



Department of Natural Resources and Conservation
Office of Administrative Hearings

GUIDELINES FOR WATER RIGHT CONTESTED CASE HEARINGS

AN ADMINISTRATIVE HEARING IS NOT A PUBLIC MEETING.
THE HEARING IS AN ADVERSARY PROCEEDING
HAVING OPPOSING SIDES LIKE A DISTRICT COURT TRIAL.
YOU MUST BE A PARTY TO PARTICIPATE IN A CONTESTED CASE HEARING.

THE HEARING IS THE **ONLY** OPPORTUNITY YOU HAVE TO PRESENT EVIDENCE SUPPORTING YOUR SIDE OF THE CASE. THE DECISION OF THE HEARING EXAMINER IS BASED SOLELY ON THE RECORD OF THE HEARING.

**INFORMATION OR EVIDENCE
WHICH IS NOT A PART OF THE RECORD WILL NOT BE CONSIDERED.**

YOU SHOULD HAVE ALL EVIDENCE YOU BELIEVE IS RELEVANT GATHERED IN TIME FOR THE HEARING. YOU SHOULD PRESENT IT FOR INCLUSION INTO THE HEARING RECORD THROUGH THE TESTIMONY OF WITNESSES AND/OR IN EXHIBITS.

**ONCE THE RECORD IS CLOSED,
YOU CANNOT PRESENT FURTHER EVIDENCE.**

The conduct of the hearing (including pre-hearing and post-hearing procedures) is governed by Montana Code Annotated (MCA), Title 85, Chapter 2, Parts 3 and 4; the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6, MCA; and the Administrative Rules of Montana (ARM), Title 36, Chapter 12.

NOTICE: The rules of the Department of Natural Resources and Conservation (DNRC) contested case hearings, ARM Title 36, Chapter 2, Sub-chapter 2, supersede the Montana Rules of Civil procedure unless specifically referenced by DNRC rule.

For copies of any of the statutes or rules, or questions about hearing procedures, you may contact the Office of Administrative Hearings at 406-444-6615 or 1539 11th Avenue, PO Box 201601, Helena, MT 59620-1601, or e-mail: DNRCOAH@mt.gov. Information may also be found on the DNRC Water Rights website at <http://dnrc.mt.gov/divisions/directors-office/oah>.

Do not discuss the facts or issues in dispute with the Hearing Examiner. That would be *ex parte* communication, which is prohibited. See ARM 36.12.230¹

**A SUMMARY OF THE HEARING PROCEDURES FOLLOWS.
PLEASE BECOME FAMILIAR WITH THE ACTIONS YOU MUST TAKE TO ADEQUATELY
REPRESENT YOUR INTERESTS.**

¹ These references are to the Administrative Rules of Montana (ARM) or the Montana Codes Annotated (MCA). These rules and laws can be found at county courthouses, DNRC offices, most law offices, many libraries, or from the Secretary of State's website at <https://sosmt.gov>. Copies may be obtained from DNRC offices for a copying fee.

I. **PREHEARING PROCEDURES**

A. **DISCOVERY**

Discovery is an essential tool in preparing your case. Make use of it as soon as possible. See ARM 36.12.215.

You may demand other parties to disclose or reveal their exhibits and witnesses and must be in writing. The term "discovery" includes all forms of discovery allowed by the Montana Rules of Civil Procedure and ARM 36.12.215. Parties receiving a discovery request must respond to the request or file an objection to the request in accordance with ARM 36.12.215.

Responses to discovery requests and depositions will be used in making the decision only if the evidence is introduced and admitted into the record upon motion. In addition, any written or recorded statements made by you or by your witnesses on your behalf which you intend to present at the hearing must be made available for inspection and reproduction if another party sends in a written request.

You must inform in writing all other parties of the names and addresses of all witnesses you intend to call, including yourself if you intend to testify. You must also include a brief summary of each witness's testimony. All witnesses unknown at the time of initial disclosure must be disclosed as soon as they become known.

Any party failing to comply with a demand or order for discovery will not be permitted to present evidence at the hearing through exhibits or witnesses which were not disclosed.

B. **SUBPOENAS**

Any party may request the Hearing Examiner subpoena (require presence at the hearing) witnesses or documents.

Subpoena requests for the attendance of witnesses or production of documents must be made in writing to the Hearing Examiner and contain a brief statement demonstrating the potential relevance of the testimony or evidence sought and must identify any documents sought with specificity. ARM 36.12.217.

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. ARM 36.12.217; §§ 26-2-502, 507, MCA.

A party who wishes to have a Department employee testify at the hearing must subpoena that employee and reimburse the State of Montana for employee time spent when called to testify in connection with the employee's official duties in an action where the Department is not a party. § 26-2-515, MCA.

C. **MOTIONS**

Pre-hearing motions must be in writing and must state with particularity the grounds for the motion and the relief or order requested. The original motion is filed with the Hearing Examiner, and copies of the motion must be served on all parties. The motion must give notice to the other parties that, should they wish to contest the motion, they must file a written response within 10 days after service of the motion. All pre-hearing motions and responses to pre-hearing motions must contain a certificate of service. See ARM 36.12.213 for the rule and exceptions.

Motions should be timely to allow the Hearing Examiner to rule on the motion prior to the affected deadline or action requested. Parties are encouraged to take into account the time required for the Hearing Examiner to receive responses and rule on the motion. The Hearing Examiner may request oral argument on any pending pre-hearing motions.

D. **FILING**

Motions may be transmitted by electronic mail (e-mail); however, the original motion must be provided to the Hearing Examiner and all parties within 5 days of the transmittal date.

Copies of all documents filed with the Hearing Examiner, including correspondence, must be served upon all other parties, or if represented by legal counsel, on each party's counsel of record. A certificate of service must appear on the original certifying the manner in which the document was served (for example, hand-delivery, mail). Service is defined in ARM 36.12.101(67) and includes service by First Class U.S. mail, personal service, and service by state agencies through the state's mail distribution system.

E. SETTLEMENT

Settlement may be made at any point after objections have been received. The parties may mutually agree to be bound by the terms of a conditional or unconditional stipulation. The parties may submit such proposed conditions to the Hearing Examiner for review, but the Department shall include them only if the conditions are designed to further compliance with the applicable statutory criteria. See ARM 36.12.207.

II. THE HEARING

A. REPRESENTATION

Parties must file timely, written, and valid, correct and complete objections to the application on DNRC Form 611, Objection to Application, to appear at the hearing to present relevant evidence and testimony. See § 2-4-105, MCA; ARM 36.12.218.

If you are an individual, you may represent yourself in this matter whether or not you are an attorney. However, you may not represent anyone but yourself in this matter, even if you are on the same side of the matter. All corporations, limited liability companies, trusts, partnerships and not-for-profit associations **must** be represented by an attorney eligible to practice law in Montana as a result of either Montana licensure or admission *pro hac vice*. See Weaver v. Law Firm of Graybill, Ostrem, Warner & Crotty, 246 Mont. 175, 178, 803 P.2d 1089, 1091 (1990); Montana Supreme Court Com'n on Unauthorized Practice of Law v. O'Neil, 2006 MT 284, ¶ 86, 334 Mont. 311, 147 P.3d 200; ARM 36.12.206. Any attorney appearing before the Department must be eligible to practice law in Montana as a result of either Montana Licensure or admission *pro hac vice*. See ARM 36.12.206.

B. RELEVANT FACTUAL EVIDENCE

The Department proposed to grant an application for beneficial water use permit or to change a water right. The issue in this matter is whether the appropriation for which the Applicant has applied meets the required statutory criteria of § 85-2-311, MCA (permit application) or § 85-2-402, MCA (change application). While the Department made a Preliminary Determination to grant the application, it did so based on the evidence contained in the file. When a valid objection is received, the Applicant retains the burden of proof to show the criteria can be met.

Parties should be prepared to present relevant factual evidence the Hearing Examiner may need to make the decision. Objectors must present factual information supporting the basis of their objection. An objector to a permit application must state facts tending to show that one or more of the criteria in § 85-2-311, MCA, are not met. For change applications, objectors must state facts to show that one or more of the criteria in § 85-2-402, MCA are not met. Testimony or evidence that is irrelevant, immaterial, or unduly repetitious will be excluded. ARM 36.12.221(1)

Parties may present data or information that you developed by yourself, that was developed by a private consultant, or that has been developed by such agencies as DNRC, United States Geological Survey, or United States Natural Resources Conservation Services. DNRC will not develop materials for parties in water contested case hearings.

C. TESTIMONY

Each party will be given full opportunity to question the opposing party and their witnesses. All parties will be given opportunity to testify and present arguments on all issues involved. See § 2-4-612, MCA.

All testimony shall be given under oath, or an affirmation if a person objects to taking an oath (such as for religious reasons). Witnesses will be sworn by the Hearing Examiner before testifying.

All testimony of the parties and their witnesses, and all exhibits, must be relevant to the application or objection. Objections to questions, testimony, or evidence may be made by any party. The Hearing Examiner will rule on objections during the hearing or may reserve ruling until later, such as in the written decision. Unless stipulated to by all parties, the statutory rules of evidence will not apply. See § 85-2-121, MCA.

If a necessary witness will not be available on the date of the hearing, contact the Hearing Examiner.

D. EXHIBITS

Exhibits will be marked for identification and kept by DNRC as a permanent record of the proceedings. If you do not

want or if it is not possible for an original document to be kept permanently by DNRC, prepare a copy of the document and present it at the hearing together with the original document, if possible. The Hearing Examiner may admit the copy into the record after all parties present at the hearing have had an opportunity to examine it, and if the Hearing Examiner is satisfied the copy is a true and correct reproduction of the original.

Any party who had a document prepared for use in his/her application or objection must have the author of the document at the hearing as a witness so other parties and the Hearing Examiner may cross-examine the author. If this is impossible, contact the Hearing Examiner to make other arrangements.

E. HEARING PROCEDURE

Unless agreed to otherwise, pursuant to ARM 36.12.223, the hearing will be conducted substantially in the following manner:

- i. Opening remarks by Hearing Examiner;
 - ii. (Optional) Opening statements by Applicant and Objector(s);
 - iii. Presentation of testimony and evidence by Objector, including presentation of pre-filed expert testimony (see ¶ 6 below);
 - iv. Cross-examination of Objector's witnesses by Applicant, followed by optional redirect by Objector and recross-examination by Applicant;
 - v. Presentation of testimony and evidence by Applicant, including presentation of pre-filed expert testimony (see ¶ 6 below);
 - vi. Cross-examination of Applicant's witnesses by Objector, followed by optional redirect by Applicant and recross-examination by Objector;
 - vii. Objector/Applicant may call rebuttal witnesses and Objector/Applicant may respond to the rebuttal witnesses;
 - viii. The Hearing Examiner may call a DNRC staff witness and ask them to present materials or testimony. The Hearing Examiner may also question any party or witness to clarify testimony or elicit additional information.
 - ix. (Optional) closing statements by Applicant and Objector(s); and
 - x. Closing remarks, including scheduling of post-hearing deadlines, if any, by Hearing Examiner.
- b. The hearing will be recorded and any party may request copies of the verbatim audio record upon payment at the Department's current rates. (See Department Form No. 613).
 - c. The record will be closed at the end of the hearing, unless good cause is shown why evidence could not be presented at the hearing. See *also* ARM 36.12.234, ARM 36.12.222(5), and ARM 36.12.226.

III. POSTHEARING PROCEDURES

A. FINAL DECISION

The DNRC will issue a Final Order stating its final decision on the application. The Final Order may be appealed by filing a petition in the appropriate court within 30 days after service of the Final Order. See ARM 36.12.228; § 2-4-623, MCA.

B. COPIES OF RECORD

Anyone wanting a duplicate of the audio recording of the hearing should contact the Office of Administrative Hearings to make the necessary arrangements which includes payment of a copying fee. Copies of documents such as exhibits or DNRC's file on the application may also be obtained from the Office of Administrative Hearings and requires payment of a copying fee. **Written hearing transcripts are seldom produced by DNRC.** Parties may produce their own transcripts from copies of the audio recording. See 36.12.227

CONTACT PERSON: Hearings Assistant, Phone: (406) 444-6615; or Address: Department of Natural Resources and Conservation, Office of Administrative Hearings, 1539 11th Avenue, PO Box 201601, Helena, MT 59620-1601. E-mail: DNRCOAH@mt.gov

ATTORNEY REPRESENTATION

If you wish to hire an attorney to represent you in this matter, it is strongly recommended that you do so as soon as possible. Once a date for the hearing is set, there may only be approximately 30 days to prepare your case.

If you wait to obtain an attorney until a hearing date is set, the attorney may not have sufficient time to prepare for the hearing. Unless there is good cause shown, the hearing date will not be postponed to allow you time to hire an attorney nor for the attorney you just hired more time to prepare your case. Therefore, you should engage the attorney's services as soon as possible to allow the attorney as much time as possible to prepare your case.

See the Administrative Rules of Montana 36.12.206

CORPORATION REPRESENTATION

Each party has the right to be represented in this case by an attorney at the party's own expense. An individual may represent themselves whether or not they are an attorney. However, a non-attorney may not represent anyone other than themselves in this case even if they are on the same side. All legal entities, including but not limited to corporations, limited liability companies, trusts, partnerships and not-for-profit associations, must be represented by an attorney eligible to practice law in Montana as a result of either Montana licensure or admission pro hac vice. See *Weaver v. Law Firm of Graybill, Ostrem, Warner & Crotty*, 246 Mont. 175, 178, 803 P.2d 1089, 1091 (1990); *Montana Supreme Court Com'n on Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, ¶ 86, 334 Mont. 311, 147 P.3d 200; ARM 36.12.206(1). Any attorney appearing before the Department must be eligible to practice law in Montana as a result of either Montana Licensure or admission pro hac vice. See ARM 36.12.206(1).