

# A GUIDE TO PARTICIPATING IN A CONTESTED CASE HEARING



Department of Natural Resources  
and Conservation (DNRC)  
1424 9th Avenue  
PO Box 201601  
Helena, MT 59620-1601

Phone: 406-444-6615 Fax: 406-444-0533

Web: <http://dnrc.mt.gov/divisions/water/water-rights/hearings-unit>

This booklet is a general guide to many of the legal requirements that apply to contested case proceedings and how the Department of Natural Resources and Conservation (DNRC) Hearings Unit conducts those hearings. Employees of DNRC may not provide legal advice to agencies, organizations, or people involved in its hearings. This guide should not be considered a substitute for having an attorney.

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## GENERAL INFORMATION

### Why did I Receive this Information?

You are either an applicant for a water right permit or water right change, or you have filed a valid objection to a water right application. Therefore, you are considered a “party” in the hearing process. Included with this information is a Party List that identifies all the individuals that are, at this time, a party to this process. **YOU MUST BE A PARTY TO PARTICIPATE IN A CONTESTED CASE HEARING.**

### What is a Contested Case Hearing?

A contested case hearing is a proceeding held before a hearing examiner which is similar, but not identical to a court trial. A contested case hearing is not a public meeting. The hearing is an adversary proceeding with an opposing side, similar to a District Court trial. A contested case hearing is held when an applicant and objector disagree on whether the statutory application criteria are met. The contested case hearing is the only opportunity the applicant and objector have to present information, or “evidence” supporting their side of the case to a hearing examiner.

### Is There More Information I should Know?

You need to become familiar with the actions you must take to represent your interests adequately. This is meant to provide you with a general overview, and is not intended to provide you with legal advice. Other information that is helpful is found under the *Contested Case Procedures Summary*.

## LEGAL INFORMATION

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.<sup>1</sup>

**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 Hearings Unit at 406-444-6615 or 1424 9<sup>th</sup> Avenue, PO Box 201601, Helena, MT 59620-1601 FAX: 406-444-0533. Information may also be found on the DNRC Water Rights web site at <http://dnrc.mt.gov/divisions/water/water-rights/hearings-unit>

**NOTICE:** 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; ARM36.12.206. 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 ARM36.12.206.

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<sup>1</sup> 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, and many libraries. Copies may be obtained from DNRC offices for a copying fee.

## CONTESTED CASE PROCEDURES SUMMARY

### **PREHEARING PROCEDURES**

#### **Hearing Notice and Appointment of Hearing Examiner**

The first information you will receive explains that a hearing is going to be held on the water right application (Hearing Notice) and a hearing examiner will be appointed to hold a hearing on an application (Appointment of Hearing Examiner).

#### **First Prehearing Conference**

The first information packet usually will contain a Notice of a First Prehearing Conference. The hearing examiner will request your participation in a prehearing conference with all the parties. The prehearing conference will be held by telephone or in person. The hearing examiner will:

- ▶ explain the hearing process
- ▶ the requirements that must be met by all the parties, such as discovery, motions, hearing attendance, or mailing requirements.
- ▶ the sanctions that could apply for not complying with the requirements
- ▶ set dates for certain actions

At the prehearing conference, attorneys and *pro se* (parties not represented by an attorney) parties may ask questions about the hearing process. The parties may also stipulate to the issues that will be heard at the hearing.

#### **What If I Can't Be at the Hearing or Prehearing Conference on the Scheduled Date?**

You must have a good reason to change a hearing or prehearing conference date that is specified in the Notice of Hearing or in another order. If you have a good reason, you must contact the Hearings Examiner immediately and obtain his or her agreement to reschedule the hearing or the prehearing conference. The legal terminology for this is requesting a *continuance*, and you must make your **written** request for a continuance well before the hearing is scheduled to take place. A copy of this request must be sent to the Hearing Examiner and all parties listed on the Certificate of Service.

**IMPORTANT REMINDER:** The Hearing Examiner may consider the failure by any party to appear, without prior explanation to the Hearing Examiner, to be cause for dismissal by default. Possible other results of a default include the following: the defaulting party's claim or interest in the proceeding may be denied, disregarded or disposed of adverse to the defaulting party. See ARM 36.12.212(3). However, in the event of a default of any objectors, the Applicant is not relieved of the duty to present evidence to satisfy the Applicant's substantive burden of proof under § 85-2-311, MCA or § 85-2-402, MCA.

#### **Do I need an Attorney?**

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.

Legal counsel shall file a Notice of Appearance with the Hearing Examiner and serve copies on all parties. This requirement does not apply to legal counsel who previously filed the equivalent notice with the Department.

### **Can I Ask the Hearings Examiner For Help With My Case?**

It is very important that Hearings Examiners remain completely neutral and impartial. Hearings Examiners cannot discuss your case with you or the other party unless all parties or their lawyers are present to hear what is being said. A limited exception is that the Hearings Examiner may discuss hearing dates and deadlines with you. If you are in doubt about whether it is proper to call the Hearings Examiner, you may call the Hearings Assistant at 406-444-6615.

Section 2-4-613, MCA, and ARM 36.12.230, prohibit *ex parte* communications with the Hearing Examiner concerning any issue of fact or law in a contested case. Communicating directly with the Hearing Examiner on these matters without providing all parties an opportunity to participate is prohibited.

If you must talk to the Hearings Examiner before or after the hearing, please arrange for a conference call so that the other parties or their attorneys know what is being talked about and can tell their side of the story, if necessary. Also any time you write to the Hearings Examiner, you must send a copy to the other parties with an attached Certificate of Service.

## **HEARING PROCEDURES**

### **Participation**

(ARM 36.12.218)

To appear at the hearing to present relevant evidence and testimony, parties must have filed either a correct and complete application or a valid objection to the application on DNRC Form 611, Objection to Application. **YOU MUST BE A PARTY TO PARTICIPATE IN A CONTESTED CASE HEARING.**

### **Relevant Factual Evidence**

(See ARM 36.12.220 and ARM 36.12.221)

All parties should be prepared to give relevant factual evidence that relates to all of the criteria that must be met in order for DNRC to grant applications. Applicants will want to provide evidence to prove the application criteria can be met. Objectors will want to provide evidence to prove the application criteria cannot be met.

### **Testimony**

(See § 2-4-612, MCA; § 85-2-121, MCA)

All testimony shall be given under an affirmation (oath), and the hearing examiner will affirm witnesses before testifying.

All parties will be given an opportunity to testify and present arguments on all issues involved. Each party will be given the opportunity to ask questions of the opposing parties and their witnesses.

All testimony of the parties and their witnesses, and all exhibits, must be relevant to the application, objection, and ultimately the statutory criteria. Any party may object to the questions being asked, testimony being given, or evidence produced at the hearing. The hearing examiner will rule on objections during the hearing or may reserve ruling until the written decision. Unless stipulated to by all parties, the statutory rules of evidence **will not** apply. The statutory rules of evidence set forth in Mont. Code Ann., Title 26, Chapter 10, establish strict rules for the presentation of evidence. However, § 85-2-121, MCA provides the common law and statutory rules of evidence shall apply only upon stipulation of

all parties to a proceeding. Under the relaxed rules all evidence, including hearsay, commonly relied upon by reasonably prudent persons in the conduct of their serious affairs is admissible.

### **Exhibits**

Exhibits will be marked for identification and kept by DNRC as a permanent record of the proceedings. If it is not possible or if you do not want 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. The hearing examiner may admit the copy into the record after all parties at the hearing have an opportunity to examine it, and if the hearing examiner is satisfied the copy is a true and correct reproduction of the original. Please number your exhibits before the hearing since that helps to save time at the hearing.

The author of documents prepared for use at the hearing by the applicant or objector must be at the hearing as a witness so other parties and the hearing examiner may cross-examine the person. If this is impossible, contact the other parties to make other arrangements.

\*Please note any oversized maps or other documents (larger than 11" x 17") should be submitted on a compact disk (CD) to be included in the official hearing record. A hard copy of the map or document can be used in the hearing, but it will be for demonstration purposes only. If evidence such as a geologic samples is submitted, a picture will be taken and put in the official hearing record to depict the exhibit.

### **Hearing Sequence**

(See ARM 36.12.223)

Unless otherwise designated by the hearing examiner, the hearing will be conducted in the following sequence.

1. *Hearing Examiner:* The hearing examiner will make brief opening remarks, then ask the parties if they wish to make any opening remarks. Opening remarks are optional.
2. *Objector Information:* The objectors will be asked to explain their objections and may introduce exhibits and call witnesses in their behalf which show that one or more of the criteria for issuance of a permit or change is not met. Then the applicant may question (cross-examine) the objectors and witnesses.
3. *Applicant Information:* The applicant will be asked to present their case and explain the project for which the permit or change is requested. The applicant may introduce exhibits, and call witnesses on the applicant's behalf, to show that the criteria for issuance of the permit have been met. The objectors may question (cross-examine) the applicant and applicant's witnesses.
4. *Staff Expert:* If appointed, the staff expert will attend the hearing to offer his credentials and may be called by any party for cross-examination on any file information prepared in this matter and any other aspects of his or her expert opinion.
5. *Hearing Examiner Questions:* The hearing examiner will let all parties know if regional office staff will be attending the hearing prior to the hearing, during the discovery process. The hearing examiner may call a DNRC staff witness and ask that witness to testify. The applicant and then the objectors may question the DNRC staff witness.

If the hearing examiner will not be requiring regional office staff to attend the hearing, but a party requires their attendance, the staff must be subpoenaed. *See subpoena information.*

The hearing examiner may question any party or witness to clarify testimony or to obtain additional information.

6. *Closing Statements*: The applicant and then the objectors may make closing statements, however this is optional. The hearing examiner may also make closing remarks.

The record will be closed at the end of the hearing, which means that no additional or new evidence may be submitted for the hearing examiner's consideration after the conclusion of the hearing unless a party requests otherwise. The hearing examiner may order the record left open for parties to submit additional evidence, but only if the party requesting it shows a good reason why the evidence could not be presented at the hearing. The hearing examiner may require submission of proposed findings of fact and/or post-hearing briefs 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. See also ARM 36.12.222 (6), ARM 36.12.223 (7) and (8), and ARM 36.12.226.

**REMINDER:** Occasionally during the hearing the Hearings Examiner may interrupt whoever is talking in order to ask them to spell a word or a name or to ask participants not to speak at the same time. If that happens, you should not take that as criticism, because the Hearings Examiner is only making certain that there will be a completely accurate record of what is being said. Sometimes hearings can be very emotional, and DNRC judges and staff will make every effort to treat each party respectfully and fairly. In return, we ask each party to be polite, to treat other parties and witnesses with respect, and to cooperate to make the hearing go as smoothly as possible.

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### **POSTHEARING PROCEDURES**

The hearing examiner will review all the evidence and exhibits in the record, and will issue a Final Order on the application.

#### **Final Order**

A hearing examiner assigned to make the final decision will:

- Conduct the hearing
- Write the Final Order
- Issue the Final Order to all parties listed on the Certificate of Service

The final order will include the examiner's findings of fact, conclusions of law, and a final order. Any party who is adversely affected by the final decision can appeal to District Court.

#### **NOTICE**

This *Final Order* is the Department's final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

#### **Copies of Record**

Anyone wanting an oral record of the hearing should contact the Hearings Unit Assistant to make the necessary arrangements that include payment of a copying fee. Copies of documents such as exhibits or DNRC's file on the application may also be obtained from the Hearings Unit Assistant and also require payment of a copying fee. Parties may produce their own transcripts from oral copies of the hearing.

The record of your hearing will consist of the documents and other materials that the Hearings Examiner receives as evidence, the sworn testimony of witnesses, the arguments that the parties make to the Hearings Examiner, and the various rulings that he or she makes. The entire hearing will be recorded, either digitally or by a court reporter. CD copies of the hearing recording are available from DNRC at a per disk cost. Where the proceeding uses a court reporter, the transcript must be obtained from the court reporter, and transcript preparation fees will apply.

## **FREQUENTLY ASKED QUESTIONS**

### **Can I Settle My Case Without a Hearing?**

(See ARM 36.12.207)

DNRC encourages mediation of the parties' differences. The regional office staff will, if requested and if time allows, assist parties in seeking a solution to the disputed issues. Including DNRC in mediation may help parties understand what conditions or limitations can be added to a water right. Mediation possibilities may also be discussed at the prehearing conference and included in the prehearing schedule if the parties agree.

Stipulations have been used to settle applicant and objector differences. However, even if an agreement is reached between the parties by stipulation, DNRC's review of the application does not end there. The applicant is still required by statute to prove to DNRC, by a preponderance of the evidence, that the criteria for issuing a permit have been met.

If the stipulation includes conditions on which DNRC has no authority to enforce, the conditions cannot be added to the water right, if granted. If the parties reach a settlement and DNRC determines that criteria for issuance of the application have not been met, DNRC will not grant the application. If DNRC determines the criteria have been met, DNRC will grant the application.

### **What Does the Term "Discovery" Mean and How Is Discovery Handled?**

(ARM 36.12.215) Discovery is a process that allows parties to ask for and receive information from other parties in order to prepare for the hearing. The rules provide that all parties to a case must reveal the names of all witnesses they plan to call, including themselves, the substance of the witnesses' testimony, and a list of exhibits they intend to present at the hearing. Any party may request relevant material or information from any other party. The discovery request must be in writing. During the first prehearing conference, the hearing examiner will set a deadline date for the information to be requested from and submitted to other parties or a deadline for answering a discovery request. Discovery responses should not be filed with the hearing examiner. A "Notice" to the Hearing Examiner stating that Discovery Requests or Responses were issued is required. Discovery responses do not become a part of the record unless introduced into the record through a witness or exhibit.

Any person who does not comply with a request or order for discovery will not be permitted to present exhibits or call witnesses that were not disclosed.

### **What Does the Term "Motion" mean and How are Motions Handled?**

A "motion" is a request to do something and is made to the hearing examiner. Any motion to the hearing examiner, unless made during the hearing, must be in writing.

All motions **must include** the following statement: ***If parties wish to contest the motion they must file a written response with the hearing examiner, and that the written response, with a certificate of service attached, must be filed within 10 days after service of the motion.*** The original is to be mailed to the hearing examiner and copies of the motion must be mailed to all parties, and must be

accompanied by a signed Certificate of Service (list showing the names and addresses of those to whom you mailed the document) specifying who were sent copies and on what date.

It is common practice to contact all parties before filing the motion, to see if the request will be unopposed. When filing the motion, the parties should state whether the motion is unopposed.

If you wish to oppose a motion, you must respond in writing to the hearing examiner within ten days of the date identified on the Certificate of Service as the date the motion was mailed. If you do not file a response to a motion, the request may be granted by the Hearing Examiner. Therefore, if you object to the request being made, it is highly recommended that you file a timely written response in order to protect your interests.

An "Order" will be drafted by the hearing examiner that will contain the hearing examiner's decision on the motion, and copies will be sent to all parties.

### **What If I Can't Be at the Hearing or a Prehearing Conference On the Scheduled Date?**

You must have a good reason to change a hearing or prehearing conference date that is specified in the Notice of Hearing or in some other order. If you do have a good reason, you must contact the Hearings Examiner immediately and obtain his or her agreement to reschedule the hearing or the prehearing conference. The legal terminology for this is requesting a *continuance*, and you must make your request for a continuance well before the hearing is scheduled to take place.

**IMPORTANT REMINDER:** The Hearing Examiner may consider the failure by any party to appear, without prior explanation to the Hearing Examiner, to be cause for dismissal by default. Possible other results of a default include the following: the defaulting party's claim or interest in the proceeding may be denied, disregarded or disposed of adverse to the defaulting party. See ARM 36.12.204(1)(i) and ARM 36.12.208. However, in the event of a default of any objectors, the Applicant is not relieved of the duty to present evidence to satisfy the Applicant's substantive burden of proof under § 85-2-311, MCA or § 85-2-402, MCA.

### **What are Continuances?**

Any party may file a motion asking for a continuance to postpone prehearing deadlines or of the hearing itself, if good cause exists.

### **What are Subpoenas?**

(ARM 36.12.217; §§ 26-2-502, 507, MCA and § 26-2-515, MCA)

A subpoena is used to require a witness to attend and/or bring certain documents to the hearing. Any party may request the hearing examiner for a subpoena. The request must be in writing and must specifically identify the names of persons or the documents that they want to be made available at the hearing. 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. 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.

In this request you need to provide the names and addresses of the persons you want to subpoena and briefly describe what information each person can provide relevant to the case. Although DNRC issues subpoenas, this Office cannot help you serve them on the witnesses. Subpoenas must be served in the same way as they are in state district court. You must arrange for someone else to serve the subpoenas, and you may have to pay a fee to have that done. Also you will have to pay for the witnesses' mileage and any attendance fees.

### **What is Prefiled Testimony?**

In most cases, the hearing examiner may require prefiled direct testimony. Prefiled direct testimony requires parties to put their witness's testimony in writing and exchange their testimony or the testimony of their witnesses prior to the hearing. The witnesses then appear at the hearing for cross-examination only.

### **How Should I Prepare for the Hearing?**

In most cases, you should be prepared to give your own testimony to the Hearings Examiner after being placed under oath. You should bring anything with you that you will need to help you remember details while giving testimony, such as personal calendars, bills, receipts, notes, etc. If you testify at the hearing, the other party's lawyer has the right to cross-examine you - that is, to ask you questions under oath.

If there are other people who have knowledge of important facts, you should arrange for them to be at the hearing so that they can appear as witnesses. As a party, you also can compel witnesses to come and testify at the hearing by serving them with subpoenas. If you need to obtain subpoenas, you need to request a subpoena in writing to the Hearing Examiner.

You should also bring to the hearing any documents (letters, business records, etc.), photographs, or other materials that you want the Hearings Examiner to consider as evidence. If there are documents or other materials in someone else's possession that you want considered as evidence, you can also obtain subpoenas to make that person, company, or agency produce those materials at the hearing. This is called a *subpoena duces tecum*. You should request a subpoena duces tecum in the same way that you would request a subpoena for a witness to testify. (See above.)

When the other party's witnesses testify, you have the right to cross-examine those witnesses. So, in preparing for the hearing, you should think about the questions you want to ask your witnesses and the other party's witnesses and write down those questions for use at the hearing.

After the hearing is over, the Hearings Examiner will keep all of the materials that have been received as evidence in the hearing record. The Hearing Examiner will not keep any exhibits that have not been offered and admitted into the official record. Additionally, the Hearings Examiner will usually ask you to provide the other parties with copies of any documents that you place in evidence. So please come to the hearing with enough copies of any documents that you intend to offer as evidence so that each party, including the Hearing Examiner, receives a copy.

### **What should I bring to the Hearing?**

You should gather all the evidence you believe is relevant to support your case and be prepared to present it at the hearing. You may provide evidence that you want to be considered in the decision through your own testimony, the testimony of witnesses, and the introduction of exhibits. Only official parties in the process or a witness may present evidence to the hearings examiner.

Exhibits can be maps, reports, or other physical information that you want to use to make your case. Your information or evidence is made a part of the application record, aka "administrative record".

All parties should be prepared to present relevant factual evidence. The following list identifies data which, though not mandatory, the hearing examiner needs to make the decision. This list does not replace or alter any other information required by law.

#### **Applicants:**

1. Provide a detailed map showing the proposed project.
  - a. Show points of diversion, canals, pipelines, pump sires, storage facilities, etc.
  - b. Show where the water will be put to use. If irrigation, show the area and acreage of land that would be irrigated.

- c. If irrigation, show the area and acreage of any land currently irrigated that would be irrigated with supplemental water applied for in this application.
  - d. Indicate legal land descriptions and true North.
  - e. Identify land ownership within the proposed project.
  - f. Name and indicate the source of supply.
  - g. Provide other information that will help explain your proposed project.
2. Give a description of the proposed water use.
    - a. Describe the use. If irrigation, describe the method of irrigation, name the crops to be grown, and indicate the irrigation frequency.
    - b. Describe the means of diversion and conveyance.
    - c. Indicate the period of diversion.
  3. Have hydrologic studies and/or records showing there is water physically available in the source of supply at the proposed point of diversion. Also that water can reasonably be considered legally available during the period you seek to appropriate, in the amount you seek to appropriate, based on the records of the Department or other evidence provided to the Department. Legal availability is determined by using an analysis of the factors listed below.
    - a. Identify the physical water availability by taking measurements, using measurements made in a prior study, or any data available from any agency.
    - b. Identify the existing legal demands on the source of supply throughout the area of potential impact by your proposed use by using Department records.
    - c. Analyze the evidence on physical water availability and the existing legal demands by comparing the physical demands with the existing legal demands on the water supply.
  4. Provide information showing the water rights of other appropriators will not be adversely affected.
  5. Provide supportive engineering studies, plans, and specifications to show the proposed means of diversion, construction, and operation of the appropriation works is adequate. Provide the design of the diversion facility, the conveyance system, storage system, and the irrigation system or other system if not irrigation.
  6. Provide information to show how the water use will be measured.
  7. Provide a description of the proposed construction plan, including expected date of completion.
  8. Provide proof of possessory interest in the property where the water is to be put to beneficial use, or the written consent of the person with the possessory interest.

**Objectors:**

1. Provide records of past water use.
2. Provide a detailed map showing current water use.
  - a. Show the points of diversion, canals, pipelines, pump sites, storage facilities, etc.
  - b. Indicate the place of use. If irrigation, show the area and acreage of land irrigated.
  - c. Indicate legal land descriptions and true North.
  - d. Name and indicate the source of supply.
  - e. Provide other information that will help explain your water use.
3. Provide a description of the current water use.
  - a. Describe the use. If irrigation, describe the irrigation method and frequency.
  - b. Describe the means of diversion and conveyance, giving dimensions and capacities.
  - c. Indicate your period of diversion.

4. Provide factual information supporting the basis of your 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.

Both the applicant and the objector may present data or information developed by the applicant or objector, a private consultant, or that has been developed by agencies such as DNRC, United States Geological Survey, or United States Natural Resources and Conservation Service. DNRC will not develop materials for parties in water right contested case hearings, or at any stage of application processing.

### **Will My Hearing Be Like a Trial?**

Your hearing will be similar to a court trial but without a jury. The Hearings Examiner will make a decision or recommendation based only on the record including evidence that is formally presented by the parties at the hearing. That evidence will normally include witnesses who will give testimony under affirmation (oath) and documents containing information that pertains to the case.

### **What Is "Burden of Proof"?**

In every administrative contested case proceeding, there are certain facts that need to be established in order for the Hearings Examiner to apply the law properly. If there is no evidence of those essential facts, the Hearings Examiner must find that they have not been proven. Burden of proof refers to the responsibility that one party or the other has to produce evidence that establishes essential facts. The party proposing that some kind of action be taken usually has the burden of proving the facts that are essential to the claim. If you are uncertain about your responsibility for producing evidence of essential facts, you should ask the Hearings Examiner about that responsibility.

The burden of proof also means that the party responsible for producing evidence of an essential fact must establish that fact by a preponderance of the evidence. The term "preponderance" simply means the greater weight of the evidence. The Hearings Examiner must be satisfied that it is more likely than not that something happened in a certain way. In deciding the greater weight of the evidence, the Hearings Examiner considers not only how much evidence each party has introduced but also the quality and believability of the evidence.

### **What Happens If I Do Not Attend the Hearing?**

(See ARM 36.12.208)

You must appear at the time and place scheduled unless you have contacted the Hearings Examiner ahead of time and have arranged for a new hearing time. If you do not show up for the hearing, the Hearings Examiner can find you in default and dismiss you from the proceeding.

**IMPORTANT NOTE:** If an emergency happens that will make you late for your hearing or be unable to attend the hearing you should call the Hearings Examiner or the Hearings Assistant **immediately** to explain what the problem is. If you do not notify them, you could be found to be in default.

### **Do I Have to Make Any Special Arrangements If I Have a Disability?**

If you have a disability that requires some kind of accommodation in order for you or one of your witnesses to participate in the hearing, you should call the DNRC Hearings Assistant at 406-444-6615 (TTY number: 406-444-0517).