

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 36.12.101, 36.12.201,)	PROPOSED AMENDMENT,
36.12.203, 36.12.204, 36.12.206,)	ADOPTION, AND REPEAL
36.12.207, 36.12.209, 36.12.210,)	
36.12.212 through 36.12.216,)	
36.12.220, 36.12.223, 36.12.225)	
through 36.12.228, 36.12.234; the)	
adoption of New Rule I; and the)	
repeal of ARM 36.12.202, 36.12.205,)	
36.12.211, 36.12.219, and 36.12.229)	
regarding definitions and the)	
procedural rules for hearings)	

To: All Concerned Persons

1. On November 19, 2014, at 10:00 a.m., the Department of Natural Resources and Conservation will hold a public hearing in the Ted Doney Conference Room (top floor), Water Resources Building, 1424 Ninth Avenue, Helena, Montana, to consider the proposed amendment, adoption, 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 November 17, 2014, 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:

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

(1) through (15) remain the same.

(16) "Contested case" means a proceeding before the department in which a determination of legal rights, duties, or privileges of a party is required to be made after an opportunity for hearing pursuant to Title 2, chapter 4, part 6, MCA. A contested case includes, but is not limited to: a proceeding and hearing on an objection to application pursuant to 85-2-309, MCA; a show cause proceeding and hearing involving revocation or modification of a permit or change in appropriation right pursuant to 85-2-314, MCA; and a show cause proceeding conducted following a preliminary determination to deny or preliminary determination to grant with modifications pursuant to 85-2-310, MCA.

(16) through (20) remain the same but are renumbered (17) through (21).

(22) "Director" means the director of the department or the director's designee.

(21) through (28) remain the same but are renumbered (23) through (30).

(31) "Hearing examiner" means the person or persons assigned by the director to hear the contested case.

(29) through (42) remain the same but are renumbered (32) through (45).

(46) "Party" means an applicant, objector, petitioner, respondent, or other person named, admitted, or entitled to a contested case hearing pursuant to Title 85, chapter 2, parts 3 and 4, MCA.

(43) and (44) remain the same but are renumbered (47) and (48).

(49) "Permit" means a permit to appropriate water issued by the department under Title 85, chapter 2, part 3, MCA.

(50) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity (see 85-2-102, MCA).

(45) through (53) remain the same but are renumbered (51) through (59).

(60) "Proceeding" means all events in a contested case following issuance of a hearing notice and appointment of hearing examiner, including prehearing conferences, hearings, interlocutory orders, and the decision of the hearing examiner on the merits.

(54) through (60) remain the same but are renumbered (61) through (67).

(68) "Service" or "serve" means personal service or service by first class United States mail, postage prepaid and addressed to a person's last known address. Proof of service shall be made by the person making such service. Service by mail is complete upon the placing of the item to be served in the mail. Agencies of the state of Montana may also serve by depositing the item to be served with the mail and distribution section, General Services Division, Department of Administration.

(69) "Show cause" means a contested case before the department in which a person aggrieved by a proposed action of the department is given the opportunity to present evidence and testimony to show why the proposed action should not be taken. A show cause proceeding conducted following a preliminary determination to deny or preliminary determination to grant with modifications pursuant to 85-2-310, MCA, shall be conducted as an informal contested case proceeding pursuant to 2-4-604, MCA.

(61) through (63) remain the same but are renumbered (70) through (72).

(73) "Staff" means a person employed or retained by the department.

(64) through (79) remain the same but are renumbered (74) through (89).

AUTH: 85-2-113, 85-2-308, 85-2-370, MCA

IMP: 2-4-201, 85-2-113, 85-2-301 through 85-2-319, 85-2-321 through 85-2-323, 85-2-329 through 85-2-331, 85-2-335 through 85-2-338, 85-2-340 through 85-2-344, 85-2-350, 85-2-351, 85-2-360 through 85-2-364, 85-2-368, 85-2-370, 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-410 through 85-2-413, 85-2-415 through 85-2-419, 85-2-436, 85-2-437, 85-2-439, 85-2-501 through 85-2-514, 85-2-518, 85-2-520, MCA

36.12.201 SCOPE AND PURPOSE (1) ~~The procedures contained herein within this subchapter shall govern the contested case proceedings conducted by the department of natural resources and conservation pursuant to Montana Code Annotated (MCA) Title 85, chapter 2, parts 1 through 4, MCA.~~

(2) ~~The attorney general's model rules for conducting contested case proceedings, adopted by the department at Administrative Rules of Montana (ARM) 36.2.101, shall not apply to proceedings conducted by the department pursuant to Title 85, chapter 2, MCA, and are superseded for that purpose only. These rules do not govern any proceedings conducted by the Board of Natural Resources and Conservation pursuant to Title 85, chapter 2, MCA.~~

AUTH: 2-4-201(2), 85-2-113(2), MCA

IMP: 2-4-201(2), 85-2-113(2), 85-2-121, MCA

36.12.203 HEARING EXAMINERS (1) A hearing examiner shall be assigned to preside over a contested case proceeding before the department. ~~When the department orders a contested case hearing, the director shall assign a hearing examiner to hear the case. The director may not assign as hearing examiner a~~An individual that was involved in the preliminary determination on the application shall not be assigned as hearing examiner. The department shall provide the hearing examiner with a complete copy of the department's file including all applications, correspondence, documents, notices, objections, petitions, and preliminary determinations. ~~The file that is submitted to the hearing examiner, subsequent to the assignment of the case, shall contain the parties' applications, notices of applications, petitions, objections to applications, or permits under consideration to be modified or revoked. After reviewing the file, the hearing examiner shall contact the parties and advise them as to the location and time during which a hearing should be held. Except as required under the circumstances of ARM 36.12.232, no hearing shall be scheduled on a Saturday, Sunday, or legal holiday.~~

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

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

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

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

~~(d) hear and rule on motions;~~

~~(e) preside over at the contested case hearing;~~

~~(f) remains the same but is renumbered (d).~~

(g) maintain a complete record of the proceeding grant or deny requests for continuances; and

(h) issue a decision or final order containing findings of fact and conclusions of law. examine witnesses where the hearing examiner deems it necessary to make a complete record;

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

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

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

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

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

~~(n) appoint a staff expert;~~

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

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

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

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

(3) Consistent with law and at the hearing examiner's discretion, the hearing examiner is authorized to perform the following duties:

(a) enter preliminary, interlocutory, and other orders deemed necessary;

(b) limit the scope of discovery;

(c) appoint a staff expert to issue a written report;

(d) question witnesses;

(e) issue subpoenas;

(f) enter rulings regarding the admissibility of evidence;

(g) request the submission of proposed findings of fact and conclusions of law;

(h) perform such other duties consistent with the authority provided for by law; and

(i) perform such other duties as may be delegated by the director.

(4) The authority of the hearing examiner terminates upon the entry of a decision or final order on the merits.

AUTH: 2-4-201~~(2)~~, 85-2-113~~(2)~~, MCA

IMP: 2-4-611, 2-4-612, 2-4-614, ~~2-4-621~~, 2-4-623, 85-2-121, MCA

36.12.204 HEARING NOTICE AND APPOINTMENT OF HEARING EXAMINER COMMENCEMENT OF A CONTESTED CASE A contested case is commenced, subsequent to the assignment of a hearing examiner, by the service of a notice of and order for hearing by the director.

(1) The department shall serve all parties with a hearing notice and appointment of hearing examiner:

(a) within 30 days of issuing a preliminary determination to deny an application pursuant to 85-2-310, MCA; or

(b) within 30 days of the applicant filing a written request for a hearing on a preliminary determination to grant application in modified form pursuant to 85-2-310, MCA; or

(c) within 30 days after determining the validity of objections to application pursuant to 85-2-308 and 85-2-309, MCA.

(42) A hearing notice and appointment of hearing examiner in all contested cases shall include ~~The notice and order. A notice of and order for hearing, which shall be a single document, shall be served upon all parties and shall contain, but not be limited to, the following:~~

(a) a short and plain statement regarding each of the requirements set forth in 2-4-601, MCA ~~the time, date, place, and nature of the hearing;~~

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

(c) notification of the right of the parties to be represented by legal counsel ~~a statement of the legal authority and jurisdiction under which the hearing is to be held;~~

(d) notification that the failure of a party to appear at the hearing may result in default against a party ~~a reference to the particular sections of the statutes and rules involved; and~~

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

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

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

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

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

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

(23) A hearing notice and appointment of hearing examiner involving an objection to application pursuant to 85-2-308 and 85-2-309, MCA, shall include: ~~The notice of and order for hearing shall be served not less than 30 days prior to the hearing unless all parties agree in writing to a shorter notice time period. Provided, however, that a shorter time period may be allowed when the hearing examiner determines, on the basis of the parties' applications and objections to applications, that the parties will not be substantially prejudiced by a shorter time.~~

(a) a copy of all valid objections; and

(b) the name, address, and telephone number of each objector or the objector's attorney if represented.

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

(4) A hearing notice and appointment of hearing examiner in a show cause proceeding conducted following a preliminary determination to deny an application or to grant application in modified form pursuant to 85-2-310, MCA, shall include a statement that the proceeding is subject to the informal contested case proceedings provisions of 2-4-604, MCA.

(5) A hearing notice and appointment of hearing examiner shall be served not less than 30 days prior to the hearing unless the parties agree in writing to a shorter notice time period.

(6) Except as required under the circumstances of ARM 36.12.232, no hearing shall be scheduled on a Saturday, Sunday, or legal holiday.

(7) Service of a hearing notice and appointment of hearing examiner constitutes the commencement of a contested case proceeding before the department.

(8) When a party is represented by an attorney, service upon the attorney shall constitute service upon the party.

AUTH: 2-4-201(2), 85-2-113(2), MCA

IMP: 2-4-105, 2-4-601, 85-2-308, 85-2-310, MCA

36.12.206 REPRESENTATION (1) Any party may appear on their own behalf or may be represented by an attorney legal counsel throughout the proceedings in a contested case proceeding or an individual may appear on his/her own behalf. All legal entities, including but not limited to corporations, limited liability companies, trusts, partnerships, and not for profit associations must be represented by an attorney licensed to practice law in the state of Montana throughout all contested case proceedings. This rule shall not be construed to sanction the unauthorized practice of law.

(2) The department may appear in a contested case for the limited purpose of representing the interests of the public.

AUTH: 2-4-201(2), 85-2-113(2), MCA

IMP: 2-4-105, MCA

36.12.207 INFORMAL DISPOSITION SETTLEMENT, STIPULATION OR CONSENT (1) The terms of a settlement, stipulation, or consent entered between parties as a private contractual agreement are not binding on the department.

(2) If the parties propose inclusion of the terms of a settlement, stipulation, or consent as a condition(s) to a permit or change authorization, the parties shall submit a copy of the written settlement, stipulation, or consent along with any proposed condition(s) to the department for consideration. At the department's discretion, the terms of a settlement, stipulation, or consent may be included as a condition(s) to a permit or change authorization upon determination that the terms of the settlement, stipulation, or consent are consistent with and necessary to satisfy the applicable statutory criteria.

(3) A complete copy of any settlement, stipulation, or consent considered by the department must be included in the record.

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

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

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-603 85-2-310, 85-2-311, 85-2-402, MCA

36.12.209 TIME (1) remains the same.

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

~~(3) If a pleading or other document is not filed in accordance with applicable time limits, upon motion of a party or the hearing examiner, the pleading may be stricken from the record.~~

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-611, MCA

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

(a) if consolidation is proposed by a party, the procedures regarding filing of motions to the hearing examiner provided for by ARM 36.12.213 shall be followed;
or

(b) if consolidation is proposed by the hearing examiner, the hearing examiner shall serve each party with written notification of the proposal to consolidate. Any party opposing consolidation shall file and serve a written objection stating the reasons consolidation should not be ordered within 14 days of service of notice.

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

(a) the proceedings present substantially the same issues of fact or law a description of the cases for consolidation;

(b) the final order in one proceeding would affect the rights of parties in the other(s) the reasons for consolidation; and

(c) the consolidation would not substantially prejudice any party notification of a consolidated prehearing conference if one has been requested.

(3) An order granting or denying a motion for consolidation shall be served upon all parties and shall contain a description of the cases being consolidated and shall explain the basis for the hearing examiner's determination (a) Any party may object to consolidation by filing, at least ten days prior to the hearing in the case, a motion for severance from consolidation, setting forth the party's name and address, the title of the case prior to consolidation, and the reasons for that party's motion.

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

(4) Multiple objections to a single application shall be consolidated without requirement of a motion, notice, or order.

AUTH: 2-4-201(2), 85-2-113(2), MCA

IMP: 85-2-309, MCA

36.12.212 PREHEARING CONFERENCES AND ORDERS

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

(2) Upon written request of any party or upon by order of the hearing examiner's motion, a prehearing conference may be conducted to: ordered prior to each contested case hearing. The hearing examiner may require the parties to file a prehearing statement prior to the prehearing conference which shall contain such items as the hearing examiner deems necessary to promote a useful prehearing conference. A prehearing conference shall be an informal proceeding conducted expeditiously following written notice to all parties or their attorneys. Agreements on the simplification of issues, amendments, stipulations or other matters may be entered on the record or may be the subject of an order by the hearing examiner. A party who fails (without having made prior arrangements with the hearing examiner)

~~to appear at a prehearing conference shall have waived the right to object to any matters agreed upon by other parties in attendance at the prehearing conference. Following a prehearing conference, the hearing examiner may issue a procedural order which fixes any dates which are appurtenant to the disposition of the case, and which sets out the procedures to be followed by the parties. The procedural order may include a description of the matters discussed at and the actions taken pursuant to the prehearing conference.~~

- ~~(a) clarify the issues to be determined prior to or at the hearing;~~
- ~~(b) establish deadlines for matters including but not limited to:
 - ~~(i) submission of prehearing evidence;~~
 - ~~(ii) submission of post-hearing pleadings; and~~
 - ~~(iii) submission of proposed findings of fact and conclusions of law;~~~~
- ~~(c) obtain stipulations regarding foundation for evidence including but not limited to expert witness testimony;~~
- ~~(d) hear argument and rule on prehearing motions and evidentiary objections;~~
- ~~(e) identify witnesses and exhibits;~~
- ~~(f) establish and review hearing procedures; and~~
- ~~(g) address other issues related to the hearing.~~

~~(2) Following a prehearing conference the hearing examiner shall issue an order reciting the matters addressed and documenting any action taken at the prehearing conference. The order shall control the subsequent course of the proceeding and hearing unless modified by order.~~

~~(3) A party who fails to appear at a prehearing conference without good cause waives the right to object to any matters set forth in the prehearing order.~~

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-611, 2-4-612, MCA

36.12.213 MOTIONS TO HEARING EXAMINER (1) Any party may seek relief by means of an appropriate written motion. Written motions shall clearly state the relief sought by a party and the grounds and authority supporting the entry of an order granting the motion. All motions which assert factual matters not of record as the grounds for relief must be accompanied by affidavits or verified exhibits which show the facts upon which the proposed relief is grounded. Each motion must be supported by a brief or memorandum of law showing the moving party's entitlement to relief as a matter of law. Any application to the hearing examiner for an order shall be by motion which, unless made during a hearing, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. Written motions or responses to motions shall first be served on all parties, and then filed with the hearing examiner with a certificate of service attached. A written motion shall give notice to other parties that should they wish to contest the motion they must file a written response with the hearing examiner (after first serving all parties), and that the written response, with a certificate of service attached, must be filed within ten days after service of the motion. Requests for disqualification of a hearing examiner, prehearing conferences, and subpoenas are not governed by the requirements of this rule. The hearing examiner may require a hearing or telephone

~~conference call before issuing an order on the motion. All orders on such motions, other than those made during the course of the hearing, shall be in writing, and shall be served upon all parties of record. In ruling on motions where these rules are silent, the hearing examiner shall apply the Montana Rules of Civil Procedure to the extent the hearing examiner determines is appropriate to do so in order to promote a fair and expeditious proceeding.~~

(a) All written motions other than motions for summary judgment shall contain a statement that each party has been contacted and state whether the party contests the motion. Uncontested written motions shall be accompanied by a proposed order for the hearing examiner's consideration.

(b) Within ten days after service of a contested motion, each opposing party shall file a written response stating with particularity the factual and legal basis for opposition to the motion.

(c) Within ten days of being served with a response, the moving party may file a written reply in support of the written motion.

(d) A written motion, response, or reply may include a request for oral argument on the motion. At the hearing examiner's discretion the parties may be ordered to appear at a specific time and place for oral argument telephonically or in person before ruling on the motion.

(e) The original of all written motions, responses, and replies must be filed with the hearing examiner.

(f) A copy of all written motions, responses, and replies must be served on all parties.

(g) All written motions, responses, and replies must include a signed certificate of service setting forth the date and manner of service on all parties.

(2) At the hearing examiner's discretion, oral motions may be considered during a contested case hearing.

(a) The hearing examiner may request that an oral motion and/or any response presented at the time of hearing be submitted in writing before ruling.

(b) The hearing examiner may enter an oral ruling granting, denying, or modifying the relief requested at the time of hearing.

(3) The hearing examiner shall enter an order on all written and oral motions granting, denying, or modifying the relief requested. All orders of the hearing examiner regarding written and oral motions shall state with particularity the basis for the order and shall be:

(a) issued in writing prior to the hearing; or

(b) incorporated in writing into the hearing examiner's decision or final order following hearing.

AUTH: 2-4-201(2), 85-2-113(2), MCA

IMP: 2-4-611, MCA

36.12.214 MOTIONS TO DIRECTOR (1) ~~No motions shall be made directly to or be decided by the director subsequent to the assignment of a hearing examiner and prior to the completion and filing of the hearing examiner's proposal for decision except as provided by ARM 36.12.211 or except when the motion is certified to the director by the hearing examiner. Any party may request that a pending motion, or a~~

motion decided adversely to that party by the hearing examiner before or during the course of the proceeding hearing be certified by the hearing examiner to the director. In deciding what motions should be certified, the hearing examiner shall consider the following:

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

(b) whether certifying the motion is necessary to promote the development of the full record or resolution of the case on the merits ~~and avoid a remand.~~

(2) The director may not rule upon a motion unless the motion is certified to the director by the hearing examiner in the manner described in this rule. If a motion is certified to the director, the director may require the parties to file briefs before ruling upon the a-certified motion. Certified motions shall be decided in the manner provided for in ARM 36.12.229(2). ~~Uncertified motions shall be ruled upon by the hearing examiner and reviewed during the final decision-making process.~~

(3) No motions shall be made directly to the director subsequent to the assignment of a hearing examiner.

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-611, MCA

36.12.215 DISCOVERY (1) Written Discovery may commence upon service of the hearing notice and appointment of hearing examiner under this rule may commence following the department's acknowledgement of receipt of valid objections. Unless otherwise specified in this rule or order of the hearing examiner, the methods, scope, and procedures of discovery available pursuant to the Montana Rules of Civil Procedure apply to written discovery in a contested case.

(2) ~~Each~~ A party shall, may make a written demand upon another party requesting the disclosure of witnesses and written documents following the commencement of discovery. w~~Within ten days of a service of a written demand, by another the responding party must, disclose the following:~~

(a) disclose ~~the~~ names and addresses of all witnesses known to the responding party to have knowledge of relevant facts along that a party intends to call at the hearing together with a brief summary of the facts known by each witness, whether the responding party intends to call the witness as a witness at hearing, and the anticipated testimony of any witness the responding party intends to call as a witness at hearing each witness's testimony. All witnesses unknown at the time of said disclosure shall be disclosed, together with a brief summary of the expected ~~their~~ testimony, as soon as they become known;:-

(b) identify all Any relevant documents, maps, photographs, correspondence, written or recorded statements, or other written materials;

(c) provide the name and address of the custodian of such information; and

(d) disclose whether the responding party intends to use the evidence at hearing made by the party or by witnesses on behalf of the party shall be permitted to be inspected and reproduced by the demanding parties.

(3) Unless otherwise provided for by order of the hearing examiner, within ten days of being served with written requests for production of documents, written

interrogatories, and/or written requests for admission, the responding party shall serve written responses and/or objections upon the requesting party.

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

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

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

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

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

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

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

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-602, MCA

36.12.216 DEPOSITIONS BY ORAL EXAMINATION TO PRESERVE TESTIMONY (1) Depositions of parties and witnesses by oral examination may be taken in accordance with Rule 30, Montana Rules of Civil Procedure, governing depositions by oral examination Upon the motion of any party, the hearing examiner may order that the testimony of any witness be taken by deposition to preserve that witness' testimony in the manner prescribed by law for depositions in civil actions, which includes the right of other parties to attend the deposition and cross-examine the witness. The motion shall indicate the relevancy and shall make a showing that the witness will be unable or cannot be compelled to attend the hearing or show other good cause. No part of a deposition shall constitute a part of the record unless received in evidence by the hearing examiner.

(2) Depositions of parties and witnesses by oral examination may be used at hearing for any purpose permitted by Rule 32, Montana Rules of Civil Procedure, for the use of depositions in court proceedings.

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-602, 2-4-611, MCA

36.12.220 WITNESSES AND PRE-FILED TESTIMONY (1) Any party may be a witness and may present witnesses at the hearing. ~~All oral testimony at the hearing shall be under oath or affirmation.~~

~~(2) Upon the hearing examiner's motion or, upon the motion of a party, the hearing examiner may order anticipated that the testimony to be given upon direct examination testimony by experts or other witnesses shall be prepared in advance and submitted as pre-filed testimony in either question-and-answer or narrative format. Such prefiled~~

~~(3) Pre-filed testimony shall be served upon the hearing examiner and all parties as established by a schedule set by the hearing examiner at least seven days prior to the first hearing date. Any witness who submits The pre-filed testimony will be part of the record in each proceeding as if read, but all of the witnesses whose substantive testimony is prefiled must be available for cross-examination at the hearing.~~

~~(4) Evidentiary objections (such as motions to strike) to such pre-filed direct testimony may be made by any party at any time during the hearings conducted pursuant to these rules.~~

~~(5) At the hearing, the party presenting the testimony may, if they deem it appropriate, briefly summarize the pre-filed testimony prior to the start of cross-examination. Nothing contained within the pre-filed testimony herein shall be deemed to foreclose any party from presenting rebuttal testimony or from presenting testimony in response to reasonably unforeseen areas without the necessity of pre-filing.~~

~~(6) At the request of a party or a witness, the hearing examiner may permit a witness to appear and provide oral testimony by means of telephonic or video participation. Such requests may only be granted if the hearing examiner determines that telephonic or video participation will not substantially prejudice the rights of any party.~~

~~(37) All oral testimony and pre-filed testimony shall be under oath or affirmation parties shall be advised of a staff expert witness' findings, if any, based on any prepared written testimony filed by the parties pursuant to ARM 36.12.220(2), site observations taken pursuant to ARM 36.12.225, materials noticed pursuant to ARM 36.12.221(4) and ARM 36.12.228(1)(b), or testimony or other documents introduced during the proceeding. A staff expert witness' deposition may be taken by any party and the expert may be called to testify by any party and/or by the hearing examiner. The expert witness shall be subject to cross-examination by all parties. Nothing in this rule shall prevent any of the parties from producing other expert evidence on the same fact or matter to which the testimony of the staff expert witness appointed by the hearing examiner relates.~~

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-611, 2-4-612, MCA

36.12.223 HEARING PROCEDURE (1) Unless the hearing examiner determines otherwise the a contested case hearing shall be conducted substantially in the following manner:

(a) The hearing examiner shall open the hearing and provide a statement that explains or identifies: ~~After opening the hearing, the hearing examiner shall, unless all parties are represented by counsel, state the procedural rules for the hearing including the following:~~

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

(ii) the procedures to be followed at hearing including the sequence for presenting evidence and argument; ~~All parties have a right to be represented at the hearing.~~

(iii) any exhibits or evidence entered into the record by stipulation of the parties; ~~The rules of evidence are set forth in ARM 36.12.221(1).~~

(iv) the burden of proof for each party;

(v) the hearing is the time and place for each party to present argument, evidence, and cross-examine witnesses;

(vi) the common law and statutory rules of evidence do not apply;

(vii) the hearing examiner's discretion to make determinations regarding admissibility of evidence; and

(viii) such other matters as the hearing examiner considers appropriate.

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

(32) Each ~~The party with the burden of proof may~~ shall be provided the opportunity to make an opening statement. ~~All of the parties may make such statements in a sequence determined by the hearing examiner.~~

(43) Each party shall be provided the opportunity to present evidence and examine witnesses ~~After any opening statements, unless otherwise determined by the hearing examiner, the applicant shall begin the presentation of evidence. The applicant shall be followed by the other parties and/or expert witness in a sequence determined by the hearing examiner.~~

(54) Each party shall be provided the opportunity to cross-examine witnesses ~~Cross-examination of witnesses shall be conducted in a sequence determined by the hearing examiner.~~

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

(76) After final argument, the hearing shall be closed or continued. If the hearing is continued, ~~it~~ the hearing examiner shall make an oral statement providing:

(a) the contested case hearing will be either continued to a certain time and day, announced at the time of the hearing and made a part of the record; or

(b) the contested case hearing will be continued to a date to be determined later by written order, ~~which must be upon not less than ten days written notice to the parties.~~

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

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

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-611, 2-4-612, MCA

36.12.225 SITE VISIT (1) Upon the hearing examiner's motion or upon the motion of any party, a site visit to the lands involved in the proceeding may be made at any time during the proceeding.

(2) The hearing examiner may enter upon lands to view proposed works, sources of water, location of proposed uses, construction of works, and such other views that are deemed relevant by the hearing examiner to gain a proper understanding of the issues involved in the proceeding.

(3) Before making any site visit, the hearing examiner shall give the parties at least five days written notice to participate, unless the motion is made during a hearing and then oral notice on the record shall be sufficient. ~~During the final decision-making process, the final decision-makers may, upon their own motion or upon the motion of any party, make a site visit of the lands involved in the proceeding provided that the parties are given written notice as stated above.~~

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 85-2-115, MCA

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

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

(a) a complete copy of the application file;

(ab) all pleadings, motions, and intermediate rulings, and orders;

(bc) all evidence received or considered, including a verbatim record of oral proceedings and pre-filed testimony;

(ed) a statement of matters officially noticed;

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

- ~~(e) proposed findings and exceptions;~~
- ~~(f) any decision, opinion or report by the hearing examiner; and~~
- ~~(gf) the department file and all staff memoranda or data submitted to the hearing examiner as evidence in connection with the case; and . (Note substantially the same as 2-4-614, MCA.)~~
- (g) the decision or final order by the hearing examiner.

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-614, MCA

36.12.227 VERBATIM RECORD (1) The verbatim record consisting of ~~tape~~ audio recordings of the contested case hearing shall be transcribed if requested by the hearing examiner.

(2) If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the department for ordering and payment of preparation cost of a written transcript.

(3) If the hearing examiner does not request a transcript, no request is made the department will transmit a copy of the ~~tape(s)~~ recording(s) of the proceedings to the district court.

(4) Any party may request copies of the ~~tape~~ recordings and shall pay the charge set by the department board. All monies received for copies of the ~~tapes~~ recordings shall be payable to the department and shall be deposited in the department's water right appropriation account in the state treasury.

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-614, MCA

36.12.228 THE DECISION OR FINAL ORDER (1) ~~The hearing record shall be the basis for the decision.~~

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

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

(21) Following the close of the record, the hearing examiner shall make a decision or final order pursuant to ~~2-4-621~~ 2-4-623, MCA, ~~and~~

(2) Upon completion, a copy of the decision shall be served upon all parties by:

- (a) personal service; , by
- (b) first class mail; or by
- (c) depositing it with the mail and distribution section, General Services Division, Department of Administration.

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-612, ~~2-4-621~~, 2-4-623, MCA

36.12.234 REOPENING RECORD (1) Upon motion of a party to the proceeding filed prior to ~~issue~~ issuance of a decision or final order, the record may be reopened for receipt of evidence. ~~Such motion must be received by the hearing examiner within 15 days after the issuance of the proposal for decision. Additional evidence may be received only if it is shown to the satisfaction of the hearing examiner that:~~

~~(a) the additional evidence is to be material; and~~

~~(b) there were good reasons for the failure to present it in the hearing.~~

(2) Prior to issuance of a decision or final order and upon providing the parties with notice and the opportunity to object, the hearing examiner may reopen the record to request additional evidence or clarification that the hearing examiner deems necessary to issue a decision or final order.

AUTH: 2-4-201(2), 85-2-113(2), MCA

IMP: 2-4-611, 2-4-614, 2-4-703, 2-4-621, 2-4-622, MCA

4. The rule as proposed to be adopted provides as follows:

NEW RULE I APPOINTMENT OF STAFF EXPERT (1) A department staff expert may be appointed to issue a written report/opinion regarding:

(a) the subject matter and issues presented by technical aspects of the application;

(b) valid objections; and/or

(c) evidence in the contested case proceeding.

(2) A copy of any department staff expert report/opinion shall be served on each party at least 14 days before commencement of the contested case hearing.

(3) A party may take the deposition pursuant to ARM 36.12.216 of any department staff expert witness who prepares a report/opinion.

(4) A department staff expert witness who prepares a report/opinion may be called as a witness at the contested case hearing and examined or cross-examined by any party and/or the hearing examiner.

(5) Nothing in this rule shall prevent any of the parties from producing other expert evidence on the same fact or matter to which the staff expert witness appointed by the hearing examiner relates.

AUTH: 2-4-201, 85-2-113, MCA

IMP: 2-4-611, 2-4-612, MCA

5. The department proposes to repeal the following rules:

36.12.202 DEFINITIONS

AUTH: 2-4-201, 85-2-113, MCA

IMP: 2-4-201, 85-2-113, MCA

36.12.205 DEFECTIVE NOTICE OF APPLICATION

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-105, MCA

36.12.211 DISQUALIFICATION OF HEARING EXAMINER

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-611, MCA

36.12.219 UNTIMELY OBJECTORS

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-611, 2-4-612, MCA

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

AUTH: 2-4-201(2), 85-2-113(2), MCA
IMP: 2-4-621, 2-4-622, 2-4-623, MCA

REASONABLE NECESSITY: The amendments to ARM 36.12.101, 36.12.201, 36.12.203, 36.12.204, 36.12.206, 36.12.207, 36.12.209, 36.12.210, 36.12.212 through 36.12.216, 36.12.220, 36.12.223, 36.12.225 through 36.12.228, 36.12.234; the adoption of New Rule I; and the repeal of ARM 36.12.202, 36.12.205, 36.12.211, 36.12.219, and 36.12.229 are reasonably necessary to clarify the procedure for contested case procedures before the department. The department's hearing rules were originally adopted in 1984. In 2009, HB 40 was adopted by the legislature. HB 40 (2009) amended the process for granting, modifying, or denying applications for water use permits and change authorizations and expressly provided an applicant with the opportunity to show cause on preliminary determinations to deny or grant in modified form pursuant to 85-2-310, MCA. The amendments, New Rule I, and repeal of these rules provide clarification and guidance regarding procedures for show cause hearings. The amendments, New Rule I, and repeal to these rules also eliminate unnecessary rules, eliminate unnecessary definitions, and consolidate the definition section of the department's rules.

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 November 20, 2014.

7. Martin Balukas, 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, do not apply.

11. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment, adoption, and repeal of the above-referenced rules will not significantly and directly 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 October 14, 2014.