BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the amendment of ARM 36.12.101, 36.12.105, 36.12.107, 36.12.117, 36.12.121, 36.12.1301, 36.12.1501, 36.12.1702, and 36.12.1801 and the repeal of ARM 36.12.106 pertaining to water right permitting	)))))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On September 8, 2017, the Department of Natural Resources and Conservation (department) published MAR Notice No. 36-22-196 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 1485 of the 2017 Montana Administrative Register, Issue Number 17. On September 22, 2017, the department published a notice of extension of comment period on the proposed amendment and repeal of the above-stated rules at page 1608 of the 2017 Montana Administrative Register, Issue Number 18.

2. The department has amended the following rules as proposed: ARM 36.12.101, 36.12.105, 36.12.117, 36.12.121, 36.12.1301, 36.12.1702, and 36.12.1801. The department has repealed the following rule as proposed: ARM 36.12.106.

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

36.12.107 FILING FEE REFUNDS (1) through (4) remain as proposed.

(5) If a deficiency letter is not sent, no refund will be authorized once the public notice of the application has been initiated.

(6) through (9) remain as proposed.

36.12.1501 PERMIT AND CHANGE APPLICATION DEFICIENCY LETTER AND TERMINATION (1) remains as proposed.

(2) The priority date on a permit application or the date received on a change application will not be changed if:

(a) all of the requested information in the deficiency letter is postmarked ~~and~~ or submitted to the department within 30 days of the date of the deficiency letter; or

(b) remains as proposed.

(3) The permit application priority date or change application date received will be changed to the date when the department receives all of the requested information if:

(a) all of the requested information in the deficiency letter is postmarked ~~and~~ or submitted between 31 and 90 days of the date of the deficiency letter; or

(b) and (4) remain as proposed.

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

COMMENT 1: The proposed use of the "department's judgement" in the definition gives the department too broad of discretion, and it is inappropriate for the department to grant its own authority of discretion. The proposed definition of "combined appropriation" hinges on ambiguous, undefined, and indiscriminate "department judgement." The department is not allowed to adopt rules that subject applications or applicants to unchecked agency decision making.

COMMENT 2: The proposed rule is too broad and not appropriate. Commenter voiced concerns as a senior water right holder of being limited on ability to develop his property into residential area in the future which could affect property values. The department should be considering in rule changes how the conversion from flood to sprinkler irrigation has dropped water tables and the lack of recharge is more important than small effects from these domestic wells. Commenter gave example of thinning forest to raise water table and streamflow.

COMMENT 3: The department guidance on implementing the proposed definition of combined appropriation is extensive and substantive and raises the question of whether the guidance should go through rulemaking to allow public notice and comment. Several elements in the guidance document have legal consequences and require analyses that effectively makes the guidance a rule, without the required Montana Environmental Policy Act (MEPA) notice and comment. The guidance document's elements of analyzing what constitutes a "project or development," "same source aquifer" and "could the development be accomplished by a single appropriation," are rule-like in character and therefore the guidance document should go through the rule making process in compliance with the Montana Administrative Procedures Act (MAPA).

COMMENT 4: Without defining "same source aquifer," the Gallatin valley might be considered one large aquifer or "same source aquifer" which could be very limiting and detrimental to large number of properties. Also, depending on a parcels configuration, application of the proposed definition could be too restrictive for water use. The definition states springs and wells, clarification is needed to determine if "pit (ponds)" are considered "groundwater development" in this rule change.

COMMENT 5: Given the court decisions over the last decade, it is the Legislature's prerogative to define the term "combined appropriation" in the Water Use Act. The defining of "combined appropriation" will have a substantial impact and should be subject to the legislative policymaking process. The proposed definition is inflexible and will pose difficulties for developers. The definition also gives the department too much discretion and different individuals within the department may apply that discretion differently, which may lead to unpredictability and uncertainty. This is an

inappropriate grant of authority to an executive agency that does not comport with the Water Use Act.

COMMENT 6: The definition proposed is too vague and difficult to interpret, and the current guidance document for implementation is not a workable, long term, statewide solution. The proposed definition and current guidance document are difficult for well drillers to determine where to drill a well to be exempt from the permitting process and does not work on the ground. A process for a property owner to inquire with the department to determine if a permit will be required, prior to drilling their well, would be needed; which is inconsistent with the purpose and intent of exempt wells. The existing definition for "project" in ARM 36.12.101(61) states a "project is a place of use, that has its own identifiable flow rate, volume and means of diversion," which doesn't seem to fit with how it is used in the proposed definition for combined appropriation. The court ruling invalidated the 1993 rule and defaulted to the prior rule, it did not state the department was to permanently adopt the 1987 rule. The department should consider a rule that includes enough guidance and direction that a driller and property owner could easily determine if their well is exempt from permitting or not.

COMMENT 7: While the Montana Supreme Court did invalidate the 1993 rule which reverts back to the 1987 rule, the Court held that "it is up to the DNRC to determine whether initiating rulemaking to change the reinstated 1987 rule is appropriate" not that the department had to adopt the language of the 1987 rule. The department guidance document for implementing the Court's decision was issued without any notice or public comment pursuant to MAPA. Without defining "project or development," the vague wording of the definition of combined appropriation gives the department too broad of discretion, leaving water users at the mercy of the department, and could have substantial impact on property values. When the Montana Supreme Court issued its ruling, it was emphasized the need to protect existing water right holders from adverse effect caused by new appropriations, while through 85-2-306(a), MCA, the Montana Legislature already decided exempt wells did not raise adverse effect concerns. To address adverse effect, any definition of combined appropriations needs to take into consideration site-specific hydrology and other water conditions to determine whether existing water rights will be adversely affected. The terms "project or development" and "same source aquifer" need to be defined in applicable rules or statutes.

COMMENT 8: The use of "department's judgement" in determining what could have been accomplished by a "single appropriation" provides significant exposure to the department for litigation. It should be in rule what analysis the department will use to make the determination of what could be accomplished by a "single appropriation." The proposed definition uses the term "project" and seems to be a conflict how project is defined in ARM 36.12.101(61). The department needs to review and define "project" in a way that existing water rights are not harmed by the concentrated use of exempt wells.

RESPONSE TO COMMENTS 1-8: The department is not adopting a new rule. As stated in the reasonable necessity of proposal notice No. 36-22-196, published September 8, 2017, at page 1485 of the 2017 Montana Administrative Register, Issue Number 17, the Montana Supreme Court invalidated the 1993 rule defining "combined appropriation" and reinstated the 1987 rule. The department is proposing to amend the Administrative Rules of Montana (ARM) in order to reflect the Montana Supreme Court's decision. Currently, individuals reviewing the official ARM published by the Secretary of State's office would see the invalidated 1993 rule only. They would not see the 1987 rule as reinstated by the Montana Supreme Court, and therefore would be misinformed regarding the current law. The Secretary of State's office does not automatically update the official ARM record to reflect court orders. The process the department is following is the only process available to reflect the Montana Supreme Court's reinstatement of the 1987 rule in ARM.

The intent of the proposed rulemaking is only to reflect the reinstatement of the 1987 rule as ordered by the Montana Supreme Court. There is no intent at this time to propose anything new or different. The department will continue to implement the 1987 rule as it has done since the 2014 district court decision. If the department considers proposing anything new or different, the department will take these comments into consideration during any formal rulemaking process.

COMMENT 9: Commenter suggests the department adopt animal unit equivalent to the standards used by Natural Resource Conservation Service (NRCS). The NRCS numbers and the concessions they make for larger animals are more reflective of the animal unit.

RESPONSE TO COMMENT 9: The department will take the comment into consideration. While there is merit in the comment, a change to the proposed rule amendment at this time would require a new proposed amendment notice. The department will proceed with the amendments as proposed.

COMMENT 10: The proposed language in ARM 36.12.107 appears to create conflict or confusion between which deadline applies to whether a refund will be issued. It is suggested that the old subsection (4) be amended to state "(5) in the event a deficiency letter is not sent no refund will be authorized once the public notice of the application has been initiated."

RESPONSE TO COMMENT 10: The only time renumbered (5) would be in effect is in the event a deficiency letter is not sent. To clarify the rule, the department amends renumbered (5) to read:

(5) If a deficiency letter is not sent, no refund will be authorized once the public notice of the application has been initiated.

COMMENT 11: Commenter requests clarification as to why the proposed rule changes to ARM 36.12.117 now when the statute, 85-2-308(5), MCA already requires this information. Commenter wants to be sure all water right holders, not just instream flow rights, are held to the same standard when objecting to protect

their water rights. Commenter also questions the timing of including this in the rule now when the language has been in statute for many years.

RESPONSE TO COMMENT 11: As stated in the reasonable necessity of the proposed amendments to the rule, the statutory language under 85-2-308(5), MCA, expressly requires the language be in rule. In reviewing the statute, the department realized the language was not included in the rule as required, and is rectifying this oversight.

COMMENT 12: With the proposed addition of "the discharge rate may be less than the proposed rate if the application is for multiple wells and the total proposed rate cannot be obtained from a single well" to ARM 36.12.121, it is recommended a required 1000 minute draw down test as opposed to the 8-hour test because a test of short duration and low discharge rate may not fully characterize the aquifer.

RESPONSE TO COMMENT 12: The purpose of an 8-hour test is only to demonstrate physical availability and adequacy of diversion, and generally is not intended to be used to evaluate aquifer characteristics. The data may be useful, or used to support other data on aquifer characteristics, but that is not the main purpose.

COMMENT 13: Commenter recommends the "and" in the following should be replaced with "OR," "the deficiency letter is postmarked AND submitted" in the proposed ARM 36.12.1501.

RESPONSE TO COMMENT 13: The department agrees. A deficiency response must be submitted to the department or postmarked by the appropriate deadline. The department has amended the rule accordingly.

COMMENT 14: While the commenter appreciates DNRC's proposed amendment to ARM 36.12.1501, the commenter recommends the following alternative wording: (2) The priority date on a permit application or the date received on a change application will not be changed if all of the requested information in the deficiency letter is postmarked and submitted to the department: (a) within 30 days of the date of the deficiency letter; or (b) under an extension granted by the department, within 45 days of the date of the deficiency letter. The department may only grant an extension if the applicant submits a written request for an extension within 30 days of the date of the deficiency letter.

RESPONSE TO COMMENT 14: The language proposed by the commenter seems to imply that an extension could be granted within 45 days. The extension request must be made within 30 days. The priority date will not change if an extension request made within 30 days has been granted and the information is postmarked or submitted within 45 days.

COMMENT 15: Commenter expresses concerns over the discretionary "may" language in ARM 36.12.1702(4)(b) as it could leave applicant in a position where

they cannot take the measurements as per DNRC standards and cannot obtain a variance from the standards.

RESPONSE TO COMMENT 15: The department's intent with the proposed language change is to allow for more flexibility for the applicant and the department for fact specific cases. Without the proposed amendments, the rule only allows for a variance from taking measurements on non-perennial sources. The proposed rule allows source conditions and other measurement information to be taken into consideration when determining what, if any, measurements may be needed to provide correct and complete information for physical availability.

/s/ Barbara Chillcott
BARBARA CHILLCOTT
Rule Reviewer

/s/ John E. Tubbs
JOHN E. TUBBS
Director
Natural Resources and Conservation

Certified to the Secretary of State February 13, 2018.