



**MONTANA
ADMINISTRATIVE
REGISTER**



DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

NOTICE OF ADOPTION

MAR NOTICE NO. 2025-157.2

Summary

Amendment of ARM 36.12.101, 36.12.102, 36.12.103, 36.12.115, 36.12.117, and 36.12.1305 and adoption of NEW RULES 1 through 7 pertaining to water right permitting

Previous Notice(s) and Hearing Information

On July 11, 2025, the Department of Natural Resources and Conservation published MAR Notice No. 2025-157.1 pertaining to the public hearing on the proposed amendment and adoption of the above-stated rules in the 2025 Montana Administrative Register, Issue Number 13. A public hearing was held on July 31, 2025.

Final Rulemaking Action – Effective October 1, 2025

ADOPT AS PROPOSED

The agency has adopted the following rules as proposed:

NEW RULE 1 (36.12.124) PUBLIC COMMENT ON A DRAFT PRELIMINARY DETERMINATION

NEW RULE 6 (36.12.814) HEARING AND FINAL ACTION

ADOPT WITH CHANGES

The agency has adopted the following rules with changes from the original proposal, stricken matter interlined, new matter underlined:

NEW RULE 2 (36.12.810) PROJECT COMPLETION NOTICE

- (1) For a ~~project completion notice filed after October 1, 2025~~ ~~an appropriation completed after the effective date of this rule~~, the appropriator must file a correct and complete project completion notice with the department on or before the deadline specified in the permit ~~authorization~~, including any order to reduce or modify the permit pursuant to 85-2-313, MCA, change authorization, or any written extension of time. A correct and complete project completion notice must be on a form provided by the department.
- (2) through (3)(c) remain as proposed.
 - (d) if a permit ~~authorization~~ is reduced or modified following the final decree pursuant to 85-2-313, MCA, a description explaining compliance with the order reducing or modifying the permit;
 - (e) through (f) remain as proposed.
- (4) remains as proposed.
- (5) For a project completion notice filed with the department prior to ~~the effective date of this rule~~ October 1, 2025, the department will consider the information required by (3) for a permit or (4) for a change to determine whether the project completion notice includes adequate information.
- (6) and (7) remain as proposed.
- (8) The department may inspect the completed appropriation any time after a project completion notice is filed. The department will provide appropriators with a minimum of 48-hour notice before an inspection.
- (9) If a project completion notice for a permit was verified prior to ~~the effective date of this rule~~ October 1, 2025, and the permit is reduced or modified following final decree pursuant to 85-2-313, MCA, the appropriator is required to file a subsequent project completion notice. Such a subsequent project completion notice is subject to the applicable sections of this rule.

Authorizing statute(s): 85-2-113, 85-2-402, MCA

Implementing statute(s): 85-2-310, 85-2-311, 85-2-312, 85-2-313, 85-2-314, 85-2-315, 85-2-402, MCA

NEW RULE 3 (36.12.811) PERMIT VERIFICATION

- (1) The department will conduct a comparative analysis of the information provided in the project completion notice and the permit ~~authorization~~, including any reduction of modification of the permit pursuant to 85-2-313, MCA, to verify whether the appropriation was completed in substantial accordance with the permit ~~authorization~~ and any reduction or modification. The department will review all relevant information within its possession.
- (2) remains as proposed.
- (3) ~~Corrections to legal land descriptions due to improved mapping of township, range, section, and 1/4 section may be considered in substantial accordance with the point of diversion and place of use element(s) of the water right.~~
- (4)(3) The department will evaluate whether the following information identified in the project completion notice is in substantial accordance with the permit ~~authorization~~, including any reduction or modification of the permit pursuant to 85-2-313, MCA:
 - (a) through (e) remain as proposed.
 - (f) the point of diversion, which may not be completed outside the legal land description authorized unless the department determines:
 - (i) the point of diversion marked on the project completion map and the map included in the permit file are the same; and
 - (ii) the legal description in the project completion notice is correct based on improved mapping of the township, range, section, and 1/4 section;
 - (g) the place of use, which may not be completed outside the legal land description authorized unless the department determines:
 - (i) the place of use marked on the project completion map and the map included in the permit file are the same; and
 - (ii) the legal description in the project completion notice is correct based on improved mapping of the township, range, section, and 1/4 section;
 - (h) through (k) remain as proposed.
- (5) remains as proposed but is renumbered (4).

Authorizing statute(s): 85-2-113, MCA

Implementing statute(s): 85-2-310, 85-2-311, 85-2-312, 85-2-313, 85-2-314, 85-2-315, MCA

NEW RULE 4 (36.12.812) CHANGE VERIFICATION

- (1) The department will conduct a comparative analysis of the information provided in the project completion notice, all relevant information within its possession, and the change authorization to verify whether the appropriation was completed in substantial accordance with the change authorization. ~~The department will not evaluate any elements of the water right not authorized for change. The department will review all relevant information within its possession. The department will evaluate:~~
 - (a) those elements of the underlying water right authorized for change;
 - (b) terms, conditions, restrictions, and limitations of the change authorization;
 - (c) whether the elements and conditions of the change are in substantial accordance with the final decree pursuant to 85-2-402(9)(a), MCA; and
 - (d) if applicable, whether the elements of a change authorization for a permit are in substantial accordance with reduction, modification, or revocation of the permit pursuant to 85-2-313, 85-2-314, and 85-2-315, MCA.
- (2) remains as proposed.
- (3) ~~Corrections to legal land descriptions due to improved mapping of township, range, section, and 1/4 section may be considered in substantial accordance with the point of diversion and place of use element(s) of the water right.~~
- ~~(4)~~(3) The department will evaluate whether the following information identified in the project completion notice is in substantial accordance with the change authorization:
 - (a) for a change in point of diversion, the flow rate, which may not exceed the authorized amount, and the point of diversion, which may not be completed outside the legal land description authorized unless the department determines;
 - (i) the point of diversion marked on the project completion map and the map included in the change authorization file are the same; and
 - (ii) the legal description in the project completion notice is correct based on improved mapping of the township, range, section, and 1/4 section;
 - (b) for a change in place of use, the place of use, which may not be completed outside the legal land description authorized unless the department determines;
 - (i) the point of diversion marked on the project completion map and the map included in the change authorization file are the same; and

- (ii) the legal description in the project completion notice is correct based on improved mapping of the township, range, section, and 1/4 section;
 - (c) for a change in the purpose of use, the completed purpose of use matches the authorized purpose, ~~and the consumptive use volume, which may not exceed the historical consumptive use volume of the water right;~~
 - (i) The consumptive use volume for the completed use may not exceed the historical consumptive use volume, if any, determined by the change authorization.
 - ~~(i)(ii)~~ For a change in purpose to water marketing, the volume of the water marketing purpose will be limited to the maximum annual use proven by the appropriator;
 - (d) for a change in place of storage or addition of storage, the completed place of storage, which includes:
 - (i) and (ii) remain as proposed.
 - (iii) the consumptive use volume, if previously assigned by the department, which may not exceed the authorized amount; and
 - (iv) and (e) remain as proposed.
- (5) remains as proposed but is renumbered (4).

Authorizing statute(s): 85-2-113, 85-2-402, MCA

Implementing statute(s): 85-2-312, 85-2-314, 85-2-315, 85-2-402, MCA

NEW RULE 5 (36.12.813) VERIFICATION DECISION

- (1) If, after final decree in the respective administrative basin, the department determines that an appropriation was completed in substantial accordance with a permit ~~authorization~~, including any reduction or modification of the permit pursuant to 85-2-313, MCA, or change authorization, it shall issue a certificate of water right.
- (2) If the department determines that an appropriation was not completed in substantial accordance with a permit ~~authorization~~, including any reduction or modification of the permit pursuant to 85-2-313, MCA, or change authorization, the department shall send the completed verification abstract to the appropriator. The verification abstract shall include a statement of the department's proposed action.

- (3) Within ~~30~~ 60 days of issuance of the verification abstract, the appropriator may:
 - (a) and (b) remain as proposed.
- (4) If the department does not receive notice of the appropriator's decision in (3) within ~~30~~ 60 days of issuance of the verification abstract, the department will proceed with the proposed action in (2).
 - (a) and (b) remain as proposed.
- (5) through (7) remain as proposed.

Authorizing statute(s): 85-2-113, 85-2-402, MCA

Implementing statute(s): 85-2-313, 85-2-314, 85-2-315, 85-2-402, MCA

NEW RULE 7 (36.12.2102) TEMPORARY LEASE OF A WATER RIGHT

- (1) An appropriator proposing to temporarily lease a water right pursuant to 85-2-428, MCA ~~{SB-178-(2025)}~~, must file an application with the department. An application may be filed only by the owner of record of the water right proposed for lease.
- (2) The applicant must provide evidence that the water right has been used within the five years prior to the date an application is filed. Evidence of use under this section includes, but is not limited to the following:
 - (a) and (b) remain as proposed.
 - (c) power bills or other records that document pump usage, if the conveyance system includes a pump;
 - (d) and (e) remain as proposed.
- (3) If the department previously identified the historical consumptive use of the water right proposed for lease as part of an earlier change authorization, the department may reuse that calculation when reviewing an application for a temporary lease. If the historical consumptive use of the water right proposed for lease has not been calculated by the department through a previous change application, the department will use the following standards for estimating consumptive use of the water right when reviewing an application for temporary lease:
 - (a) the consumptive volume for irrigation is the lesser of:
 - (i) crop consumptive use as calculated using the methodology from ARM 36.12.1902(14) through (16)(f). This methodology will use the priority

date of the right being leased to determine the applicable county management factor; or

(ii) remains as proposed.

(b) through (f) remain as proposed.

- (4) An application must include a statement of potential adverse effects and description of the planned actions the applicant will take which demonstrate no adverse effect on other water rights.

(a) remains as proposed.

- (b) The applicant's description of planned actions must document the effects to other water rights including the following:

(i) remains as proposed.

(ii) the effect that ~~discontinued~~ ceased use of all or a portion of the leased water right at the place of use will have on other water users; and

(iii) remains as proposed.

(5) and (6) remain as proposed.

Authorizing statute(s): 85-2-113, MCA

Implementing statute(s): 85-2-428, MCA ~~{SB-178 (2025)}~~

AMEND AS PROPOSED

The agency has amended the following rules as proposed:

36.12.115 WATER USE STANDARDS

36.12.117 OBJECTION TO APPLICATION

AMEND WITH CHANGES

The agency has amended the following rules with the following changes from the original proposal, stricken matter interlined, new matter underlined:

36.12.101 DEFINITIONS

In addition to definitions provided for in 85-2-102, MCA, and unless the context requires otherwise, to aid in the implementation of the Montana Water Use Act and as used in these rules:

(1) through (54) remain as proposed.

(55) “Project completion notice” means a notice by the appropriator on a form provided by the department that the project works are completed, and water is being appropriated in substantial accordance with the terms of the permit ~~authorization~~, including any reduction or modification of the permit pursuant to 85-2-313, MCA, or change authorization.

(56) through (68) remain as proposed.

(69) “Substantial accordance” means that an appropriation has been completed in compliance with the terms of a permit ~~authorization~~, including any reduction or modification pursuant to 85-2-313, MCA, or change authorization. Substantial accordance may allow for minor deviation from those terms if the department determines the deviation will not cause injury to other appropriators or otherwise does not require a change authorization.

(70) through (77) remain as proposed.

(78) “Verification” or “verify” means the process used by the department to determine whether completion of an appropriation of water and a project completion notice are in substantial accordance with the terms, conditions, restrictions, and limitations of the permit ~~authorization~~, including any reduction or modification pursuant to 85-2-313, MCA, or change authorization.

(79) through (85) remain as proposed.

Authorizing statute(s): 2-4-201, 85-2-113, 85-2-308, 85-2-370, MCA

Implementing statute(s): 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, 85-2-351, 85-2-360, 85-2-361, 85-2-362, 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, 85-2-418, MCA

36.12.102 FORMS

- (1) The following necessary forms for implementation of the act and these rules are available from the Department of Natural Resources and Conservation, P.O. Box 201601, Helena, Montana 59620-1601 and its Water Resources regional offices, or on the department's website. The department may revise as necessary the following forms to improve the administration of these rules and the applicable water laws:
 - (a) through (qq) remain as proposed.
 - (rr) Form No. 670, "~~Waiver of Adverse Effect~~ Consent to Approval of Application," which must be submitted for a ~~waiver~~ consent to approval filed under ~~{SB 190 (2025)}~~ 85-2-311 or 85-2-402, MCA.

Authorizing statute(s): 85-2-113, MCA

Implementing statute(s): 85-2-113, 85-2-302, 85-2-306, 85-2-307, 85-2-311, 85-2-316, 85-2-402, 85-2-424, 85-2-428, 85-2-429, 85-2-401, MCA; ~~{SB 178 (2025), HB 432 (2025)}~~

36.12.103 FORM AND SPECIAL FEES

- (1) remains as proposed.
- (2) The department will assess the following filing fees:
 - (a) through (l) remain as proposed.
 - (m) \$100, plus \$20 for each water right or authorized notice of intent to appropriate groundwater transferred after the first water right, for a Water Right Ownership Update, Form No. 608. The total amount shall not exceed \$600. No fee is required for removing a deceased person from a record of ownership;
 - (n) through (hh) remain as proposed.
- (3) There shall be no fees charged for filing the following forms:
 - (a) through (j) remain as proposed.
 - (k) Form No. 670, ~~Waiver of Adverse Effect~~ Consent to Approval of Application.
- (4) remains as proposed.

Authorizing statute(s): 85-2-113, MCA

Implementing statute(s): 85-2-113, 85-2-302, 85-2-306, 85-2-307, 85-2-311, 85-2-312, 85-2-314, 85-2-402, 85-2-426, 85-2-428, 85-2-429, 85-2-436, 85-20-401, MCA; ~~[SB 178 (2025), HB 432 (2025), HB 441 (2025), HB 681 (2025)]~~

36.12.1305 FILING A CHANGE APPLICATION AND FORM ACCEPTANCE

(1) through (3) remain as proposed.

(4) For proposed water right changes with both temporary and permanent components, one application form may be submitted. If an applicant chooses to submit a single application which includes a permanent and temporary change, the application must identify a single project completion date.

(5) through (8) remain as proposed.

Authorizing statute(s): 85-2-113, 85-2-302, MCA

Implementing statute(s): 85-2-302, 85-2-402, MCA

Statement of Reasons

The agency has considered the comments and testimony received. A summary of the comments received, and the agency's responses are as follows:

Comment 1: Three commenters questioned the department's authority to adopt the definition of "aquifer system" in ARM 36.12.101.

Response 1: The department has general rulemaking authority to adopt rules necessary to implement and carry out the purposes of the Water Use Act. 85-2-113(2), MCA. The term "aquifer" is used extensively throughout the Water Use Act but not statutorily defined. The department is proposing to amend the definition of "source aquifer" and add the definitions of "aquifer" and "aquifer system" to clarify how the department determines the source of supply and the parameters of an aquifer or aquifer system for groundwater appropriations. (For example: 85-2-306, 85-2-311(1), and 85-2-361, MCA.)

Comment 2: Two commenters appreciated the inclusion of definitions for "aquifer" and "aquifer system" in ARM 36.12.101 and felt that these definitions improve clarity and provide scientifically credible definitions. One of the commenters felt the definitions provided in the

rule notice are necessary due to passage of statutory changes in 85-2-313, MCA, as amended in HB 441 (2025).

Response 2: The department appreciates the support for the proposed aquifer and aquifer system definitions.

Comment 3: Four commenters proposed alternative definitions for “aquifer system” in ARM 36.12.101. Three commenters asserted the proposed definition(s) created ambiguity and recommended that the department adopt the National Ground Water Association Compendium of Hydrogeology definition of aquifer system. The fourth commenter recommended the following amendments for clarity: (6) “Aquifer” means a geologic structure or unit whose horizontal and vertical extents could be limited by formation contacts, faults, surface water bodies, and/or less permeable materials and that contains saturated and permeable material capable of yielding water in usable quantities; (7) “Aquifer system” means a series of hydraulically connected aquifers ~~whose horizontal and vertical extents could be limited by formation contacts, faults, surface water bodies, and less permeable materials.~~

Response 3: The amendment to the definition of “source aquifer” and addition of definitions for aquifer and aquifer system are included to clarify how the department determines the source aquifer and the parameters of an aquifer or aquifer system when evaluating groundwater appropriations.

Source aquifer, as currently defined in ARM 36.12.101, means “the specific groundwater source from which water is diverted for a beneficial use.” Groundwater source can be broadly defined and is without specificity. The proposed amendment to the definition of “source aquifer” and the proposed definitions of “aquifer” and “aquifer system” are meant to objectively define what constitutes a groundwater source, using well known groundwater terms and concepts that align with the department’s technical and scientific practices.

The department’s proposed definition of aquifer system already incorporates the concepts reflected in the National Ground Water Association Compendium of Hydrogeology definition and alternate definitions proposed by commenters’ recommendation. The department’s proposed definitions provide additional guidance on what factors may limit or bound aquifers that are connected through leakage or hydraulically connected aquifers. Moreover, the National Ground Water Association Compendium of Hydrogeology definition includes the term “scale of interest” which is not scientifically defined, is ambiguous, and could be construed to identify smaller or larger areas and aquifer systems than what would be considered scientifically reasonable.

Comment 4: One commenter felt the modification in ARM 36.12.101 to the definition of “possessory interest” does not resolve the department’s alleged practice of refusing to accept an applicant’s signature on an application as proof of possessory interest, requiring additional proof, and requiring more information on an application than is required to establish possessory interest.

Response 4: The amendment to the definition of “possessory interest” adds the terms “possess” and “use” to the first sentence of the definition to be consistent with the second sentence of the definition. It does not substantively alter the definition. The comment is critical

of the department's alleged application of the possessory interest criterion rather than the substance of the proposed amendment and exceeds the scope of the proposed amendment.

Comment 5: One commenter questions why in ARM 36.12.101 the term "permit authorization" is used for the first time in the definition of "project completion notice."

Response 5: The department agrees. The rules are amended to strike the term "authorization" following the term "permit" throughout.

Comment 6: One commenter states that in ARM 36.12.101 the term "verification" or "verify" should not be used as it has been used to describe different processes in the past. The commenter suggests using a different term such as validation, authentication, or reconciliation.

Response 6: The department recognizes that the history of terminology used is complicated. HB 441 (2025) was enacted by the Montana Legislature to provide a process "to verify whether the appropriation was completed in substantial accordance with the terms" of a permit or change in appropriation right. The proposed definition of "verification" or "verify" is consistent with the terminology and process set forth in HB 441.

Comment 7: Three commenters supported the new forms and titles used for the new forms in ARM 36.12.102.

Response 7: The department appreciates the support for the forms and titles. Upon further review of the forms and titles, ARM 36.12.102(1)(rr) and ARM 36.12.103(3)(k) are amended to strike the "Waiver of Adverse Effect" form title and replaced with "Consent to Approval of Application" to better align the name of the form with the statutory language in SB 190 (2025).

Comment 8: Two commenters expressed concerns in ARM 36.12.103(2)(g) about the fee associated with Form 602I. Both commenters identified this as being a 160% increase from the current cost. Both commenters recognized the need to fund staff associated with bill implementation but wanted to express concern over the economic impact to water users.

Response 8: The department does not take setting fees lightly as it recognizes the financial burden that can be imposed on water users. HB 681 (2025) provides for a 10-business day statutory timeline in which the department must complete a deficiency review and authorize or deny a correct and complete Notice of Intent to Appropriate Groundwater filing. The legislature authorized the department to hire additional staff necessary to implement the new process and timelines. The bill sponsor and finance and claims committee determined that a fee increase was necessary to fund additional staff necessary to complete the work within the statutory timelines set by the bill. Fees were calculated to ensure that the state special revenue account would receive enough funding to cover personnel services costs for the new positions necessary to process Notice of Intent to Appropriate Groundwater forms based on average annual submittals under the exception to the permitting process in 85-2-306, MCA.

Comment 9: One commenter supported the proposed fees in ARM 36.12.103(2)(cc) associated with new Form 650.

Response 9: The department appreciates the support of the proposed fees.

Comment 10: One commenter supported the department’s proposed fee schedule included in the rule proposal, including new fees for forms established in ARM 36.12.102 as a result of legislation in the 2025 legislative session and revisions to existing fees for consistency. The commenter recognized that fee increases are necessary to generate adequate state special revenue to implement these legislative changes, including staffing and operational expenses associated with implementation. The commenter also referenced that the increases to fees were included in discussions at both the Comprehensive Water Review Stakeholder Work Group and during appropriations committee discussions in both the House and Senate and that it was widely supported in all of these venues that increases to fees would be required to generate state special revenue to pay for implementation.

Response 10: The department appreciates the support of the proposed fees.

Comment 11: One commenter raised a concern on ARM 36.12.103(2)(m) that additional clarification is needed related to fees associated with ownership updates to clarify that the filing of an ownership update for notice of intent to appropriate is treated the same as for a water right. The commenter recommended adding the italicized text to (2)(m):

“(m) \$100, plus \$20 for each water right *or authorized notice of intent to appropriate groundwater* transferred after the first water right, for a Water Right Ownership Update, Form No. 608. The total amount shall not exceed \$600. No fee is required for removing a deceased person from a record of ownership.”

Response 11: The department agrees that additional clarification is needed regarding ownership updates for authorized Notices of Intent to Appropriate. ARM 36.12.103(2)(m) is amended to include the recommended text.

Comment 12: Two commenters supported the change to domestic use standards in ARM 36.12.115.

Response 12: The department appreciates the support for the update to the domestic use standards in ARM 36.12.115.

Comment 13: One commenter recommended the department provide examples or further explanation of what constitutes “probable, believable facts sufficient to support a reasonable legal theory” as referenced in ARM 36.12.117. The commenter identified that this is not easily understood by lay water users who may need to defend their rights and recommended that a standardized objection template or guidance document would be extremely helpful in ensuring complete and valid submissions and an efficient process.

Response 13: Pursuant to statute, a valid objection must be “correct and complete,” 85-2-308 and 85-2-309, MCA. A correct and complete objection must include “substantial credible information” which requires “probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested.” 85-2-102(9) and (26), MCA. The phrase “probable, believable facts sufficient to support a reasonable legal theory . . .” was incorporated into ARM 36.12.117 to align with the statutory requirements for an objection and reduce the number of deficient objections received by the department. The proposed amendment does not impose a new legal requirement on an objector. Whether an

objection satisfies this standard is a threshold determination made by the department on a case-by-case basis.

Comment 14: One commenter appreciated the flexibility outlined in ARM 36.12.117(16), which allows for individual agreements while maintaining protections for water rights. This is a commendable approach.

Response 14: The department appreciates the support for these changes.

Comment 15: One commenter appreciated the language changes included in ARM 36.12.117, including the update in the rules to allow for electronic communications.

Response 15: The department appreciates the support for these changes.

Comment 16: Two commenters asserted that 15 business days may not be enough time to respond to an Objection Deficiency Notice as provided by ARM 36.12.117(10). One of the commenters raised concern that the 15-business-day timeline could violate a water user's due process rights because it provides insufficient time for average objectors to respond to Objection Deficiency Notices with the types of "probable believable facts" requested by the department.

Response 16: The proposed amendments do not alter the existing timelines. The timeline for deficiency responses was modified from 15 days to 15 business days in MAR Notice No. 36-22-219 in 2023, effectively giving objectors an additional week in which to prepare and submit their deficiency response. The current 15 business day timeline reflects that objection review, deficiency letters, deficiency responses, validity rulings, and scheduling a hearing date must all be completed within the 90 days of the objection deadline pursuant to 85-2-309, MCA.

Although the current amendments do not extend the 15-day timeline, the department's proposed amendment to this rule allows objectors to maximize the deficiency response timeframe through electronic communication, including notification of a deficiency and submittal of a response. The proposed changes provide a more efficient process for deficiency notifications and responses, allowing for immediate knowledge of deficiencies and a greater response period. This should benefit most objectors in providing more opportunity to develop a response within the existing 15-day deficiency response period.

Comment 17: One commenter supported the changes to ARM 36.12.117 concerning filing objections to applications. The commenter identified the current process of using a postmark date to assess the timeliness of filing an objection has become obsolete, and the utilization of digital filing brings the process into the modern era for all water users. The commenter also supported the changes to correct and complete determination that supports more defensible valid objections by requiring an objector to include both a set of "probable and believable facts" as well as requiring that those facts "support a reasonable legal theory." The commenter also supported applying the existing objection rules to HB 432 (2025) and SB 178 (2025) implementation to support consistency in objection requirements and processes.

Response 17: The department appreciates the feedback on the objection process. However, the "probable, believable facts sufficient to support a reasonable legal theory . . ." language

added to ARM 36.12.117(8)(f) does not impose new legal requirements on an objection. See Response 13.

Comment 18: One commenter raised concern with the change in language of ARM 36.12.117 on the objection rule that instead of “facts indicating that the application does not meet one or more of the applicable criteria” and to merely “specifically describe why or how one or more of the criteria are not met” that objectors must provide “*probable, believable facts sufficient to support a reasonable legal theory* that the application does not meet one or more of the applicable criteria[.]” The commenter requests that ARM 36.12.117(8)(f), formerly (9)(f), remain unchanged.

Response 18: The “probable, believable facts sufficient to support a reasonable legal theory . . .” language added to ARM 36.12.117(8)(f) does not impose new legal requirements on an objection. See Response 13.

Comment 19: Two commenters support the modification to ARM 36.12.1305 to allow one application form when a change involves both temporary and permanent components. One commenter requested that the department be specific about what components of the change are required to be completed for notice of completion and/or if two different notice of completion dates will be identified.

Response 19: The department appreciates the support from the commenters on the modification to ARM 36.12.1305. The department agrees that the project completion notice requirements for change applications with temporary and permanent components needs clarification. ARM 36.12.1305(4) is amended to include the following statement: “If an applicant submits a single application that includes a permanent and temporary change, the application must identify a single project completion date.”

Comment 20: One commenter supported the elimination of all rules under ARM 36.12.1305(8) to align with the new stockwater permit change exemption.

Response 20: The department appreciates this support.

Comment 21: For NEW RULE 1, one commenter questions the need for separate public comments on each water right application, suggesting instead that one submission could specify which rights it addresses. They note that duplicating comments is burdensome but appreciate the allowance for joint comments by co-owners.

Response 21: Public comment must be tied to a specific application to ensure a clear record for the water right file. As a point of clarification, NEW RULE 1 requires a public comment for each individual “water right application.” If an application includes multiple water rights, only one comment is required because all water rights are part of the same application.

Comment 22: One commenter supports NEW RULE 1 as a helpful clarification that strengthens the public comment process by promoting consistency, completeness, and early issue identification, aligning with HB 114 (2023). The comment raised similar concerns about NEW RULE 1(2) and (3), to those raised in Comment 21.

Response 22: The department appreciates this comment. See Response 21.

Comment 23: Three commenters express concern that use of the term “appropriation” is too broad and question whether NEW RULE 2 applies to Form 602, Form 605, or changes approved under an exception.

Response 23: NEW RULE 2 does not apply to exceptions to the permitting process filed under 85-2-306, MCA. NEW RULE 2(1) clearly states that it applies to the deadlines specified in the permit or change authorization. A “change authorization” as defined by rule is limited to 85-2-402, MCA. A notice of completion is filed before a stock permit is issued pursuant to 85-2-306, MCA. Therefore, a stock permit does not include a completion deadline and falls outside the scope of NEW RULE 2.

Comment 24: For NEW RULE 2, a commenter asks what happens to the unused volume if an appropriation holder fails to perfect the full volume originally proposed.

Response 24: HB 441 (2025) requires the department to verify the extent to which an appropriation was completed in substantial accordance with the terms of the permit or change authorization. NEW RULE 2 itemizes the information an appropriator must provide on the project completion notice regarding completion of the appropriation. If the appropriation was not completed for the full volume authorized and there is an unused volume, the department may propose to reduce the permit or change authorization. NEW RuULES 3, 4, and 5 provide the procedure for a proposed reduction or modification.

Comment 25: One commenter is concerned that the phrase “other information deemed necessary by the department” in NEW RULE 2(3)(f) and (4)(e) is vague and creates uncertainty for applicants about what additional information may be required.

Response 25: The information itemized in NEW RULE 2 reflects the type of information the department has required of an appropriator either through a form or through a field investigation to determine whether an appropriation was completed in substantial accordance with the permit or change authorization. Prior to 1992, the department obtained this type of information through a mandatory field investigation. The 1992 amendments to 85-2-315, MCA, made field investigations optional rather than mandatory. Accordingly, the department developed a more robust project completion notice form that requested information that was historically obtained through field investigation to reduce staff time and expense involved in field investigations.

NEW RULE 2(3)(f) and (4)(e) provide the department with the ability to request additional information on a case-by-case basis that is deemed necessary for verification. These subsections ensure that the department has the flexibility to request additional information from the appropriator in some circumstances to ensure the department has adequate information and to potentially avoid the time and expense of conducting a site investigation for more complex appropriations.

Comment 26: Several commenters assert that NEW RULE 2(5) exceeds the department authority and could be applied retroactively. The commenters question how the department can require resubmission of a notice of completion that complied with the rules and practices in place at the time the project completion notice was originally filed. One of those commenters is concerned the department will reopen and potentially revoke or alter thousands of long-

completed permits and change authorizations dating back to 1973, despite applicants having complied with the rules in place at the time. They assert this retroactive review creates vague new requirements, undermines finality for water users, and exceeds the authority granted under HB 441 (2025) and the Montana Administrative Procedure Act. The comment asserts that notices of completion were not always required or did not require the level of detail required in NEW RULE 2. One commenter asserts that NEW RULE 2(5) subjects permit holders to unnecessary financial burden by forcing them to revisit previously finalized decisions.

Response 26: Although the statutory requirements regarding the contents of a project completion notice and verification of a permit or change authorization have evolved over time, to the department's knowledge, all permits and change authorizations issued by the department include written "terms, conditions, restrictions, and limitations" that required the appropriator to file a written project completion notice with the department. 85-2-312 and 85-2-402, MCA. Statute has always authorized the department to modify, reduce, or revoke a permit or change authorization that was not completed in compliance with the permit or change authorization. 85-2-311, -312, -314, and -402, MCA.

The information itemized in NEW RULE 2(3) and (4) reflects the type of information the department has required of an appropriator either through a form or through a field investigation to determine whether an appropriation was completed in substantial accordance with the permit or change authorization. Prior to 1992, the department obtained this type of information through a mandatory field investigation. The 1992 amendments to 85-2-315, MCA made field investigations optional rather than mandatory. Accordingly, the department developed a more robust project completion notice form that requested information that was historically obtained through field investigation to reduce the staff time and expense involved in field investigations. NEW RULE 2(5) clarifies that the department may need additional information, consistent with past practice, on projects for which a project completion notice was filed prior to adoption of NEW RULE 2. If, as alleged by the comment, there are permits or change authorizations for which a project completion notice was not required by statute or as a condition of the authorization, NEW RULE 2(5) does not apply.

NEW RULE 2 does not retroactively change the burden on the appropriator. The department has always been authorized to obtain from an appropriator the necessary information to verify the appropriation was completed in compliance with the terms and conditions of the permit or change authorization. NEW RULE 2 simply provides the procedure for obtaining the requisite information. To the extent an appropriator disagrees with the manner in which a permit or change authorization is verified, NEW RULES 3, 4 and 5 provide the procedure pursuant to which the department verifies the project completion notice and notifies an appropriator of any proposed reduction, modification, or revocation of a permit or change authorization; and NEW RULE 6 provides the procedure pursuant to which an appropriator may show cause why the proposed action should not be taken consistent with the due process requirements of 85-2-314, MCA. These procedures do not retroactively impair vested rights.

Comment 27: One commenter suggests adding a notice requirement under NEW RULE 2(8), recommending 24 to 48 hours' notice to landowners before site entry so they can be present and assist with inspections.

Response 27: The department agrees. NEW RULE 2(8) is amended to include a 48-hour notice prior to land entry.

Comment 28: One commenter questions why NEW RULE 2(9) requires filing a new project completion notice instead of simply adjusting verified parameters under 85-2-313, MCA. They note that older notices lacked detailed information, making it difficult for current owners to comply decades later. They emphasize that HB 441 was intended to give water users and permit holders finality.

Response 28: A permit modified or reduced pursuant to 85-2-313, MCA, may be subject to new terms and conditions, or may require alterations to the way the permit was completed. NEW RULE 2(9) requires a new project completion notice to be filed to ensure that adequate information regarding compliance with any modification or reduction is provided. If there are elements of the prior project completion notice that do not require changes to comply with the modification or reduction, the appropriator may incorporate that information into the new project completion notice.

Comment 29: One commenter supported the streamlined approach in NEW RULE 2 but expressed concern with NEW RULE 2(8). They recommend setting a 30-day inspection deadline (with extensions for weather) to protect property rights and prevent perceptions of unlimited access, which could undermine landowner trust in the department.

Response 29: A time limit is not feasible given the current status of provisional permits, final decrees, and project completion notices. In most cases, permits and change authorizations will not be verified until after final decree in a basin. This ensures that the petition process under 85-2-313, MCA, will be completed for permits and changes on those permits, and ensures that verification of changes on claims is consistent with adjudication of existing rights in the final decree. Accordingly, project completion notices have been and will continue to be filed long before final decree is issued triggering the verification process. Requiring a field inspection to be completed within 30 days of filing a project completion notice would foreclose field inspections in most cases.

Comment 30: One commenter generally supports NEW RULE 2 on project completion notices as drafted, while noting that some stakeholders seek clearer expectations. They are willing to work with the department on any needed clarifications.

Response 30: The department appreciates the commenter's support for NEW RULE 2 and the willingness to work with the department.

Comment 31: One commenter raises questions on NEW RULE 2(1) about what "completed after the effective date" means, noting uncertainty around permits or changes that are partially complete, have submitted but unreviewed notices, or missed deadlines. They caution this could create inconsistent treatment across different time periods (pre-1992, 1992 through 2025, post-2025).

Response 31: The department agrees with the commenter. NEW RULE 2(1) is amended to read “For a project completion notice filed after October 1, 2025, the appropriator must file a correct and complete project completion notice[.]”

Comment 32: The commenter asks whether NEW RULE 2 applies to permits or changes where a project completion notice has been filed but not yet reviewed by the department.

Response 32: This situation is addressed in NEW RULE 2(5).

Comment 33: A commenter asks if NEW RULE 2 applies to permits or changes that were completed before the project completion notice deadline but where no PCN has been filed yet.

Response 33: NEW RULE 2(1) and (3) or (4) apply to project completion notices filed after the effective date of the rule. A project completion notice must be filed before a permit or change authorization is verified by the department.

Comment 34: The commenter asks whether NEW RULE 2 applies to permits or changes where the PCN deadline has passed, no notice was filed, but the project was fully or partially completed.

Response 34: NEW RULE 2 does not address the situations proposed by the commenter. Those situations are addressed in 85-2-312, MCA.

Comment 35: The commenter questions whether NEW RULE 2 creates a third category of permits/changes (pre-1992, 1992 through 2025, and post-2025), leading to inconsistent rules across time periods.

Response 35: NEW RULE 2 ensures that the information used to evaluate whether an appropriation is completed in substantial accordance with a permit or change authorization is consistent and satisfies the statutory requirements for verification and issuance of a certificate of water right pursuant to 85-2-313, 85-2-315, and 85-2-402, MCA, regardless of when the notice of completion is filed. For additional explanation, see Response 26.

Comment 36: One commenter believes NEW RULE 2(2) is unclear and should be revised to state “If one or more water rights have multiple change authorizations...” to better reflect the intended meaning.

Response 36: NEW RULE 2(2) provides that if there are multiple change authorizations for water rights that have the same project completion date, a single project completion notice can be filed so the changes can be verified as a single project. This is necessary because there could otherwise be conflicting elements on the different changes which could not have all been completed.

Comment 37: One commenter asserts that NEW RULE 2(3)(d) is problematic because a project completion notice deadline typically occurs before a final decree is issued, meaning reductions or modifications under 85-2-313, MCA, could happen years later. They recommend adding language to clarify how the department will review PCNs in relation to the final decree or petition process.

Response 37: The department recognizes the complexity created by different timelines applicable to project completion notice deadlines, final decree issuances, and subsequent

verification. With limited exceptions, the department will review project completion notices for permits (and change authorizations on permits) after final decree and any applicable modification or reduction pursuant to 85-2-313, MCA. The department will review project completion notices for change authorizations on existing water rights after final decree of the underlying water right.

Comment 38: One commenter questions how NEW RULE 2(5) applies to projects that are completed but a project completion notice has not been filed. They suggest revising the language to read: “For permits/changes with PCN deadlines prior to the effective date of this rule...” to provide clarity.

Response 38: NEW RULE 2(5) only applies to project completion notices filed before the effective date of the rule. If a project completion notice was not filed before the effective date of the rule, the appropriator must comply with NEW RULE 2(1) and (3), or (4).

Comment 39: One commenter notes that under NEW RULE 2(9), if a permit is later reduced or modified, the appropriator must file another project completion notice. They suggest adding a requirement for the department to notify the permittee and set a filing deadline for this subsequent project completion notice.

Response 39: A department determination to reduce or modify a permit pursuant to 85-2-313, MCA, will include a deadline for filing a project completion notice.

Comment 40: One commenter is concerned that NEW RULE 3(2) and NEW RULE 4(2) could cause confusion over who determines which water use standards apply. They suggest creating an index or catalogue of historical water use standards to provide clarity for both permit holders and the department.

Response 40: The department recognizes that there is potential confusion regarding past historical standards. NEW RULE 3(2) simply confirms the department will adhere to the standards of a permit or change as they were authorized. The standards used at the time of authorization are made clear in each permit or change authorization decision document. If a decision document was not issued by the department, the standards used will still be available in the water right application file.

Comment 41: One commenter recommends revising NEW RULE 3(3) and NEW RULE 4(3) so that corrections to legal land descriptions from improved mapping “will/shall” be considered, rather than the discretionary “may” be considered.

Response 41: In most instances, whether a correction to the legal land description is due to improved mapping will be readily apparent, and the department will have the discretion under the proposed rule to determine whether the corrections are in substantial accordance. This discretion is necessary to resolve circumstances such as where there is a dispute regarding whether the correction is based on improved mapping, or where the correction calls into question the adequacy of the notice of the permit or change application. Accordingly, use of the term “may” is appropriate to reflect the department discretion to resolve corrections to the legal land description on a case-by-case basis.

Based on Comments 41, 42, and 47, NEW RULE 3(3) and NEW RULE 4(3) have been deleted, and the department's discretion to consider corrections to legal descriptions based on improved mapping is incorporated into renumbered NEW RULE 3(3)(f) and (g) and NEW RULE 4(3)(a) and (b) respectively. See Responses 42 and 47.

Comment 42: One commenter argues that NEW RULE 3(4) and NEW RULE 4(4) conflict with (3) of each respective rule and the required level of legal land description is ambiguous (e.g., section vs. quarter-quarter-quarter). They warn that this inconsistency could give some applicants more flexibility than others when relocating points of diversion, places of use, or place of storage (NEW RULE 3(4)(g) and NEW RULE 4(4)(d)).

Response 42: The department agrees that the relationship between NEW RULE 3(3) and (4) and the relationship between NEW RULE 4(3) and (4) is confusing. NEW RULE 3(3) is deleted and NEW RULE 3(4)(f) and (g) are amended for clarification and renumbered NEW RULE 3(3)(f) and (g). NEW RULE 4(3) is deleted and NEW RULE 4(4)(a) and (b) are amended for clarification and renumbered NEW RULE 4(3)(a) and (b).

Renumbered NEW RULES 3(3)(f) and (g) and 4(3)(a) and (b) allow the department to consider corrections to the legal land description of the point of diversion or place of use to be in substantial accordance with the permit or change authorization if the legal land description in the project completion notice does not match the legal land description in the permit or change authorization, but the point of diversion and place of use shown on the project completion map are in the correct location and were completed in the location as marked on the map included with the permit or change application. This is intended to address infrequent occurrences where the point of diversion and place of use were completed in the correct location, but due to mapping errors (usually low-quality maps or near 1/4 section boundaries), the legal land description applied for in the permit or change authorization is incorrect.

The qualifiers in renumbered NEW RULES 3(3) and 4(3) clarify the maximum extent of the department's discretion to determine what constitutes substantial accordance. Substantial accordance allows for minor deviations that do not cause injury or necessitate a change authorization. ARM 36.12.101(69).

Comment 43: One commenter suggests clarifying NEW RULE 3(4)(j) so that if consumptive use was not analyzed in the original permitting process, it will not be newly imposed or defined during verification.

Response 43: NEW RULE 3(4)(j) applies to a permit that relies on mitigation. In these cases, the permit may not exceed the consumptive use authorized because the mitigation component was evaluated for that specific consumptive use and if the consumptive use were to be exceeded, the mitigation would not be adequate.

Comment 44: One commenter had no specific feedback on NEW RULE 3 and expressed appreciation for the clarity in that rule.

Response 44: The department appreciates the feedback.

Comment 45: Commenters generally support NEW RULE 3 on permit verification as drafted under HB 441 (2025) but note that some stakeholders want clearer expectations—particularly

on the required level of detail in legal descriptions and whether corrections are discretionary or mandatory. They offer to work with the department on clarifications.

Response 45: The department appreciates the commenters' support for NEW RULE 3 and the willingness to work with the department.

Comment 46: One commenter recommends adding a specific timeframe for the department to process project completion notices (PCNs) under NEW RULES 3 and 4 on permit and change verification.

Response 46: A specific timeframe to process a project completion notice limit is not feasible given status of provisional permits, final decrees, and project completion notices. In most cases, permits and change authorizations will not be verified until after final decree in a basin. This ensures that the petition process under 85-2-313, MCA, will be completed for permits (and changes on those permits) and ensures verification of changes on claims is consistent with adjudication of existing rights in the final decree. Accordingly, project completion notices have been and will continue to be filed long before final decree is issued triggering the verification process.

Comment 47: One commenter argues that NEW RULES 3 and 4 are inconsistent and overly strict. They allege a conflict between allowing projects in "substantial accordance" (minor deviations allowed) and prohibiting anything "outside" authorized parameters. Because water use and project design often change slightly in practice, strict compliance would create unnecessary difficulties, costs, and repeated applications. They recommend allowing reviewers discretion to judge whether deviations materially affect other users and suggest using additional public notice rather than requiring new applications when projects differ in non-substantive ways. They also highlight challenges with defining "historical use" for new applications in such cases.

Response 47: NEW RULE 3(3) is deleted and NEW RULE 3(4)(f) and (g) are amended for clarification and renumbered NEW RULE 3(3)(f) and (g). NEW RULE 4(3) is deleted and NEW RULE 4(4)(a) and (b) are amended for clarification and renumbered NEW RULE 4(3)(a) and (b).

NEW RULES 3 and 4 are consistent with 85-2-311, 85-2-312, 85-2-315, and 85-2-402, MCA, and the definition of "substantial accordance," which allows for minor deviations that do not cause injury or necessitate a change authorization. ARM 36.12.101(69). See Response 42 for an explanation of renumbered NEW RULE 3(3)(f) and (g) and renumbered NEW RULE 4(3)(a) and (b).

If the department determines a permit or change was not completed in substantial accordance, NEW RULE 5(3) allows the appropriator to provide a written plan to bring the permit or change authorization into substantial accordance. The written plan may include steps to file a change application or an additional permit to bring the water use into compliance with the Water Use Act and thus bring the specific permit or change into substantial accordance with the terms of the authorization. The department will suspend action on the verification of the permit or change authorization for up to two years to allow the appropriator time to execute and complete their compliance plan.

Comment 48: One commenter recommends clarifying NEW RULE 4(4)(c) and (d)(iii) so that consumptive use limitations apply only when they were included in the original change authorization, not imposed retroactively.

Response 48: The department agrees. The department proposes to modify NEW RULE 4(4)(c) and (d) to account for situations in which consumptive use was not a condition, limitation, or restriction of the change authorization.

Comment 49: One commenter points out for NEW RULE 4 that because conversion of irrigation method is exempt from change authorization under 85-2-102 (7) (b), MCA, unique situations may arise. For instance, if a landowner changes irrigation methods outside a prior place-of-use change, consumptive use could increase compared to the historic use relied on in that earlier authorization. They ask whether the department would then find the project out of substantial accordance due to exceeding consumptive use.

Response 49: The purpose of NEW RULE 4 is to outline what constitutes substantial accordance with a change authorization. The department will be reviewing the project completion notice to the authorized change to determine if the project was completed in substantial accordance with the change authorization. The department agrees that a change in method of irrigation does not require a change authorization from the department. Unique circumstances will be addressed on a case-by-case basis depending on the facts.

Comment 50: One commenter states they have no specific feedback on NEW RULE 4 and appreciate the clarity that the rule provides.

Response 50: The department appreciates the feedback.

Comment 51: One commenter generally supports NEW RULE 4 on change verification as drafted under HB 441 but emphasizes the need for clarification, similar to NEW RULE 3. They stress that HB 441 was intended to align change authorizations with final decrees while avoiding re-litigation of completed authorizations. To achieve consistency across abstracts, they propose revised language limiting the department's evaluation to: (a) elements authorized for change, (b) authorization terms and conditions, (c) final decree elements under 85-2-402(9), MCA, and (d) elements modified or revoked under 85-2-313, 85-2-314, and 85-2-315, MCA.

Response 51: The department agrees additional clarification is appropriate. NEW RULE 4(1) is amended to clarify the extent to which elements of a change authorization are subject to verification.

Comment 52: The commenter asks if a change of use authorization is revoked under NEW RULE 5(4)(b), does the underlying water right revert to its original parameters, or does the applicant need a new authorization to restore it? What appears in the final decree? They also raise questions about situations where the department's determination of historic use is less than what the court decreed, or the project is only partially completed. They ask what happens to the "balance" of acreage or flow rate not acknowledged or used—how it is treated in the final decree—and note that only a court can determine abandonment of water rights, not the department.

Response 52: The comment illustrates the complexity of reconciling differences between change authorizations issued prior to the final decree of the underlying water right.

As a general rule, change authorizations for pre-July 1, 1973, water rights will be verified after a final decree is issued for the underlying water right. If a change authorization is revoked through verification, the underlying water right reverts to the version adjudicated in the final decree. Verification of a change authorization does not make a determination regarding remainder or abandonment of any portion of an existing water right adjudicated in a final decree but not completed through the change authorization.

Consistent with HB 441 (2025), the verification process will determine whether a water user completed an appropriation as authorized and to reconcile discrepancies between a final decree and a change authorization on a water right. If the department proposes to modify or revoke a change authorization, NEW RULES 5 and 6 provide the process for an appropriator to propose an alternative compliance plan or to request a show cause hearing. Ultimately, the hypothetical questions raised in the comment are more appropriately resolved through the verification and hearing process provided for by HB 441 (2025) and NEW RULES 2 through 6.

Comment 53: One commenter stated they have no specific feedback on NEW RULE 5 and appreciates the clarity provided in that rule.

Response 53: The department appreciates the feedback.

Comment 54: One commenter generally supports NEW RULE 5 on verification decisions as drafted under HB 441.

Response 54: The department appreciates the commenter's support for this rule.

Comment 55: For NEW RULE 5, one commenter suggests renaming the process to "certification" if the department will be issuing certificates. They also request allowing 60 to 90 days for appropriators to respond, especially for long-outstanding PCNs, as shorter deadlines would be unreasonable.

Response 55: HB 441 (2025) was enacted by the Montana Legislature to provide the process "to verify whether the appropriation was completed in substantial accordance with the terms" of a permit or change in appropriation right. The proposed definition of "verification" or "verify" is consistent with the terminology and process set forth in HB 441.

The department agrees that 30 days may not be adequate for an appropriator to evaluate and respond to the verification abstract. NEW RULE 5(3) and (4) are amended to allow a 60-day response period.

Comment 56: One commenter states they have no specific feedback on NEW RULE 6 and appreciate the clarity provided in that rule.

Response 56: The department appreciates the feedback.

Comment 57: One commenter states that NEW RULE 6 on hearings and final actions aligns with HB 441's intent to ensure due process in verification disputes, and they generally support the rule as drafted.

Response 57: The department appreciates the support.

Comment 58: One commenter specifically expressed support for the NEW RULE 6(1) and (2).

Response 58: The department appreciates the support.

Comment 59: One commenter supports NEW RULE 7(3), highlighting its role in determining consumptive value for leases. The commenter emphasizes the need for additional clarity regarding how consumptive use is calculated, recommends further clarification on crop consumptive use methodology (specifically which figures/columns are used), and supports allowing water right holders to use existing consumptive use analyses from recent change authorizations.

Response 59: The department agrees. New Rule 7(3)(a)(i) is amended to include the following text: “This methodology will use the priority date of the right being leased to determine the applicable county management factor.”

Comment 60: One commenter supports NEW RULE 7(4), highlighting its role in balancing flexibility with the protection of other water right holders. They urge the department to interpret the law pragmatically and not to hamstring the intended flexibility with the same level of scrutiny applied to change applications. They stress that the law is not meant to apply the same scrutiny as change authorizations and warn against getting bogged down in detailed analyses, such as conveyance loss in ditch systems, which could undermine the statute’s goal of expedited flexibility and efficiency.

Response 60: The department appreciates the support

Comment 61: One commenter supports NEW RULE 7(5), noting that allowing temporary storage in a lease makes the tool more effective than previous law. They support requirements for applicants to specify storage capacity and calculation methods and request further clarity on whether the department will require retirement of acres to offset storage capacity and/or evaporative losses—emphasizing the need for clear expectations.

Response 61: SB 178 limits the amount of water that can be temporarily leased to the consumptive use volume of the leased right. Accordingly, it is not necessary to determine evaporative losses from the temporary storage because the entire volume of the leased water can be consumed.

Comment 62: One commenter expressed support for the written notice requirement in NEW RULE 7(6).

Response 62: The department appreciates the support.

Comment 63: One commenter recommended that NEW RULE 7 require an applicant to prove the amount needed for the lessee’s intended beneficial use to prevent waste. They propose that the rule use existing standards and require additional documentation from the applicant explaining how the volume was determined if the standard is exceeded.

Response 63: SB 178 (2025) provides flexibility to temporarily lease a water right for a short duration of time without requiring the water right owner to comply with the requirements for a change authorization pursuant to 85-2-402, MCA. SB 178 protects other water users by limiting

the amount of water that can be temporarily leased to the consumptive use of the leased right, requiring measurement and reporting, limiting the number of years a water right can be temporarily leased, limiting the number of days in a year the water right can be leased, prohibiting the use of water on the original place of use for the water right, and requiring an adverse effect plan. Although SB 178 requires that water may only be leased for a beneficial purpose and requires identification of the purpose and place of use, requiring the appropriator to prove the amount of water needed for the proposed beneficial use by the lessee imposes a greater burden than contemplated by SB 178 considering the above limitations on a temporary lease.

Comment 64: One commenter commended the department's efforts with NEW RULE 7 and suggested adding fuel receipts as evidence of water use (since some pumps use diesel/propane, not electricity). The commenter also recommends defining the time period for calculating historic water use, recommending a five-year period for consistency.

Response 64: The department agrees that there may be other records that document use of a pump. NEW RULE 7(2)(c) is amended to allow other records that document pump usage.

The department also agrees that the time-period used to calculate historical water use for an irrigation water right needs to be better defined. However, the department disagrees that use of the five-year lookback period for determining consumptive use is appropriate and instead proposes to use the priority date of the right being leased to determine the applicable county management factor. This methodology will ensure consistency with the time frames applicable for change applications. NEW RULE 7(3)(a)(i) is amended to include the following text: "This methodology will use the priority date of the right being leased to determine the applicable county management factor."

Comment 65: For NEW RULE 7, one commenter requests adding rule language to clarify what happens if more water is used than approved under a temporary lease, including the process for enforcement actions such as permit revocation or fines.

Response 65: Section 85-2-428(12), MCA provides the enforcement for violations of a short-term lease. Additional rulemaking is not necessary.

Comment 66: One commenter supports SB 178 and NEW RULE 7 for temporary water right leases, emphasizing its role in providing flexibility for water users and conserving fisheries habitats. They support limiting leases to the consumptive portion of the right, the department's methods for quickly and accurately determining that portion, and allowing use of recent consumptive use analyses. They endorse requirements for applicants to disclose and mitigate adverse effects "in aggregate," with clarification for what constitutes adequate mitigation and who holds the burden of proof in objections. They support the ability to temporarily add storage, with clarity needed on capacity and categorizations (consumptive/non-consumptive). Finally, they recommend the department provide criteria for evaluating the reasonableness of proposed lease volumes to prevent water waste, accepting volumes within standard usage as presumptively reasonable and requiring justification for outliers.

Response 66: SB 178 (2025) provides flexibility to temporarily lease a water right for a short duration of time without requiring the water right owner to comply with the requirements for a change authorization pursuant to 85-2-402, MCA. SB 178 protects other water users by limiting the amount of water that can be temporarily leased to the consumptive use of the leased right, requiring measurement and reporting, limiting the number of years a water right can be temporarily leased, limiting the number of days in a year the water right can be leased; prohibiting the use of water on the original place of use for the water right, and requiring an adverse effect plan. Although SB 178 requires that water may only be leased for a beneficial purpose and requires identification of the purpose and place of use, requiring the appropriator to prove the amount of water needed for the proposed beneficial use by the lessee imposes a greater burden than contemplated by SB 178 considering the above limitations on a temporary lease. For similar reasons, it is unnecessary to calculate consumed and non-consumed portions of temporary storage of leased water because the water being leased is already restricted to the consumptive use of the right. The restriction that only the consumed portion of a water right may be leased negates the need to monitor the extent to which stored water is consumed through evaporation.

With regard to the burden of proof, SB 178 places the initial burden of proof on the applicant to identify potential adverse effects and provide a description of planned actions to mitigate potential adverse effects that, in aggregate, demonstrate no adverse effect. Once an application has been authorized, SB 178 allows for objections. The objector has the burden to file a valid objection indicating that the rights of other appropriators would be adversely affected by the lease of the appropriation right. If the department determines the objection is valid, the lease is suspended and the owner of the water right being leased has the burden to prove by a preponderance of the evidence that the water rights of other appropriators will not be adversely affected by the lease. There is no need for rules to clarify the respective burdens of proof based on the clear language of SB 178.

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Approval

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