

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

In the matter of the amendment of	)	NOTICE OF PUBLIC HEARING ON
ARM 36.16.101 through 36.16.104,	)	PROPOSED AMENDMENT AND
36.16.105B, 36.16.106 through	)	REPEAL
36.16.107A, 36.16.110, 36.16.113,	)	
36.16.114, 36.16.118 through	)	
36.16.120, and the repeal of ARM	)	
36.16.107B, 36.16.117, 36.16.121,	)	
and 36.16.122 regarding water	)	
reservation rules	)	

To: All Concerned Persons

1. On September 10, 2015, at 10:30 a.m., the Department of Natural Resources and Conservation will hold a public hearing in the Fred Buck Conference Room (bottom floor), Water Resources Building, 1424 Ninth Avenue, Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than September 3, 2015, to advise us of the nature of the accommodation that you need. Please contact Millie Heffner, Montana Department of Natural Resources and Conservation, P.O. Box 201601, 1424 Ninth Avenue, Helena, MT 59620-1601; telephone (406) 444-0581; fax (406) 444-0533; e-mail mheffner@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

36.16.101 POLICY AND PURPOSE OF RULES (1) As provided by ~~85-2-204~~ 85-2-101, MCA: "It is the policy of this state... to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems." While it is the policy of this state to recognize and confirm all existing rights to the beneficial use of any waters of the state, Montana must be responsive to the need for establishing options for future diversionary uses of Montana's water resource and for maintaining stream flows for the protection of existing water rights, aquatic life, and water quality.

(2) The water reservation process, as provided by 85-2-316 and 85-2-331, MCA, is a means ~~whereby~~ by which this policy can be implemented. ~~This law~~ The statute provides for the establishment of reservations of water by governmental entities for beneficial uses that are necessary and shown to be in the public interest.

(3) The purpose of these rules is to provide guidelines and procedures for the preparation and processing of correct and complete water reservation applications

and for the adoption and implementation of ~~board orders~~ water reservations in order to ~~assure~~ ensure, to the fullest extent possible, that the proposed use of reserved water is not speculative.

(4) The water reservations are intended to be administered in accordance with the above policy and as provided in 85-2-316 and 85-2-331, MCA. These rules are intended to be implemented ~~so as~~ to provide reservants reasonable time for compliance with department ~~board~~ orders.

AUTH: 85-2-113, MCA

IMP: 85-2-101, 85-2-316, 85-2-331, 85-2-605, MCA

36.16.102 DEFINITIONS Unless the context requires otherwise, in these rules:

(1) "Act" means the Montana Water Use Act, Title 85, chapter 2, parts 1-through 4, MCA.

(2) and (3) remain the same.

(4) ~~"Beneficial use" means a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses. For the purpose of these rules, the term beneficial use includes the maintenance of a minimum flow, level, or quality of water.~~

(5) ~~"Board" means the board of natural resources and conservation provided for in 2-15-3302, MCA.~~

(6) ~~"Board order" means an order issued by the board granting, denying, modifying, subordinating, revoking, extending, changing, transferring, reallocating or otherwise amending a water reservation under 85-2-316 and 85-2-331, MCA.~~

(7) ~~"Change" means to change the point of diversion, place of use, purpose of use, or place of storage of a water reservation granted under 85-2-316 and 85-2-331, MCA.~~

(8) remains the same but is renumbered (4).

(95) "Direct benefits" means all benefits to the reservant derived from applying reserved water to the use for which it is granted.

(406) "Direct costs" means all costs to the reservant resulting from applying reserved water to beneficial use for the purpose granted.

(11) and (12) remain the same but are renumbered (7) and (8)

(439) "Entity" means the state, any political subdivision or agency of the state, or the United States or any agency of the United States ~~or any political subdivision or agency thereof or the United States or any agency thereof~~ that is qualified to reserve water pursuant to 85-2-316 and 85-2-331, MCA.

(4410) "Financial feasibility" means that financing for a water reservation project can be secured and that project costs will be recovered;

(a) from project revenues generated over the project life, ~~or;~~

(b) through available subsidies, ~~;~~ or

(c) from any combination of (a) and (b) ~~thereof~~.

(4511) "Firm yield" means the volume of water, including reasonable carry-over storage, that will be available from a storage facility during a specified critical dry period to meet water needs under a predetermined demand schedule.

Reasonable carry-over storage is determined on a case-by-case basis by considering such factors as type of beneficial use; relation of amount of the carry-over storage to project size; the impacts of water shortage on project operation; and other demands on the water resource.

~~(4612)~~ "Indirect benefits" means the benefits of applying reserved water to beneficial use that accrue to other uses or to parties other than the reservant.

~~(4713)~~ "Indirect costs" means the costs of applying reserved water to beneficial use that accrue to other uses or to parties other than the reservant.

(18) through (20) remain the same but are renumbered (14) through (16).

~~(2417)~~ "Modify" means to alter a term or condition of the an order of the board establishing a water reservations issued pursuant to 85-2-316 and 85-2-331, MCA.

~~(2218)~~ "Net benefits" means indirect and direct benefits less indirect and direct costs.

~~(2319)~~ "Objective" means the purpose, the need, the amount, and the public interest of a water reservation granted by the board.

(24) remains the same but is renumbered (20).

~~(2521)~~ "Periodic review" means the department board review required to determine whether the objectives of a reservation are being met.

~~(26)~~ "Permit" means the permit to appropriate water issued by the department under 85-2-301 through 85-2-314, MCA.

~~(2722)~~ "Project" means any water storage and/or diversion facility, or a combination thereof, Water storage and/or diversion facilities including include, but are not limited to:

(a) dams;

(b) water spreading systems;

(c) diversion canals;

(d) laterals;

(e) waste and drainage canals;

(f) dikes;

(g) wells;

(h) pumping units;

(i) mains;

(j) pipelines;

(k) power generators; and

(l) waterworks systems needed for application of reserved water to beneficial use.

(28) remains the same but is renumbered (23).

~~(29)~~ "Rate" means a volume of water measured during a specified time interval, expressed in cubic feet per second (cfs) or gallons per minute (gpm).

(30) remains the same but is renumbered (24).

~~(31)~~ "Reasonable diligence" means a fair, honest, and proper degree of activity or attention under the circumstances to perfect the reservation, as would be expected from a person exercising ordinary prudence.

(32) remains the same but is renumbered (25).

~~(33) "Reservation" means a water appropriation for existing or future beneficial uses approved by the board pursuant to 85-2-316 and 85-2-331, MCA, and these rules.~~

~~(3426) "Reservation term" means the period of years established by an ordered by the board during which reserved waters must be applied to beneficial use.~~

~~(35) through (37) remain the same but are renumbered (27) through (29).~~

~~(3830) "Transfer" means for a reservant to voluntarily relinquish convey ownership of all reservation or any part of a reservation thereof, and convey it to a qualified reservant.~~

~~(39) remains the same but is renumbered (31).~~

~~(40) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.~~

AUTH: 85-2-113, MCA

IMP: 85-2-113, 85-2-316, 85-2-331, 85-2-605, MCA

36.16.103 FORMS (1) The necessary forms for the administration of these rules are available from the Water Resources Division of the department, P.O. Box 201601 4520 East Sixth Avenue, Helena, Montana 59620-1601 2304. The following forms hereinafter listed must be used in the administration of these rules:

(a) Form No. 600, Application for Beneficial Water Use Permit; ;

(b) Form No. 606, Application for Change of Appropriation Water Right; ;

(c) Form No. 608, Water Right Transfer Certificate, or other ownership update form provided by the department; ;

(d) Form No. 610A, Application for Reservation of Water–Diversiory Uses; and

(e) Form No. 610B, Application for Reservation of Water–Instream Uses.

~~(f) Form No. 623, Notice of Beneficial Use of Reserved Waters.~~

AUTH: 85-2-113, MCA

IMP: 85-2-316, 85-2-331, 85-2-605, MCA

36.16.104 APPLICATIONS - GENERAL (1) Each application for reservation of water shall be accompanied by a completed Form 610A or 610B, ~~available from the department, and shall be submitted to the board through the Water Resources Division of the department, 1520 East Sixth Avenue, Helena, Montana 59620-2304.~~ A fee of ~~\$400~~ \$1500 shall be submitted with the application.

~~(2) The applicant shall submit the original and four copies of an application at the time of filing with the board. Oversized maps and design plans need only accompany the original.~~

~~(3) The application must be typed, printed, or otherwise legibly reproduced on 8½" x 11" paper, or as otherwise approved in writing by the department.~~

~~(4) The application must be submitted in a looseleaf format to facilitate the addition of updated material, except for oversized material such as maps and overlays which must be presented as attachments.~~

~~(5) The text and appendices must be consecutively numbered in a manner that provides each page in the application with a unique page number.~~

~~(6) An application must contain a list of persons involved in developing information used in preparing the application, including those involved in field investigations and professional consultations.~~

~~(7) The application must be organized in the following order:~~

~~(a) table of contents;~~

~~(b) summary, as required in ARM 36.16.105(1);~~

~~(c) a description of the purpose, as required in ARM 36.16.105(2);~~

~~(d) an analysis of need, as required in ARM 36.16.105A;~~

~~(e) an analysis of the amount of water requested and water availability, as required in ARM 36.16.105B;~~

~~(f) information to support that the reservation is in the public interest, as required in ARM 36.16.105C;~~

~~(g) a management plan, as required in ARM 36.16.106; and~~

~~(h) a bibliography, appendices, and attachments, where appropriate.~~

~~(8) The department shall return an incorrect or incomplete application to the applicant for correction or completion as required in ARM 36.16.107(2). An application will not be considered and acted upon by the board until the filing fee has been submitted and the application is found to be correct, complete, and in compliance with the act and these rules.~~

~~(9) An applicant may request the department to provide assistance in preparing a reservation application. Department assistance in the preparation of reservation applications shall not require the department to support such applications in making any recommendations to the board for findings pursuant to ARM 36.16.107B 36.16.107A.~~

~~(10) Prior to submitting a final application, an applicant may request that the board waive any application content requirements of ARM 36.16.105, 36.16.105A, 36.16.105B, 36.16.105C, and 36.16.106 that may not be required by statute. The board may grant the waiver if the applicant shows good cause and the board determines that the waiver will not seriously impair its ability to fulfill its responsibilities under ARM 36.16.107A and 107B.~~

AUTH: 85-2-113, MCA

IMP: 85-2-316, 85-2-331, 85-2-605, MCA

#### 36.16.105B APPLICATION CONTENT - DETERMINATION OF AMOUNT

(1) through (1)(a)(iv) remain the same.

(b) The amount of water for future full-service and supplemental irrigation uses must be determined on the basis of monthly crop irrigation requirements, conveyance and on-farm delivery system efficiencies, and the acreage of irrigable land to be served.

(i) Irrigable lands shall include those lands as defined in ARM 36.16.102(4~~8~~15) for which landowners have expressed an interest in developing new or supplemental irrigation.

(ii) Interest may be determined from a survey of all potential irrigators in the area that would be affected by the proposed reservation; or by other methods acceptable to the department.

~~(iii) Lands for which no survey of landowners was taken or no response to the survey or a negative response to the survey was received may be included in an application only if an explanation of how landowner interest in developing irrigation on these lands was determined is included in use application. The following lands may only be included in an application if the application also includes an explanation as to how landowner interest in developing irrigation on these lands was determined:~~

~~(A) lands for which no survey of landowners was taken;~~

~~(B) lands to which no response to the survey was received; and/or~~

~~(C) lands to which a negative response to the survey was received.~~

(c) The amount of water for future industrial uses must be determined on the basis of estimated water requirements for the proposed industrial process as reflected by the preliminary design plans required in ARM 36.16.106;

(d) through (2) remain the same.

(a) For gaged streams where there is a record sufficient to identify long-term hydrologic conditions, the physical availability of flows on a monthly basis must be demonstrated using available water resources data. Statistical information on streamflows must include monthly means and 20<sup>th</sup>, 50<sup>th</sup>, and 80<sup>th</sup> percentile exceedance frequency flows. ~~The applicant must consult with the department to assure that the period of record selected allows for comparison of water availability statistics between any competing applicants.~~ Consideration shall be given to the need for adjusting flows to a prescribed level of development.

(b) For drainages in which gaging records are not sufficient or available, monthly flows must be calculated, ~~unless otherwise waived by the department,~~ using a flow estimation technique approved by the department.

(c) For applications involving the use of ground water, estimates of aquifer supplies must be based on information collected from the aquifer(s) involved.

(i) Where available, descriptions and maps of pertinent hydrologic information, including but not limited to aquifer extent, stratigraphic relationships, and aquifer transmission capability shall be presented.

(ii) Where this information is not available, a study plan must be presented in the application showing steps that will be taken to develop the information.

AUTH: 85-2-113, MCA

IMP: 85-2-316, 85-2-331, 85-2-605, MCA

36.16.106 APPLICATION CONTENT - MANAGEMENT PLANS (1) through (1)(b) remain the same.

(c) For applications involving irrigation, the following must be clearly identified: ~~proposed water distribution systems, drainage systems, places of use, and types of irrigation systems shall be delineated, after consultation with the department, on 7.5 minute U.S. geological survey topographic maps, if available. If not available, other maps with a scale acceptable to the department may be used. This base map shall be accompanied by the following overlays:~~

(i) north arrow;

- (ii) scale bar;
- (iii) section corners and numbers;
- (iv) township and range numbers;
- (v) all proposed points of diversion;
- (vi) all proposed places of use;
- (vii) proposed reservoir locations;
- (viii) proposed water distribution systems;
- (ix) proposed drainage systems;
- (ix) ~~a transparent overlay to the same scale as the base map that delineates~~

the location of irrigated and irrigable lands in the project areas. For irrigable lands, ~~the map this overlay~~ shall delineate soil classifications using the U.S. ~~Soil~~ ~~Conservation Service's~~ soil mapping units, the department's land classification standards, or other methods acceptable to the department. A narrative describing the criteria used for selecting irrigable lands shall be included in the application. Soil suitability for irrigation must be based on standards acceptable to the department; and

~~(ixi) a transparent overlay showing the ownership of land proposed to be irrigated with reserved water and lands underlying project of facilities. A table that lists ownership locations may be substituted for this requirement. 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.~~

(d) through (f) remain the same.

(2) A management plan shall accompany all reservation applications for instream use(s), as defined in ARM 36.16.102(4914), and shall include an explanation of how reserved instream flows will be protected from future depletions by later priority users.

AUTH: 85-2-113, MCA

IMP: 85-2-316, 85-2-331, 85-2-605, MCA

#### 36.16.107 CORRECT AND COMPLETE PROCESSING APPLICATIONS AND MONITORING RESERVATIONS - DEPARTMENT RESPONSIBILITIES

(1) The department will, upon request, assist the applicant by responding to questions regarding the interpretation and requirements of these rules. The department may review draft applications prior to final submittal. The department shall provide access to and assistance in the interpretation of water rights records, water availability information, or other needed data maintained by the department.

(2) The department shall determine if an application is correct and complete within 180 90 days after an application has been submitted along with the required application fee. ~~To be determined as correct and complete, a water reservation application shall meet all requirements of ARM 36.16.104, 36.16.105, 36.16.105A, 36.16.105B, 36.16.105C and 36.16.106. A water reservation application will be deemed correct and complete if a permit applicant's information, required to be submitted by ARM 36.16.104, 36.16.105, 36.16.105A, 36.16.105B, 36.16.105C, and 36.16.106, conforms to the standard of substantial credible information and all the necessary parts of the application form requiring the information, including any required addendums, have been filled in with the required information. A~~

determination that an application is correct and complete is in no way a judgment on the part of the department on the merits of the reservation proposal. The department must notify the applicant in writing of any deficiencies. ~~Unless otherwise provided in ARM 36.16.117, an application returned to an applicant as not being correct or complete must be resubmitted to the department within 60 days of its return to the applicant or it will be terminated, unless the applicant requests and receives written approval from the department for an extension of time. All department staff who provided technical assistance in the preparation of the application or participated in the review shall be listed in a memorandum to be attached to the application file.~~

(a) The department shall determine whether an application for a water reservation is correct and complete by reviewing:

(i) information that is publicly available within its expertise; and

(ii) that information which is submitted in the application.

(b) If the department determines the application does not contain the information required in ARM 36.16.104 through 36.16.106, the applicant will be notified in one deficiency letter of any defects and the administrative rule(s) not met will be identified in the letter.

(c) The priority date on a water reservation application will not be changed if:

(i) 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; or

(ii) within 45 days of the date of the deficiency letter if the department has granted an extension. 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.

(d) The water reservation application priority date will be changed to the date when the department receives all of the requested information if:

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

(ii) in cases where an extension is granted by the department, 45 to 90 days of the date of the deficiency letter.

(e) 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 water reservation application will be terminated and the application fee will not be refunded.

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

(a) An application deemed correct and complete does not entitle an applicant to a water reservation.

(b) Providing correct and complete information is not the same as meeting the statutory requirements.

(3) and (4) remain the same but are renumbered (4) and (5).

~~(5) The department may evaluate applications and perform analyses necessary to make recommendations to the board for findings pursuant to ARM 36.16.107B and for any other analysis requested by the board.~~

~~(6) The department may evaluate annual reports submitted by reservants regarding progress in applying reserved water to beneficial use. On the basis of such evaluations, the department shall prepare a report to the board regarding any needed action.~~



~~(7) The department shall review all change and transfer proceedings required in ARM 36.16.118 and provide information and options to the board for action on changes or transfers.~~

AUTH: 85-2-113, MCA

IMP: 85-2-316, 85-2-331, 85-2-605, MCA

36.16.107A ACTION ON APPLICATIONS AND MONITORING RESERVATIONS – BOARD RESPONSIBILITIES

~~(1) The department board may approve, deny, or condition any the requested reservation subject to such terms it considers appropriate. The department board may grant a reservation for less than the amount of water requested in an application, but in no case may it grant a reservation for more water than is requested.~~

~~(2) If an order reserving water is issued by the board with conditions, the department board shall allow the applicant a prescribed period of time to revise its management plan in response to those board conditions.~~

~~(3) When several applications are being considered concurrently within the same drainage basin, the board shall establish the priority of granted reservations by the chronological order in which the reservations are adopted pursuant to 85-2-316(9), MCA, or by the order of the board for reservations within the Missouri Basin or Little Missouri Basin pursuant to 85-2-331, MCA. Such priorities will be established only after a consideration of the positive as well as detrimental effects of establishing such priorities on applicants.~~

~~(4) The board may subordinate a water reservation to a permit issued if the permit application was accepted by the department before the date of the board order granting the reservation. The board may provide for subordination only if it finds that such permits would not substantially interfere with the purpose of a reservation. The board may consider subordination after issuing its order reserving water. The hearing convened in the matter of objections to the reservations may be separated into two proceedings to consider the establishment of the water reservations and the subordination of those reservations independently. A request to subordinate a water reservation to a permit may be initiated by the board, the department, or by petition of an affected permittee. The record of evidence and testimony presented at the hearing establishing the reservations will be considered part of the record in the hearing on subordination. Additional evidence and testimony limited to the matter of subordination may be presented. The person seeking the subordination has the burden to prove by preponderance of evidence the criteria in 85-2-316(9)(d), MCA. Notice of the hearing shall be provided to all affected permittees, permit applicants, reservants, and all parties who participated in the hearing on the matter of establishing the reservations. A separate final order may then be issued by the board on the matter of subordination.~~

~~(5) A permit does not substantially interfere with the purpose of a reservation if the reservation is not significantly diminished in value as defined in ARM 36.16.105A through 36.16.105C from water use under the permit.~~

~~(6) Substantial interference with the purpose of a reservation may result from water use under an individual permit or from the cumulative effect of water use under two or more permits. The board may subordinate a reservation to water use~~

~~under only those permits, in order of priority, which cumulatively would not result in substantial interference.~~

~~(7) If a reservation is subordinated to one or more permits, and that reservation is senior in priority to one or more reservations in the same water course, all junior reservations granted pursuant to 85-2-331, MCA, shall also be subordinate to the same permit or permits.~~

~~(8) The board shall periodically, but at least once every 10 years, review reservations pursuant to 85-2-316(10), MCA and ARM 36.16.120. Where the objectives of the reservation are not being met, the board may extend the term of, revoke, or modify the reservation after the reservant has been granted an opportunity to be heard by the board.~~

~~(9) The board shall act on requests for changes or transfers of reserved water, in accordance with ARM 36.16.118.~~

~~(3) The applicant must prove, by a preponderance of the evidence, that:~~

~~(a) the purpose of the reservation is a beneficial use as defined in 85-2-102(4), MCA; and~~

~~(b) the reservation is needed, as required in 85-2-316(4)(a)(ii), MCA, through evidence that:~~

~~(i) there is a reasonable likelihood that future instate or out-of-state competing water uses would consume, degrade, or otherwise affect the water available for the purpose of the reservation; or~~

~~(ii) if information regarding the effect of future water uses on a proposed reservation is not available;~~

~~(A) the applicant is not eligible to apply for a water use permit and water resource values warrant reserving water for the requested purpose; or~~

~~(B) the applicant would be eligible for a permit, but that there are constraints that would restrict the applicant from perfecting a water permit for the intended purpose of the reservation; or~~

~~(c) the amount requested is needed to fulfill the purpose of the reservation, as required in 85-2-316(4)(a)(iii), MCA, through evidence that:~~

~~(i) the methodologies and assumptions used to determine the requested amount are accurate and suitable;~~

~~(ii) water-use efficiencies associated with diversionary uses are reasonable, and there are no other reasonable cost-effective measures that could be taken within the reservation term to increase the use efficiency and lessen the amount of water required for the purpose of the reservation; and~~

~~(iii) for instream flow purposes on gaged streams, the amount does not exceed the limit provided by 85-2-316(6), MCA; and~~

~~(d) the reservation is in the public interest, as required in 85-2-316(4)(a)(iv), MCA, based on evidence and analysis of each of the following factors:~~

~~(i) whether the expected benefits of water to beneficial use are reasonably likely to exceed the costs where:~~

~~(A) benefits include all direct and indirect benefits where any non-market benefits are quantified and valued to the extent reasonably possible;~~

~~(B) costs include all direct and indirect costs where any non-market costs are quantified and valued to the extent reasonably possible; and~~

~~(C) benefits and costs that may not be reasonably quantified are considered;~~

(ii) whether the net benefits associated with granting a reservation exceed the net benefits of not granting the reservation;

(iii) whether there are no reasonable alternatives to the proposed reservation that have greater net benefits;

(iv) whether failure to reserve the water will or is likely to result in an irretrievable loss of a natural resource or an irretrievable loss of a resource development opportunity;

(v) whether there are no significant adverse impacts to public health, welfare, and safety; and

(vi) any other relevant considerations based on the evidence.

(4) If the purpose of the reservation proposes the withdrawal and transport of water for use outside the state, in addition to (3), the applicant must prove by clear and convincing evidence that the proposed out-of-state use of water is not contrary to water conservation in Montana and is not detrimental to the public welfare of citizens of Montana by considering the following factors:

(a) whether there are present or projected water shortages within the state of Montana;

(b) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(c) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(d) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(5) A department order reserving water must make findings regarding the applicant's proof regarding the applicable factors of (3) and (4). A department order reserving water must also find:

(a) the applicant is qualified to reserve water pursuant to 85-2-316, MCA;

(b) the reservation, as proposed for adoption, will not adversely affect existing water rights, including reservations; and

(c) the applicant is capable of exercising reasonable diligence toward financing projects contemplated in the application and applying the reserved water to beneficial use in accordance with a management plan as required in ARM 36.16.106(1).

(6) If the purpose of the reservation requires the diversion of water from one of the basins designated in 85-2-316(2)(a), MCA, for use in another of the designated basins, a department order reserving water must find that stored water under the water leasing program is not reasonably available for the proposed use because the applicant(s) project does not meet the statutory terms, conditions, or requirements of a lease under 85-2-141, MCA.

AUTH: 85-2-113, MCA

IMP: 85-2-316, 85-2-331, 85-2-605, MCA

36.16.110 WATER USE UNDER A RESERVATION - RESERVANT RESPONSIBILITIES (1) A reservant may use water in accordance with the board order granting the reservation and the administrative procedures developed in ARM 36.16.106(1)(f) as approved or amended by the department board. A reservant

~~holding a reservation for a diversionary use shall, upon applying water to a beneficial use, file form No. 623, notice of beneficial use of reserved waters, with the department.~~

(2) remains the same.

(3) A reservant must file an annual report with the department that summarizes the progress made in complying with provisions of the ~~board~~ order reserving water, except where otherwise required by law ~~board order~~.

(4) and (5) remain the same.

AUTH: 85-2-113, MCA

IMP: 85-2-316, 85-2-331, 85-2-605, MCA

36.16.113 ENVIRONMENTAL IMPACT STATEMENT (EIS) (1) The necessity for an EIS must be evaluated for each reservation application as required by the Montana Environmental Policy Act (Title 75, chapter 1, MCA), the Montana Water Use Act (Title 85, chapter 2, MCA), and ~~board~~ and department rules (ARM Title 36, chapter 2, subchapters 5 and 6).

~~(2) If several applications are received or expected to be filed in a common drainage basin, the department may choose to prepare one EIS that addresses all applications.~~

(~~3~~2) An EIS, if required, shall be prepared by the department sufficiently in advance of any ~~board~~ action on the reservation application to allow for full public review and comment. If necessary, the department may require the applicant to submit information needed to assess the impacts of the proposed reservation.

AUTH: 85-2-113, MCA

IMP: 85-2-124, 85-2-316, 85-2-331, 85-2-605, MCA

36.16.114 FEES AND COSTS (1) As required by ARM 36.16.104, a ~~\$100~~ \$1500 fee must be paid to the department when filing an application for reservation of water.

(2) In addition to the ~~\$100~~ \$1500 fee, as required by 85-2-316, MCA, the following must be paid by the applicant, excepting the cost of department personnel's salaries; department's cost of giving notice; holding the hearing; conducting investigations; and making records incurred in acting upon the application to reserve water, ~~except the cost of salaries of the department's personnel, must be paid by the applicant.~~ The applicant is also required to pay a reasonable portion of the department's costs for EIS preparation ~~unless waived by the department upon a showing of good cause by the applicant.~~

(a) An applicant shall consult with the department prior to submitting an application to develop a preliminary estimate of department costs that must be paid by the applicant pursuant to 85-2-316(3), MCA of acting upon such application. Within 30 days of a correct and complete determination by the department, the applicant must pay the department ten percent of the preliminary estimate to prepare a scope of work for completing any EIS and any other detailed work plans required in acting upon the applications. ~~Where more than one application is expected to be filed for a common drainage basin, the department may meet with all the applicants~~

~~in order to determine an appropriate allocation of costs among the applicants that is based on the relative amount of work to process each application. Within a reasonable time after filing an application, the applicant must pay the department 10 percent of the preliminary estimate or, where more than one application is expected to be filed for a common drainage basin, 10 percent of the applicant's share of the preliminary estimate of the total cost, to prepare a scope of work for completing any EIS and any other detailed work plans required in acting upon the applications.~~

(b) After a scope of work for the EIS and any other detailed plans for acting upon the application have been completed, the department will notify applicants of the maximum cost they will be individually assessed to process their applications.

(i) Applicants shall be notified of the maximum cost within 90 days of the department's receipt of the final application.

(ii) The estimated ~~ten~~ 40 percent prepayment will be included in this amount and deducted from each applicant's future obligations.

(iii) The terms of payment for such fees will be negotiated and set forth in a contract between each applicant and the department.

(iv) For applications involving the construction of diversion facilities, the costs attributable to EIS preparation shall not exceed the limits provided in 85-2-124, MCA.

(c) An applicant may appeal to the ~~department~~ board to have its fees reduced.

(d) Any payments made to the department in excess of what is actually expended shall be remitted to the applicant ~~within a reasonable time after the date of the board order reserving water.~~

(3) The reservant or applicant shall be required to pay the notice costs ~~When the department board provides notice of a proposed department board action on an existing water reservation, by first class mail and publication in a newspaper of general circulation, the reservant or applicant shall be required to pay the notice costs.~~

AUTH: 85-2-113, MCA

IMP: 85-2-124, 85-2-316, 85-2-331, 85-2-605, MCA

36.16.118 CHANGES AND TRANSFERS ~~(1) Points of diversion, places of use, place of storage, and purpose of use not indicated in the original public notice of the reservation, and otherwise not the subject of proceedings authorized in 85-2-316(10) and (11), MCA, may be included in the reservation at a later date if approved by the board.~~

(2) and (3) remain the same but are renumbered (1) and (2).

(43) The department shall process the application for change pursuant to 85-2-402 ~~and 85-2-316~~, MCA. If the department approves the change it shall give notice to the board on action taken on the application.

(5) ~~The board shall set a date for hearing and direct the applicant to establish at a show cause hearing conducted under the contested case provisions of the Administrative Procedure Act, that the reservation criteria will be met under the approved change. The board shall provide notice of the hearing date by first class mail on persons who according to the department's notice list as determined under~~

~~ARM 36.16.122 have an interest in the reservation and shall publish such notice at least once in a newspaper of general circulation in each county as determined by the board within the basin 60 days prior to board action.~~

~~(6) A person wishing to intervene in the show cause hearing must file a notice with the board 30 days prior to board action.~~

~~(7) The applicant shall pay for notice and publication of hearing under this rule as required under ARM 36.16.114.~~

(8) remains the same but is renumbered (4).

(95) A reservant may voluntarily transfer all or any portion of its reservation to a transferee without loss of priority if the transfer is approved by the department board.

(10) remains the same but is renumbered (6).

(447) The transfer certificate shall include an affidavit from the entity receiving the water reservation that:

(a) the entity qualifies to reserve water under 85-2-316(1), MCA; ;

(b) the entity agrees to comply with the requirements of 85-2-316, MCA, and the conditions of the water reservation; ; and

(c) the entity can meet the objectives of the reservation as granted or will be able to meet the objectives under an authorized change in the water reservation.

(428) An Application for Change of Appropriation Water Right must be filed in accordance with (1) through (6) if a Ttransfers of water reservations which involves a change in the original reservations' criteria under 85-2-316(4), MCA, shall file an Application for Change of Appropriation Water Right according to subsections (2) through (8) above.

(439) All decisions regarding changes and transfers shall reflect a consideration of the decision criteria listed in 85-2-316(4), MCA, and ARM ~~36.16.107B~~ 36.16.107A.

AUTH: 85-2-113, MCA

IMP: 85-2-316, 85-2-331, 85-2-605, MCA

36.16.119 REALLOCATION OF INSTREAM RESERVATIONS (1) Except as provided in 85-20-1401, MCA, Tthe department board may:

(a) modify an existing or future order originally adopted to reserve water for the purpose of maintaining minimum flow, level, or quality of water; and

(b) reallocate the a water reservation, or a portion of the reservation, to an applicant that is for instream flows, or a portion thereof, to a qualified reservant.

(c) The department may not reallocate reserved water on any stream or river more than once every five years.

(2) A qualified reservant shall apply to the department board for a reallocation by filing a petition on a form prescribed by the department board. The petition must include the information required under ARM 36.16.104 through 36.16.106 and the following:

(a) and (b) remain the same.

(3) Upon receipt of a petition the department board shall notify the original reservant for instream flows that a petition for reallocation has been filed. The department board may require the original reservant to submit appropriate

information in accordance with ARM 36.16.105, 36.16.105A, 36.16.105B, and 36.16.105C, such as whether the amount of water needed for the instream flow reservation has changed due to new or refined methodologies for determining flow needs. The department board may require the reservant to submit revised estimates of instream flow needs based on these new or refined methodologies.

(4) The department board shall set a date for a hearing and direct the petitioner to establish ~~at a show cause hearing~~ that the reservation criteria under 85-2-316(4), MCA, the reallocation criteria under 85-2-316(11), MCA, and the requirements of this rule will be met under a reallocation of reserved water. The department board shall:

(a) provide notice by first class mail on persons who, according to the records of the department's notice list as determined under ARM 36.16.122, may be affected by the proposed reallocation have an interest in the reservation; and shall

(b) publish such notice at least once in a newspaper of general circulation in each county ~~as determined by the board~~ within the basin 60 days prior to the hearing.

(5) A person wishing to intervene in the ~~show cause~~ hearing must file a notice with the department board 30 days prior to the hearing board action.

(6) remains the same.

(7) To reallocate an instream reservation the department board must find that all or part of the reservation is not required for its purpose and that the need for the reallocation has been shown by the petitioner to outweigh the need shown by the original reservant. In making such determinations, the department board must follow the criteria defined under ARM ~~36.16.107B~~ 36.16.107A.

AUTH: 85-2-113, MCA

IMP: 85-2-316, 85-2-331, 85-2-605, MCA

### 36.16.120 BOARD DEPARTMENT PERIODIC REVIEW OF RESERVATION OBJECTIVES

(1) Except for reservations for the purposes of maintaining a minimum flow, level, or quality of water or a reservation provided in 85-20-1401, MCA, ~~The~~ department board shall review water reservations at least once every ten ~~10~~ years to determine if the objectives of the reservation are being met.

(2) The department board shall issue an order for the review, including which includes the information ~~which that~~ must be submitted by the reservant and the deadline for its submittal.

(3) All reservants shall submit a report reviewing the objectives of the reservation and how they are being met, including but not limited to the following:

(a) a summary of the amount granted, allocated to date, any change in the amount required to satisfy the purpose and need of the reservation, and any change in the methodology originally used to determine the amount; ~~For instream flow reservants, if there are new or refined methodologies for quantifying instream flow amounts, the reservant is required to discuss the appropriateness and feasibility of reviewing the granted instream flows in light of the new or refined methodologies.~~

(b) whether the purpose remains the same as identified in the application and board order;

(c) whether the need still exists as identified in the application and ~~board~~ order; ~~;~~

(d) whether the amount is still appropriate in accordance with the application and ~~board~~ order; ~~;~~ and

(e) whether the reservation remains in the public interest as identified in the application and ~~board~~ order.

(4) All reservants shall provide information evidencing compliance with the ~~board's~~ order granting the reservation. The information shall include a list of all compliance documents such as general plans, detailed plans, annual and biennial reports and their submittal dates.

(5) If a diversionary reservation has not reached the development level projected, the reservant shall provide information explaining:

(a) what factors have deterred the progress towards perfecting the water reservation; and

(b) what actions will the reservant take to ~~insure~~ ensure perfection of the reservation.

~~(6) Instream use reservations shall include information showing how they are protecting the reservation from adverse affect by junior water users and where appropriate, that they are in compliance with their management plan under ARM 36.16.106 and any other conditions required by the board.~~

~~(76) The department ~~board~~ shall consider the following when determining whether the objectives are being met:~~

~~(a) all information above and as ordered, by the department ~~board~~;~~ ~~;~~

~~(b) the period of time which has elapsed since the date of the order granting the reservations and whether the reservant's actions reflect reasonable diligence in the perfection of the water reservation;~~ ~~;~~

~~(c) new or changed circumstances, information, or values;~~ and

~~(d) any other considerations set out in the ~~board~~ order granting the reservation.~~

~~(87) Reasonable diligence is demonstrated by actions of the reservant in investment of time and money in the perfection of the reservation, including but not limited to:~~

~~(a) partial development of water reservation; and~~

~~(b) completion of additional studies, project design plans, promotional efforts, or environmental assessments.~~

~~(i) Upon review of a water reservation, if the department determines the objectives of the reservation are not being met the department may:~~

~~(A) extend the time period to complete the appropriation of water;~~

~~(B) modify the reservation; or~~

~~(C) revoke the reservation.~~

~~(98) If the department ~~board~~ determines that the objectives of a reservation are not being met; or at the request of the entity holding the water reservation, it shall:~~

~~(a) set a date for hearing and require the reservant to show cause why the proposed department ~~board~~ action should not be taken; ~~The board shall~~~~



(b) provide notice of the proposed action by first class mail on persons who according to the records of the department's notice list ~~may~~ have an interest in the reservation ~~as determined under ARM 36.16.122;~~ and shall

(c) publish such notice at least once in a newspaper of general circulation in each county ~~as determined by the board~~ within the basin 60 days prior to the hearing ~~board action~~.

(409) Any person wishing to intervene in the ~~show cause~~ hearing must file a notice with the department board 30 days prior to the hearing date.

(11) remains the same but is renumbered (10).

(4211) Reasons a water reservation may be modified or revoked include but are not limited to:

(a) a reservant is unable to meet the objectives of the water reservation or show reasonable diligence in perfecting the water reservation as determined under ARM 36.16.120(98); ;

(b) a reservant relinquishes all or a portion of its water reservation; ; or

(c) failure of the reservant to comply with the ~~board's~~ order granting the reservation.

(4312) A reservation term may be extended for a reasonable period of time to enable the reservant to meet the objectives of the reservation. An extension may be considered at the request of the reservant or on the department's ~~board's~~ own motion.

AUTH: 85-2-113, MCA

IMP: 85-2-316, 85-2-331, 85-2-605, MCA

4. The department proposes to repeal the following rules:

36.16.107B ACTION ON APPLICATIONS - BOARD DECISION CRITERIA

AUTH: 85-2-113, MCA

IMP: 85-2-316, 85-2-331, 85-2-605, MCA

36.16.117 APPLICATIONS IN MISSOURI RIVER BASIN AND THE LITTLE MISSOURI RIVER BASIN

AUTH: 85-2-113, MCA

IMP: 85-2-316, 85-2-331, MCA

36.16.121 PERMIT FOR RESERVED WATER

AUTH: 85-2-113, MCA

IMP: 85-2-316, 85-2-331, 85-2-605, MCA

36.16.122 NOTICE LIST FOR BOARD ACTIONS

AUTH: 85-2-113, MCA

IMP: 85-2-316, 85-2-331, 85-2-605, MCA

5. REASONABLE NECESSITY: The amendments to ARM 36.16.101 through 36.16.104, 36.16.105B, 36.16.106 through 36.16.107A, 36.16.110, 36.16.113, 36.16.114, and 36.16.118 through 36.16.120, and the repeal of ARM 36.16.107B, 36.16.117, 36.16.121, and 36.16.122 are reasonably necessary to clarify the procedure for water reservation applications.

The department's water reservation rules were originally adopted in 1994. In 1995, the Board of Conservation and Natural Resources was eliminated and the former duties of the board under 85-2-316, MCA, were assigned to the department. In 2007, statutory changes eliminated the department's ability to issue new permits for waters already reserved under a state water reservation; changed the way priorities of reservations are established; and, eliminated the ability of the department to subordinate reservations to permits. Further statutory amendments were made in 2015 (SB 330) with regard to the department review process of water reservations. The amendments and the repeal of ARM 36.16.107B, 36.16.117, 36.16.121, and 36.16.122 provide clarification and guidance regarding water reservation applications and actions on those applications based upon the changes discussed above. They also correct minor grammatical and formatting errors and remove obsolete language.

The financial impact of the increased application fee in ARM 36.16.104 from \$100 to \$1500 will likely be negligible. In the last ten years, the department has received zero applications under ARM 36.16.104. The fee of \$1500 is comparable to existing petitions to the department, such as petitions for closure of a highly appropriated basin and petitions for a controlled groundwater area (ARM 36.12.103).

6. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted in writing to Millie Heffner, Department of Natural Resources and Conservation, P.O. Box 201601, 1424 Ninth Avenue, Helena, MT 59620; fax (406) 444-0533; or e-mail mheffner@mt.gov, and must be received no later than 5:00 p.m. on September 10, 2015.

7. David Vogler, Department of Natural Resources and Conservation, has been designated to preside over and conduct the public hearing.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources, or a combination thereof. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Lucy Richards, P.O. Box 201601, 1625 Eleventh Avenue, Helena, MT 59620; fax

(406) 444-2684; e-mail lrichards@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

9. An electronic copy of this proposal notice is available through the department's web site at <http://www.dnrc.mt.gov>. The department strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered.

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by e-mail on July 29, 2015.

11. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment and repeal of the above-referenced rules will not significantly impact small businesses.

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

/s/ Brian Bramblett  
BRIAN BRAMBLETT  
Rule Reviewer

Certified to the Secretary of State on August 3, 2015