (s) maximum number of times a reservoir was filled during a year; and
  - (t) maximum period of time when water was legally collected for storage.
- (8) A narrative must be included in the application materials explaining why the historic operation of the right can be considered reasonable and typical of the purpose for which the historic right was used.
- (9) The following information may help an applicant establish the requirements under (7):
- (a) aerial photographs depicting irrigated land:
    - (i) 1979, 1997, and 2005 photos showing the irrigated land would be beneficial;
    - (b) aerial or other photographs showing diversion or conveyance structures;
    - (c) Water Resources Survey book information;
    - (d) Water Resources Survey field notes;
    - (e) water commissioner field notes;
    - (f) Natural Resources Conservation Service (NRCS) information, such as field specific soils information;
    - (g) affidavits from persons with first-hand knowledge of historic use;
    - (h) calculation of historic ditch capacities;
    - (i) description of irrigation equipment, field treatments, means of conveyance, control structures, and other onsite features related to water use;
    - (j) description of water supply availability;
    - (k) log books or diaries of previous irrigators or farm operations, crop yield records, or diversion records; or
    - (l) an evaluation of the seniority of the water right in relation to other users.
- (10) Calculations for each water right showing how the historic flow rate, consumed and diverted volumes for each water right, and capacity were determined must be included in the application materials, and the methodology employed must be described.
- (11) The annual or monthly historic diverted volume must be based on the appropriator's typical historic operation of their diversion, irrigation, and harvest schedule throughout the period of diversion and the period of use. If applicable, in addition to the information required in 36.12.1902(7), if a secondary diversion from a ditch or reservoir exists, an applicant shall identify the diversion means and the typical operation of that secondary diversion.
- (12) Historic consumptive volume must be based on the acre-feet of water used for the beneficial purpose, such as water transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products that do not return to ground or surface water.
- (13) The following may be used to calculate ditch capacity, historic available water supply, and reservoir capacity:
- (a) Manning's equation;
  - (b) Orsborn's equation;
  - (c) Blaney-Criddle equation; and

(d) the department will determine the acceptability of other reports or methods on a case-by-case basis.

(14) The methodology in (16) may be used to determine the historic consumptive volume for irrigation. The methodology is based on data from the United States Department of Agriculture (USDA) National Agricultural Statistics Service (NASS), and generated using the USDA NRCS Irrigation Water Requirements (IWR) program. If the applicant chooses not to use the methodology, they shall provide evidence showing how the historical consumptive use was calculated and why that amount is less than or greater than the methodology described in (16).

(15) IWR Data for Seasonal Alfalfa Evapotranspiration County Management Factor are shown in Table 1 and may be used to identify the historic consumptive volume. If this table is used to establish the historic consumptive volume, the department will recognize that volume as a reasonable calculation, unless a valid objection is received which offers proof that the volume is inaccurate.

(16) To determine the historic consumptive volume using the table, complete the following steps:

(a) determine which weather station (column B) is the most representative for the place of use (column C). The most representative weather station may not be in the county of the place of use, but must be nearby and about the same elevation and climatic conditions as the irrigated acres. A map showing the weather stations is located on the Internet at:

[http://dnrc.mt.gov/wrd/water\\_rts/default.asp](http://dnrc.mt.gov/wrd/water_rts/default.asp);

(b) find the evapotranspiration inches based on whether the historic irrigation is flood, wheeline, handline, or center pivot, to estimate the historic IWR (columns D or E);

(c) identify the county in which the irrigated acres are located to determine the county management factor percentage (column F);

(d) multiply the IWR estimate found in column D or E by the management factor percentage in column F. The result is the number of inches used per irrigated acre;

(e) multiply the number of total acres within the historic place of use by the county adjusted inches used per irrigated acre calculated in (d) above to determine the historic consumptive inches for those acres; and

(f) divide the cumulative historic consumptive inches from (e) by 12 to determine the cumulative historic consumptive acre-feet for the total acres.

**Table 1 - Montana County Weather Station IWR Data for Seasonal Alfalfa Evapotranspiration and Montana County Management Factor.**

Column A	Column B	Column C	Column D	Column E	Column F
County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 - 1973
Beaverhead	Dillon	5239	18.34	20.74	63.7%
	Wisdom	6060	7.34	9.29	
	Jackson	6480	8.35	10.30	
	Lakeview	6710	8.39	10.67	
	Lima	6583	13.75	16.01	
Big Horn	Busby	3430	20.32	22.88	55.4%
	Hardin	2905	27.46	29.96	
	Hysham 25	3100	20.25	22.86	
	Wyola	3750	19.19	21.89	

Column A	Column B	Column C	Column D	Column E	Column F
County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 - 1973
	Yellowtail Dam	3305	28.07	31.30	
Blaine	Chinook	2420	20.80	23.57	58.7%
	Harlem	2362	21.62	24.27	
Broadwater	Townsend	3840	19.42	21.88	69.2%
	Trident	4040	20.64	23.31	
Carbon	Joliet	3776	22.41	25.12	58.3%
	Red Lodge	5500	15.57	18.41	
Carter	Ekalaka	3425	20.13	23.14	38.4%
	Ridgeway	3320	20.28	23.01	
Cascade	Cascade 20	4600	14.12	16.63	57.3%
	Cascade 5	3360	17.90	20.75	
	Great Falls	3675	19.78	22.55	
	Neihart	4945	12.17	15.08	
	Sun River	3340	18.10	20.65	
Chouteau	Big Sandy	2700	21.52	24.37	52.5%
	Fort Benton	2640	21.98	24.75	
	Geraldine	3130	20.30	23.27	
	Iliad	2950	21.55	24.27	
	Loma	2700	22.64	25.37	
	Shonkin	4300	13.32	16.70	
Custer	Miles City	2628	26.68	29.55	54.5%
	Mizpah	2480	23.80	26.57	
	Powderville	2800	24.83	27.68	
Dawson	Glendive	2076	26.01	28.99	56.8%
Deer Lodge	No weather station				See appropriate adjacent county
Fallon	Plevna	2780	22.48	25.34	47.6%
Fergus	Denton	3620	15.39	18.12	48.8%
	Grass Range	3490	18.93	21.93	
	Lewistown	4167	15.54	18.44	
	Roy	3450	19.94	22.78	
	Winifred	3240	17.86	20.75	
Flathead	Creston	2949	14.97	17.81	87.6%
	Hungry Horse Dam	3160	14.66	18.06	
	Kalispell	2972	16.45	19.03	
	Olney	3165	12.50	15.16	
	Polebridge	3600	10.20	12.50	
	West Glacier	3154	13.74	16.78	

Column A	Column B	Column C	Column D	Column E	Column F
County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 - 1973
	Whitefish	3100	15.74	18.61	
Gallatin	Bozeman Exp Farm	4775	16.84	19.55	73.5%
	Bozeman MT State	4913	18.42	21.39	
	Hebgen Dam	6667	10.09	12.77	
Garfield	Cohagen	2710	22.36	24.99	43.4%
	Jordan	2661	23.58	26.32	
	Mosby	2750	24.51	27.34	
Glacier	Babb	4300	12.12	14.87	59.7%
	Cut Bank	3855	16.01	18.60	
	Del Bonita	4340	14.61	17.30	
	East Glacier	4810	10.60	13.26	
	St Mary	4560	13.64	16.60	
Golden Valley	Ryegate	4440	17.60	20.17	62.6%
Granite	Philipsburg Ranger Station	5270	12.90	15.26	86.5%
Hill	Fort Assinniboine	2613	22.42	25.20	54.1%
	Guilford	2820	19.54	22.06	
	Havre	2585	20.94	23.46	
	Simpson	2815	19.67	22.13	
Jefferson	Boulder	4904	17.08	19.47	61.0%
Judith Basin	Moccasin Exp Station	4243	16.17	19.06	49.3%
	Raynesford	4220	16.14	19.05	
	Stanford	4860	16.74	19.69	
Lake	Bigfork	2910	17.37	20.61	55.0%
	Polson	2949	20.46	23.23	
	Polson Kerr Dam	2730	21.37	24.08	
	St Ignatius	2940	19.53	22.33	
Lewis & Clark	Augusta	4070	17.51	20.13	60.1%
	Austin	4790	15.41	17.96	
	Helena	3828	20.23	22.69	
	Holter Dam	3490	23.88	26.61	
	Lincoln Ranger Station	4575	12.87	15.22	
Liberty	Chester	3132	19.28	21.74	54.8%
	Joplin	3300	19.01	21.40	
	Tiber Dam	2850	22.98	25.46	

Column A	Column B	Column C	Column D	Column E	Column F
County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 - 1973
Lincoln	Eureka Ranger Station	2532	20.63	23.26	47.1%
	Fortine	3000	16.09	18.69	
	Libby Ranger Station	2096	21.20	23.71	
	Libby	3600	11.06	13.36	
	Troy	1950	19.90	22.68	
Madison	Alder	5800	14.33	16.75	65.2%
	Ennis	4953	17.19	19.71	
	Glen	5050	17.81	20.01	
	Norris	4750	20.88	23.97	
	Twin Bridges	4777	16.98	19.22	
	Virginia City	5770	15.57	18.13	
McCone	Brockway	2630	20.74	23.35	43.7%
	Circle	2480	22.23	25.01	
	Fort Peck Power Plant	2070	25.37	28.16	
	Vida	2400	21.74	24.65	
Meagher	Lennepe	5880	11.93	14.38	57.3%
	Martinsdale	4800	15.19	17.73	
	White Sulphur Spr	5060	16.41	18.89	
Mineral	St Regis Ranger Stn	2680	17.61	20.05	56.1%
	Superior	2710	21.94	24.54	
Missoula	Lindbergh Lake	4320	14.63	17.22	69.5%
	Missoula	3420	18.85	21.49	
	Missoula WSO AP	3199	19.45	21.89	
	Potomac	3620	14.05	16.26	
	Seeley Lake Ranger Station	4100	14.86	17.31	
Musselshell	Melstone	2920	24.22	27.17	50.0%
	Roundup	3386	23.98	26.79	
Park	Cooke City	7460	8.68	11.63	56.9%
	Gardiner	5275	22.46	24.70	
	Livingston	4870	16.59	19.41	
	Livingston FAA AP	4656	18.63	21.39	
	Wilsall	5840	13.20	16.01	
Petroleum	Flatwillow	3133	22.27	25.01	44.0%
Phillips	Content	2340	21.15	23.97	54.7%
	Malta 35	2650	20.28	22.99	

Column A	Column B	Column C	Column D	Column E	Column F
County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 - 1973
	Malta 7	2262	21.61	24.39	
	Port of Morgan	2830	20.15	22.72	
	Saco	2180	20.13	22.70	
	Zortman	4660	14.38	17.40	
Pondera	Conrad	3550	16.93	19.42	71.4%
	Valier	3810	18.31	20.96	
Powder River	Biddle	3597	21.87	24.66	38.5%
	Broadus	3032	23.03	25.69	
	Moorhead	3220	23.72	26.42	
	Sonnette	3900	18.32	20.96	
Powell	Deer Lodge	4678	13.14	15.32	77.6%
	Ovando	4109	12.28	14.43	
Prairie	Mildred	2510	22.92	25.58	59.6%
	Terry	2248	22.82	25.47	
	Terry 21	3260	18.65	21.34	
Ravalli	Darby	3880	18.91	21.44	79.5%
	Hamilton	3529	19.93	22.34	
	Stevensville	3380	19.19	21.44	
	Sula	4475	12.09	14.42	
	Western Ag Research	3600	19.82	22.15	
Richland	Savage	1990	23.61	26.59	56.0%
	Sidney	1931	22.49	25.45	
Roosevelt	Bredette	2638	19.99	22.86	46.5%
	Culbertson	1942	20.84	23.73	
	Wolf Point	1985	24.16	27.03	
Rosebud	Birney	3160	24.57	27.29	47.7%
	Brandenberg	2770	23.83	26.52	
	Colstrip	3218	23.32	26.10	
	Forsythe	2520	25.17	28.04	
	Ingomar	2780	23.18	25.83	
	Rock Springs	3020	21.35	23.93	
Sanders	Heron	2240	14.82	17.73	58.8%
	Thompson Falls Power	2380	22.49	25.36	
	Trout Cr Ranger Station	2356	16.60	19.40	
Sheridan	Medicine Lake	1975	21.64	24.49	44.8%
	Plentywood	2063	20.64	23.48	
	Raymond Border	2384	19.13	22.04	

Column A	Column B	Column C	Column D	Column E	Column F
County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 - 1973
	Station				
	Redstone	2300	17.86	20.58	
	Westby	2120	18.10	21.033	
Silverbow	Butte FAA AP	5545	14.73	17.06	68.8%
	Divide	5350	15.25	17.58	
Stillwater	Columbus	3602	22.31	25.09	46.5%
	Mystic Lake	6544	13.57	16.57	
	Nye	4840	15.00	17.93	
	Rapelje	4125	20.35	23.07	
Sweet Grass	Big Timber	4100	20.60	23.47	44.7%
	Melville	5370	12.83	15.49	
Teton	Blackleaf	4240	14.74	17.34	68.8%
	Choteau Airport	3845	20.53	23.07	
	Fairfield	3980	19.10	21.76	
	Gibson Dam	4724	13.57	16.22	
Toole	Goldbutte	3498	16.30	18.96	51.8%
	Sunburst	3610	18.74	21.46	
	Sweetgrass	3466	18.22	21.22	
Treasure	Hysham	2660	25.01	27.78	53.4%
Valley	Glasgow WSO AP	2293	23.48	26.12	57.9%
	Hinsdale	2670	22.18	25.25	
	Opheim 10	2878	16.19	18.86	
	Opheim 16	3258	16.73	19.34	
Wheatland	Harlowton	4162	17.83	20.56	46.6%
	Judith Gap	4573	13.77	16.40	
Wibaux	Carlyle	3030	19.87	22.75	See appropriate adjacent county
	Wibaux	2696	18.69	21.50	
Yellowstone	Billings Water Plant	3097	26.16	28.92	59.5%
	Billings WSO	3648	25.49	28.22	
	Huntley Exp Station	3034	21.92	24.61	

History: 85-2-112, 85-2-113, 85-2-302, MCA; IMP, 85-2-302, 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-436, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05; IMP, 2009 MAR p. 2259, Eff. 11/26/09.

### **36.12.1903 CHANGE APPLICATION - ADVERSE EFFECT**

(1) The applicant must identify the water rights which the applicant determines may be affected by the changes the applicant is proposing to make and must provide a department general abstract of the water rights identified.

(2) The applicant must identify, analyze, and document the effects to the other water rights including, but not limited to, the following:

(a) water rights using the existing or proposed point of diversion;

(b) other ditch users;

(c) down-slope water users;

(d) the effect to water rights dependent on the return flow;

(e) the effects of changing the historic diversion pattern including rate and timing of depletions;

(f) for ground water applications, the applicant shall explain how the changed water right will affect water levels in wells of junior and senior water rights and the rate and timing of depletions from hydraulically connected surface waters, and what effect those changes will have on those water rights within the notice area.

(3) A comparison between the historic consumptive use of the water rights being changed and the consumptive use if the change application was granted must be included with the application.

(4) After an application is deemed correct and complete, for public notice purposes, the department shall, independent of the information provided by the applicant under this chapter, identify existing water right owners that may be affected by the proposed application.

**History: 85-2-113 and 85-2-302, MCA; IMP, 85-2-302, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.**

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### **36.12.1904 CHANGE APPLICATION CRITERIA - ADEQUATE DIVERSION MEANS AND OPERATION**

(1) The diversion works must be capable of diverting the amount of water requested to accomplish the proposed use without unreasonable loss through design or operation.

(2) Preliminary design plans and specifications for the current and/or proposed diversion and conveyance facilities and the equipment used to put the water to beneficial use must be submitted with the application including the following:

(a) a description of the historical operation, including the typical diversion schedule from the point of diversion to the place of use;

(b) a description of how the proposed water right will be operated, from point of diversion through the place of use and on through the discharge of water, if any;

(c) the historic and proposed flow rate and volume design capacity;

(d) the historic efficiency and the projected overall efficiency, including diversion, conveyance, and system efficiencies.

(3) The diversion works must conform to current design, construction, and operation standards.

History: 85-2-113 and 85-2-302, MCA; IMP, 85-2-302, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.

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## Subchapter 20 Salvage Water

### **36.12.2001 SALVAGE WATER APPLICATIONS**

(1) Salvage water, defined at 85-2-102 (16) , MCA includes seepage, wastewater, or deep percolation water and may be used by the appropriator, moved to other lands, leased, or sold after implementing a water saving method and proving lack of adverse effect to other water rights.

(2) In addition to the rules for change applications, a salvage water application must include a report documenting the volume of water that is being saved by the proposed water saving method.

(3) For the purpose of implementing 85-2-419 , MCA, the destruction of phreatophytes is not a water saving method. For example, one cannot deforest the cottonwoods or other trees or brush on a source to obtain salvage water.

(4) Salvaged water includes water lost to deep percolation when the applicant provides geohydrologic evidence that deep percolation occurs.

History: 85-2-113, 85-2-302, MCA; IMP, 85-2-302, 85-2-402, 85-2-419, MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05.

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