MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 24

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are found at the back of each register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Administrative Rules Bureau at (406) 444-2055.

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BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 2.59.1701 and 2.59.1704 pertaining to definitions and license renewal of mortgage brokers and loan originators	)	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On January 26, 2005, the Division of Banking and Financial Institutions proposes to amend the above-stated rules pertaining to mortgage broker and loan originator license renewals.

2. The Department of Administration, Division of Banking and Financial Institutions, will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Division of Banking and Financial Institutions no later than 5:00 p.m. on January 18, 2005, to advise us of the nature of the accommodation that you need. Please contact Christopher Romano, Division of Banking and Financial Institutions, P.O. Box 200546, Helena, Montana 59620-0546; telephone (406) 841-2928; TDD (406) 444-1421; facsimile (406) 841-2930; e-mail to cromano@state.mt.us.

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

<u>2.59.1701 DEFINITIONS</u> For the purposes of the Montana Mortgage Broker and Loan Originator Licensing Act and this subchapter, the following definitions apply:

(1) through (5) remain the same.

<u>(6) "Mortgage broker entity" means corporation, limited liability corporation, partnership, limited liability partnership or any other organization other than a sole proprietorship.</u>

(6) and (7) remain the same, but are renumbered (7) and (8).

AUTH: 32-9-130, MCA
IMP: 32-9-103, 32-9-109, 32-9-115, 32-9-116, 32-9-117, 32-9-123, MCA

<u>2.59.1704 LICENSE RENEWAL</u> (1) The renewal fees shall be <u>$50 for mortgage broker entities that are not sole proprietorships</u>, $300 for <u>individual</u> mortgage brokers <u>and sole proprietors</u> and $250 for loan originators. The renewal application forms will be sent by the department to each licensed mortgage broker or loan originator in April. The application must be postmarked or received by May 31.

(2) The continuing education year will be from June 1 to May 31.

(3) No more than six hours of continuing education credits may be carried over to the next licensing year.

(3) through (8) remain the same, but are renumbered (4) through (9).

AUTH: 32-9-130, MCA
IMP: 32-9-117, 32-9-118, 32-9-123, MCA

Reasonable Necessity: The Division has determined that it is reasonably necessary to amend ARM 2.59.1701 and 2.59.1704(1) in order to define mortgage broker entity and reduce the amount of the mortgage broker entity licensing renewal fee from $300 to $50 saving approximately 100 licensees $25,000. All individual mortgage brokers and loan originators will still be subject to the same renewal fees. This change will provide relief to small mortgage broker entities who would be subject to pay both the entity and individual mortgage broker and loan originators licensing renewal fees.

The Division has determined that the new section, ARM 2.59.1704(3) is reasonably necessary to allow mortgage brokers and loan originators to carry over no more than six credit hours over to the next licensing year. Mortgage brokers and loan originators are required to complete 12 credit hours of continuing education each year from June 1 to May 31. The ability to carry over six of these credit hours over to the next year will allow mortgage brokers and loan originators to complete more of their continuing education requirement at one time. The Division also recognizes that some course offering may exceed 12 credit hours.

4. Concerned persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Mark Prichard, Legal Counsel, Division of Banking and Financial Institutions, P.O. Box 200546, Helena, Montana 59620-0546; faxed to the office at (406) 841-2930; e-mailed to mprichard@state.mt.us, and must be received no later than January 21, 2005.

5. If persons who are directly affected by the proposed amendment wish to present their data, views or arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit the request along with any comments they have to Mark Prichard, Legal Counsel, Division of Banking and Financial Institutions, P.O. Box 200546, Helena, Montana 59620-0546; faxed to the office at (406) 841-2930; e-mailed to mprichard@state.mt.us, and must be received no later than January 21, 2005.

6. If the Division receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of those who are directly affected by the

proposed amendment, from the appropriate administrative rule review committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 40 based on the number of mortgage broker and loan originator licensees issued as of publication of this notice.

7. An electronic copy of this Notice of Proposed Amendment is available through the Department's site on the World Wide Web at http://www.discoveringmontana.com/doa, under "public meetings/notices;" and "administrative rule notices." The department strives to make the electronic copy of this Notice of Proposed Amendment 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. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems and that a person's technical difficulties in accessing or posting to the e-mail address do not excuse late submission or comments.

8. The Division of Banking and Financial Institutions maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this division. Persons who wish to have their name added to the mailing list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding division rulemaking actions. Such written requests may be mailed or delivered to Christopher Romano, Division of Banking and Financial Institutions, 301 S. Park, Ste 316, P.O. Box 200546, Helena, Montana 59620-0546; faxed to the office at (406) 841-2930; emailed to cromano@state.mt.us, or may be made by completing a request form at any rules hearing held by the Division of Banking and Financial Institutions.

9. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

By: /s/ Steve Bender
Steve Bender, Acting Director
Department of Administration

By: /s/ Dal Smilie
Dal Smilie, Rule Reviewer

Certified to the Secretary of State December 6, 2004.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.30.1303, 17.30.1304, 17.30.1310, 17.30.1322, 17.30.1330, 17.30.1341 and 17.30.1343 pertaining to concentrated animal feeding operations (CAFOs) and adoption of Department Circular DEQ 9 (Montana Technical Standards for CAFOs)	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (WATER QUALITY)

TO: All Concerned Persons

1. On January 14, 2005, at 8:30 a.m., the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, 1520 Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., January 3, 2005, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@state.mt.us.

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

<u>17.30.1303 INCORPORATIONS BY REFERENCE</u> (1) and (2) remain the same.

(3) Where the department has adopted a federal regulation or statute by reference, the following shall apply:

(a) ~~References~~ <u>references</u> in the federal regulations to "administrator", "regional administrator", <u>"director",</u> or "US environmental protection agency", or the like, should be read to mean "department"~~.~~<u>;</u>

(b) ~~Where~~ <u>where</u> the department incorporates by reference a subpart of a federal regulation, both the subpart and its constituent sections and subsections are also incorporated by reference.

(4) All of the incorporations by reference of federal agency regulations listed in the table in (7) ~~of this rule~~ shall refer to federal agency regulations as they have been codified in the July 1, 1991, edition of Title 33 and 40 of the Code of Federal Regulations (CFR)<u>, unless another codification date is specified in this rule</u>.

(5) and (6) remain the same.

(7) The list of incorporations by reference follows:

ARM 17.30...	33 CFR ...	Description of Regulation

(a) through (i) remain the same.

ARM 17.30...	40 CFR ...	
(j) 1330	~~Appendix B of Part 122~~ Part 412 (July 1, 2003 edition)	~~Criteria for determining whether a facility or operation merits classification as a concentrated~~ Concentrated animal feeding operation (CAFO) point source category effluent limitations and guidelines.

(k) through (at) remain the same.

AUTH: 75-5-304, MCA
IMP: 75-5-304, 75-5-401, MCA

REASON: On February 12, 2003, the United States Environmental Protection Agency (EPA) published revisions to the federal Clean Water Act regulations pertaining to concentrated animal feeding operations (CAFOs). These rules updated EPA's 1976 CAFO regulations and became effective on April 14, 2003.

The Board of Environmental Review has adopted the 1976 CAFO regulations by reference in ARM 17.30.1303. Under EPA's revised rules, states with delegated permitting programs are required to revise their rules to reflect the revised federal regulations. The amendment to ARM 17.30.1303 noted above incorporates by reference the revised federal effluent limitations and guidelines for CAFOs. With the exception of the incorporation by reference in (7), this rule proposal will adopt the revised federal rules and will codify them in the ARM.

The revised effluent limitations and guidelines incorporated by reference continue to prohibit the discharge of manure and other process wastewater pollutants from existing sources, except for allowing the discharge of process wastewater whenever precipitation events cause an overflow from a facility designed, constructed, operated and maintained to contain all process-generated wastewaters plus the runoff and direct precipitation from a 25-year, 24-hour rainfall event.

The revised effluent limitations and guidelines include several changes, however. New source performance standards for large swine, poultry, and veal calf CAFOs have been established. These standards prohibit the discharge of manure and other process wastewater pollutants except under the provisions of an upset or bypass, and specify that a facility must be properly designed, constructed, operated, and maintained to contain all process-generated wastewaters plus the runoff and direct precipitation from a 100-year, 24-hour rainfall event.

Certain flexibilities have been included in this revised rule. Large dairy cow and cattle other than veal calf CAFOs are

allowed to request a voluntary alternative performance standard. Large swine, poultry, and veal calf CAFOs may request a voluntary superior environmental performance standard. These alternative standards set forth a process to allow CAFOs to treat and discharge process-generated wastewater, rather than contain it.

Additionally, best management practices for the land application of manure, litter, and process wastewater and additional measures including visual inspections, installation of depth markers in all open surface liquid impoundments, corrective actions, mortality handling, and recordkeeping requirements have been established for large dairy cow, cattle, swine, poultry, and veal calf CAFOs. The effluent guidelines are based on the degree of control that can be economically achieved using various levels of pollution control technology. EPA conducted an extensive economic analysis of each animal sector in developing these effluent limitation guidelines.

EPA determined that these changes to the CAFO effluent limitations and guidelines were necessary in order to protect water quality. In 1998, EPA and the United States Department of Agriculture (USDA) jointly developed a unified national strategy to minimize the water quality and public health impacts of animal feeding operations. This unified national strategy identified seven issues to address in order to resolve these concerns. These issues include: developing and implementing comprehensive nutrient management plans; accelerating voluntary, incentive-based programs; implementing and improving the existing regulatory program; coordinating research, technical innovation, compliance assistance, and technology transfer; encouraging industry leadership; increasing data coordination; and establishing better performance measures and greater accountability. The revised regulations are based on this unified strategy to protect water quality and public health.

17.30.1304 DEFINITIONS In this subchapter, the following terms have the meanings or interpretations indicated below and shall be used in conjunction with and are supplemental to those definitions contained in 75-5-103, MCA.

(1) and (2) remain the same.

(3)(a) "Animal feeding operation (AFO)" means a lot or facility, ~~(~~other than an aquatic animal production facility~~)~~, where the following conditions are met:

(i) and (ii) remain the same.

(b) Two or more animal feeding operations under common ownership are considered, for the purposes of ~~these rules~~ determining the number of animals at an operation, to be a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes.

(4) through (63) remain the same.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: This amendment to ARM 17.30.1304 is necessary in order to provide clarification about how the rules address operations with common ownership and to conform to the language that is used in the revised federal regulations.

17.30.1310 EXCLUSIONS (1) The following discharges do not require MPDES permits:

(1) through (3) remain the same, but are renumbered (a) through (c).

~~(4)~~ (d) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations (CAFOs) as defined in ARM ~~17.30.1304(3)~~ 17.30.1330, discharges from concentrated aquatic animal production facilities as defined in ARM 17.30.1304(6), discharges to aquaculture projects as defined in ARM 17.30.1304(5), and discharges from silvicultural point sources as defined in ARM 17.30.1304(56).

(5) through (7) remain the same, but are renumbered (e) through (g).

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The definition of concentrated animal feeding operations will be moved to a different rule of the ARM. This amendment is necessary in order to reference the new rule. The proposed renumbering of the rule is necessary to meet Secretary of State formatting standards.

17.30.1322 APPLICATION FOR A PERMIT (1) Any person who discharges or proposes to discharge pollutants and who does not have an effective permit, except persons covered by general permits under ARM 17.30.1341, excluded under ARM 17.30.1310, or a user of a privately owned treatment works unless the department requires otherwise under ARM 17.30.1344, shall submit a complete application, ~~(~~which must include a BMP program if necessary under 40 CFR 125.102~~)~~, to the department in accordance with this rule and ARM 17.30.1364, ~~and~~ 17.30.1365, 17.30.1370 through 17.30.1379, and 17.30.1383. All concentrated animal feeding operations (CAFOs) shall seek coverage under an MPDES permit as described in ARM 17.30.1330(5).

(2) through (6)(l) remain the same.

(7) Existing manufacturing, commercial, mining, and silvicultural dischargers applying for MPDES permits shall provide the following information to the department, using application forms provided by the department:

(a) remains the same.

(b) a line drawing of the water flow through the facility with a water balance, showing operations contributing wastewater to the effluent and treatment units. Similar processes, operations, or production areas may be indicated as a single unit, labeled to correspond to the more detailed identification

under (7)(c) ~~below~~. The water balance must show approximate average flows at intake and discharge points and between units, including treatment units. If a water balance cannot be determined (for example, for certain mining activities), the applicant may provide instead a pictorial description of the nature and amount of any sources of water and any collection and treatment measures;

(c) remains the same.

(d) if any of the discharges described in (7)(c) ~~above~~ are intermittent or seasonal, a description of the frequency, duration, and flow rate of each discharge occurrence, ~~(~~except for storm water runoff, spillage, or leaks~~)~~;

(e) and (f) remain the same.

(g) information on the discharge of pollutants specified in this subsection. When "quantitative data" for a pollutant are required, the applicant ~~must~~ shall collect a sample of effluent and analyze it for the pollutant in accordance with analytical methods approved under 40 CFR Part 136. When no analytical method is approved, the applicant may use any suitable method but ~~must~~ shall provide a description of the method. When an applicant has ~~2~~ two or more outfalls with substantially identical effluents, the department may allow the applicant to test only ~~1~~ one outfall and report that the quantitative data also apply to the substantially identical outfalls. The requirements in (7)(g)(iii)(A)~~,~~ and (B)~~,~~ and (iv) ~~below~~ that an applicant ~~must~~ shall provide quantitative data for certain pollutants known or believed to be present do not apply to pollutants present in a discharge solely as the result of their presence in intake water; however, an applicant ~~must~~ shall report such pollutants as present. Grab samples must be used for pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, and fecal coliform. For all other pollutants, 24-hour composite samples must be used. However, a minimum of ~~1~~ one grab sample may be taken for effluents from holding ponds or other impoundments with a retention period greater than 24 hours, and a minimum of ~~1~~ one to ~~4~~ four grab samples may be taken for storm water discharges depending on the duration of the discharge. One grab sample must be taken in the first hour ~~(~~or less~~)~~ of discharge with ~~1~~ one additional grab sample taken in each succeeding hour of discharge up to a minimum of ~~4~~ four grab samples for discharges lasting ~~4~~ four or more hours. In addition, the department may waive composite sampling for any outfall for which the applicant demonstrates that the use of an automatic sampler is infeasible and that the minimum of ~~4~~ four grab samples will be a representative sample of the effluent being discharged. An applicant is expected to "know or have reason to believe" that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant. ~~(~~For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water runoff from the facility.~~)~~

(i)(A) through (8)(d)(i)(K) remain the same.

(ii) The department may waive the testing and reporting requirements for any of the pollutants or flow listed in

(8)(d)(i) ~~above~~ if the applicant submits a request for such a waiver before or with his application which demonstrates that information adequate to support issuance of a permit can be obtained through less stringent requirements.

(iii) If the applicant is a new discharger, he ~~must~~ shall complete forms provided by the department by providing quantitative data in accordance with (8)(d) ~~above~~ no later than two years after commencement of discharge. However, the applicant need not complete those portions of the forms requiring tests which he has already performed and reported under the discharge monitoring requirements of his MPDES permit.

(iv) The requirements of (8)(d)(i) and (iii) ~~above,~~ that an applicant ~~must~~ shall provide quantitative data or estimates of certain pollutants~~,~~ do not apply to pollutants present in a discharge solely as a result of their presence in intake water. However, an applicant ~~must~~ shall report such pollutants as present. Net credit may be provided for the presence of pollutants in intake water if the requirements of ARM 17.30.1345(9) are met.

(e) through (h) remain the same.

(9) New and existing ~~concentrated animal feeding operations~~ CAFOs, ~~(~~defined in ARM ~~17.30.1304(3))~~ 17.30.1330, and concentrated aquatic animal production facilities, ~~(~~defined in ARM 17.30.1304(6)~~)~~, shall provide the following information to the department, using the application form provided by the department:

(a) for ~~concentrated animal feeding operations~~ CAFOs:

(i) name of the owner or operator;

(ii) facility location and mailing addresses;

~~(i)~~ (iii) specific information about the type and number of animals, whether in open confinement ~~and~~ or housed under roof (beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);

~~(ii)~~ (iv) the total number of acres used for confinement feeding~~;~~ and the total number of acres under control of the applicant available for land application of manure, litter, or process wastewater;

(iii) remains the same, but is renumbered (v).

(vi) latitude and longitude of the production area (entrance to production area);

(vii) a topographic map of the geographic area in which the concentrated animal feeding operation is located showing the specific location of the production area and land application area, in lieu of the requirements of (6)(g);

(viii) the type of containment and storage (anaerobic lagoon, roofed storage shed, storage ponds, underfloor pits, above ground storage tanks, below ground storage tanks, concrete pad, impervious soil pad, other) and total capacity for manure, litter, and process wastewater storage (tons/gallons);

(ix) estimated amounts of manure, litter, and process wastewater generated per year (tons/gallons);

(x) estimated amounts of manure, litter, and process wastewater transferred to other persons per year (tons/gallons); and

(xi) for CAFOs that must seek coverage under a permit after December 31, 2006, certification that a nutrient management plan as specified in ARM 17.30.1343 has been completed and will be implemented upon the date of permit coverage;

(b) through (17)(i) remain the same.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: Under the 1976 CAFO regulations, a permit is not required for CAFOs that do not discharge except in the event of a 25-year, 24-hour rainfall event. However, EPA determined that the 25-year, 24-hour storm event permit exemption included in the 1976 CAFO regulations has created confusion and ambiguity that undermines the ability of the permitting authorities to effectively implement the CAFO regulations. The revised federal regulations, therefore, eliminate the 25-year, 24-hour rainfall event permit exemption and specify that all CAFOs have a mandatory duty to apply for an NPDES permit. Eliminating the permit exemption is necessary to ensure that all CAFOs will be appropriately permitted and that waste control facilities are properly designed, constructed, operated, and maintained to meet the applicable effluent limitations. The proposed amendment of (1) is necessary to reflect the revised federal regulations requiring permit coverage for all CAFOs and to effectively implement the CAFO regulations.

The revised federal regulations also specify specific information that must be included in any permit application submitted by a CAFO. The proposed amendment of (9) incorporates the required information stated in the revised federal regulations. The new data elements in the permit application are necessary to correspond with the new CAFO rule requirements, including land application information.

"Must" is changed to "shall" in several places throughout this rule. These are nonsubstantive amendments, which are necessary to standardize the terms used for mandatory requirements in administrative rules.

17.30.1330 CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOs)

~~(2)~~ (1) Concentrated animal feeding operations are point sources ~~subject to the~~ that require MPDES permits ~~program~~ for discharges or potential discharges. Once an operation is defined as a CAFO, the MPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

(2) In this rule, the following terms have the meanings indicated below:

~~(1)~~ (a) "Concentrated animal feeding operation (CAFO)" means an animal feeding operation (AFO), as defined in ARM 17.30.1304(3), that is defined as a large or as a medium CAFO under this rule, or that is designated as a CAFO ~~which meets the criteria in Appendix B of 40 CFR Part 122, or which~~ by the department ~~designates~~ under (3) ~~of this rule~~.

(b) "Land application area" means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter, or process wastewater from the production area is or may be applied.

(c) "Large concentrated animal feeding operation (large CAFO)" means an AFO that stables or confines as many as or more than the number of animals specified in any of the following categories:

(i) 700 mature dairy cows, whether milked or dry;

(ii) 1,000 veal calves;

(iii) 1,000 cattle other than mature dairy cows or veal calves. "Cattle" includes, but is not limited to, heifers, steers, bulls, and cow/calf pairs;

(iv) 2,500 swine each weighing 55 pounds or more;

(v) 10,000 swine each weighing less than 55 pounds;

(vi) 500 horses;

(vii) 10,000 sheep or lambs;

(viii) 55,000 turkeys;

(ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;

(x) 125,000 chickens, other than laying hens, if the AFO uses other than a liquid manure handling system;

(xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;

(xii) 30,000 ducks, if the AFO uses other than a liquid manure handling system;

(xiii) 5,000 ducks, if the AFO uses a liquid manure handling system.

(d) "Manure" includes manure, bedding, compost, and raw materials or other materials commingled with manure or set aside for disposal.

(e) "Medium concentrated animal feeding operation" (medium CAFO) means any AFO with the type and number of animals that fall within any of the ranges listed in (2)(e)(i) and which has been defined or designated as a CAFO. An AFO is a medium CAFO if:

(i) the type and number of animals that it stables or confines falls within any of the following ranges:

(A) 200 to 699 mature dairy cows, whether milked or dry;

(B) 300 to 999 veal calves;

(C) 300 to 999 cattle other than mature dairy cows or veal calves. "Cattle" includes, but is not limited to, heifers, steers, bulls, and cow/calf pairs;

(D) 750 to 2,499 swine each weighing 55 pounds or more;

(E) 3,000 to 9,999 swine each weighing less than 55 pounds;

(F) 150 to 499 horses;

(G) 3,000 to 9,999 sheep or lambs;

(H) 16,500 to 54,999 turkeys;

(I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;

(J) 37,500 to 124,999 chickens, other than laying hens, if the AFO uses other than a liquid manure handling system;

(K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;

(L) 10,000 to 29,999 ducks, if the AFO uses other than a liquid manure handling system; or

(M) 1,500 to 4,999 ducks, if the AFO uses a liquid manure handling system; and

(ii) one of the following conditions are met:

(A) pollutants are discharged into state waters through a man-made ditch, flushing system, or other similar man-made device; or

(B) pollutants are discharged directly into state waters which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(f) "Process wastewater" means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs, or bedding.

(g) "Production area" means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes, but is not limited to, open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes, but is not limited to, lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes, but is not limited to, feed silos, silage bunkers, and bedding materials. The waste containment area includes, but is not limited to, settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of "production area" is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

(h) "Small concentrated animal feeding operation" (small CAFO) means an AFO that is designated as a CAFO and is not a medium CAFO.

(3) On a case-by-case basis, the department may designate any animal feeding operation as a ~~concentrated animal feeding operation~~ CAFO upon determining that it is a significant contributor of ~~pollution~~ pollutants to state waters. In making this designation the department shall consider the following factors:

(a) through (c) remain the same.

(d) the slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes, manure, and process waste waters into state waters; and

(e) remains the same.

(4) No animal feeding operation may be designated under this rule unless the department has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no animal feeding operation with ~~less than the~~ numbers of animals ~~set forth in Appendix B of 40 CFR Part 122~~ less than those established in (2)(e)(i) may be designated as a ~~concentrated animal feeding operation~~ CAFO unless:

(a) and (b) remain the same.

~~(5) A permit application is not required from a concentrated animal feeding operation designated under this rule until the department has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program.~~

~~(6) The board hereby adopts and incorporates herein Appendix B of 40 CFR Part 122 which is an appendix to a federal agency rule setting forth criteria for determining whether a facility or operation merits classification as a concentrated animal feeding operation. See ARM 17.30.1303 for complete information about all materials incorporated by reference.~~

(5) All CAFO owners or operators shall seek coverage under an MPDES permit, except as provided in (5)(a). Specifically, the CAFO owner or operator shall either apply for an individual MPDES permit or submit an application for coverage under an MPDES CAFO general permit. A facility seeking coverage under a CAFO general discharge permit issued in accordance with ARM 17.30.1341 shall include the information specified in ARM 17.30.1322(6)(a) through (f) and (9), including a topographic map. If the department has not made a general permit available to the CAFO, the CAFO owner or operator shall submit an application for an individual permit to the department.

(a) An owner or operator of a large CAFO does not need to seek coverage under an MPDES permit otherwise required by this rule if the owner or operator has received from the department notification of a determination under (7) that the CAFO has no potential to discharge manure, litter, or process wastewater.

(b) A permit application for an individual permit or application for coverage under a general permit must include the information specified in ARM 17.30.1322(6)(a) through (f) and (9), including a topographic map.

(6) Land application discharges from a CAFO are subject to MPDES requirements. The discharge of manure, litter, or process wastewater to state waters from a CAFO as a result of the application of that manure, litter, or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to MPDES permit requirements, except where it is an agricultural storm water discharge as provided in ARM 17.30.1304(41). For purposes of this rule, where the manure, litter, or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in ARM 17.30.1343(1)(c)(i)(F) through (I), a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO is an agricultural storm water discharge.

(7) The department will make "no potential to discharge" determinations for large CAFOs as follows:

(a) The department may, upon request, make a case-specific determination that a large CAFO has no potential to discharge pollutants to state waters. In making this determination, the department shall consider the potential for discharges from both the production area and any land application areas. The department shall also consider any record of prior discharges by the CAFO. In no case may the CAFO be determined to have no potential to discharge if it has had a discharge within the five years prior to the date of the request submitted under this section. For purposes of this rule, the term "no potential to discharge" means that there is no potential for any CAFO manure, litter, or process wastewater to be added to state waters under any circumstance or climatic condition. A determination that there is "no potential to discharge" for purposes of this section relates only to discharges of manure, litter, and process wastewater covered by this rule.

(b) In requesting a determination of "no potential to discharge," the CAFO owner or operator shall submit any information that would support such a determination, within the time frame provided by the department and in accordance with (8) and (9). Such information must include all of the information specified in ARM 17.30.1322(6)(a) through (f) and (9)(a)(i) through (xi). The department has discretion to require additional information to supplement the request, and may also gather additional information through on-site inspection of the CAFO.

(c) Before making a final decision to grant a "no potential to discharge" determination, the department shall issue a notice to the public stating that a "no potential to discharge" request has been received. This notice must be accompanied by a fact sheet that includes, when applicable: a brief description of the type of facility or activity that is the subject of the "no potential to discharge" determination; a brief summary of the factual basis, upon which the request is based, for granting the "no potential to discharge" determination; and a description of the procedures for reaching

a final decision on the "no potential to discharge" determination. The department shall base the decision to grant a "no potential to discharge" determination on the administrative record, which includes all information submitted in support of a "no potential to discharge" determination and any other supporting data gathered by the department. The department shall notify any CAFO seeking a "no potential to discharge" determination of its final determination within 90 days of receiving the request.

(d) The owner or operator shall request a "no potential to discharge" determination by the applicable permit application date specified in (8). If the department's final decision is to deny the "no potential to discharge" determination, the owner or operator shall seek coverage under a permit within 30 days after the denial.

(e) The "no potential to discharge" determination does not relieve the CAFO from the consequences of an actual discharge. Any unpermitted CAFO that discharges pollutants into state waters is in violation of the Montana Water Quality Act even if it has received a "no potential to discharge" determination from the department. Any CAFO that has received a determination of "no potential to discharge," but that anticipated changes in circumstances that could create the potential for a discharge, should contact the department and apply for and obtain permit authorization prior to the change of circumstances.

(f) Where the department has issued a determination of "no potential to discharge," the department retains the authority to subsequently require MPDES permit coverage if circumstances at the facility change, if new information becomes available, or if there is another reason for the department to determine that the CAFO has a potential to discharge.

(8) The following operations shall seek coverage under the MPDES permit program:

(a) operations defined as CAFOs prior to April 14, 2003. For operations that are defined as CAFOs under regulations that are in effect prior to April 14, 2003, the owner or operator shall have or seek to obtain coverage under an MPDES permit as of April 14, 2003, and comply with all applicable MPDES requirements, including the duty to maintain permit coverage in accordance with (9);

(b) operations defined as CAFOs as of April 14, 2003, which were not defined as CAFOs prior to that date. For all CAFOs, the owner or operator of the CAFO shall seek to obtain coverage under an MPDES permit by a date specified by the department, but no later than February 13, 2006;

(c) operations that become defined as CAFOs after April 14, 2003, but which are not new sources. For newly constructed AFOs and AFOs that make changes to their operations that result in becoming defined as CAFOs for the first time after April 14, 2003, but are not new sources, the owner or operator shall seek to obtain coverage under an MPDES permit, as follows:

(i) for newly constructed operations not subject to effluent limitations guidelines, 180 days prior to the time the CAFO commences operation; or

(ii) for other operations (e.g., resulting from an increase in the number of animals) as soon as possible, but no later than 90 days after becoming defined as a CAFO, except that, if an operational change that makes the operation a CAFO would not have made it a CAFO prior to April 14, 2003, the operation has until April 13, 2006, or 90 days after becoming defined as a CAFO, whichever is later;

(d) new sources. New sources shall seek to obtain coverage under a permit at least 180 days prior to the time that the CAFO commences operation;

(e) operations that are designated as CAFOs. For operations designated as a CAFO in accordance with (3), the owner or operator shall seek to obtain coverage under a permit no later than 90 days after receiving notice of the designation;

(f) notwithstanding any other provision of this section, a CAFO that has received a "no potential to discharge" determination in accordance with (7) is not required to seek coverage under an MPDES permit that would otherwise be required by this rule. If circumstances materially change at a CAFO that has received a "no potential to discharge" determination, such that the CAFO has a potential for a discharge, the CAFO has a duty to immediately notify the department, and seek coverage under an MPDES permit within 30 days after the change in circumstances.

(9) No later than 180 days before the expiration of the permit, the permittee shall submit an application to renew its permit in accordance with ARM 17.30.1322. However, the permittee need not continue to seek continued permit coverage or reapply for a permit if:

(a) the facility has ceased operation or is no longer a CAFO; and

(b) the permittee has demonstrated to the satisfaction of the department that there is no remaining potential for a discharge of manure, litter, or associated process wastewater that was generated while the operation was a CAFO or during the closure process, other than agricultural storm water from land application areas.

(10) The permittee shall comply with the effluent standards and limitations as set forth in 40 CFR Part 412.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The above changes adopt the CAFO permit requirements as listed in the revised federal regulations. These rules describe: requirements for CAFOs to obtain permit coverage; applicable definitions; the process for designating an animal feeding operation as a CAFO; who must seek coverage under an MPDES permit; requirements for land application discharges from CAFOs; process and deadlines for a "no potential to discharge" determination; deadlines for a CAFO to seek MPDES permit coverage; and the duty to maintain permit coverage. These revised federal requirements allow the CAFO program to be fully implemented by requiring all CAFOs to obtain a permit

unless a "no potential to discharge" determination is made; defining CAFOs based on the number of animals confined and/or discharges to state waters; clarifying when discharges from land application areas are considered to be agricultural storm water discharges exempt from MPDES requirements; and establishing deadlines for CAFOs to seek and maintain permit coverage. These regulations allow the state to complement the EPA/USDA unified strategy to protect water quality and public health.

<u>17.30.1341 GENERAL PERMITS</u> (1) The department may issue general permits for the following categories of point sources which the board has determined are appropriate for general permitting under the criteria listed in 40 CFR 122.28 as stated in ARM 17.30.1105:

(a) through (f) remain the same.

(g) <u>concentrated</u> animal ~~feedlots~~ <u>feeding operations (CAFOs)</u>;

(h) through (12)(e) remain the same.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

<u>REASON:</u> This amendment is proposed in order to clarify that general permits may be issued for the CAFO point source category and to conform to the language that is used in the revised federal regulations.

<u>17.30.1343 ADDITIONAL CONDITIONS APPLICABLE TO SPECIFIC CATEGORIES OF MPDES PERMITS</u> <u>(1)</u> The following conditions, in addition to those set forth in ARM 17.30.1342, apply to all MPDES permits within the categories specified below:

(1) remains the same, but is renumbered (a).

(a) remains the same, but is renumbered (i).

(i) through (iv) remain the same, but are renumbered (A) through (D).

(b) remains the same, but is renumbered (ii).

(i) through (iv) remain the same, but are renumbered (A) through (D).

(2) remains the same, but is renumbered (b).

(a) through (c) remain the same, but are renumbered (i) through (iii).

(i) and (ii) remain the same, but are renumbered (A) and (B).

<u>(c) All permits issued to concentrated animal feeding operations (CAFOs), in addition to meeting those requirements set forth in ARM 17.30.1322, 17.30.1330, 17.30.1341 and 17.30.1342 must include:</u>

<u>(i) requirements to develop and implement a nutrient management plan. At a minimum, a nutrient management plan must include best management practices and procedures necessary to implement applicable effluent limitations and standards. Permitted CAFOs must have their nutrient management plans developed and implemented by December 31, 2006. CAFOs that seek to obtain coverage under a permit after December 31, 2006, must</u>

have a nutrient management plan developed and implemented upon the date of permit coverage. The nutrient management plan must, to the extent applicable:

(A) ensure adequate storage of manure, litter, and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities;

(B) ensure proper management of mortalities (i.e., dead animals) to ensure that they are not disposed of in a liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities;

(C) ensure that clean water is diverted, as appropriate, from the production area;

(D) prevent direct contact of confined animals with state waters;

(E) ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants;

(F) identify appropriate site specific conservation practices to be implemented, including, as appropriate, buffers or equivalent practices, to control runoff of pollutants to state waters;

(G) identify protocols for appropriate testing of manure, litter, process wastewater, and soil;

(H) establish protocols to land apply manure, litter, or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater; and

(I) identify specific records that will be maintained to document the implementation and management of the minimum elements described in (1)(c)(i)(A) through (H);

(ii) recordkeeping requirements. The permittee shall create, maintain for a period of five years, and make available to the department, upon request, the following records:

(A) all applicable records identified pursuant to (1)(c)(i)(I);

(B) all CAFOs subject to 40 CFR Part 412 must comply with recordkeeping requirements as specified in 40 CFR 412.37(b) and (c), 412.47(b) and (c), and department Circular DEQ 9; and

(C) a copy of the CAFO's site-specific nutrient management plan must be maintained on-site and made available to the department upon request;

(iii) requirements relating to transfer of manure or process wastewater to other persons. Prior to transferring manure, litter, or process wastewater to other persons, large CAFOs must provide the recipient of the manure, litter, or process wastewater with the most current nutrient analysis. The analysis provided must be consistent with the requirements of 40 CFR Part 412 (July 1, 2003 edition). Large CAFOs must retain, for a period of five years, records of the recipient name and

address and the date and approximate amount of manure, litter, or process wastewater transferred to another person;

(iv) annual reporting requirements. The permittee shall submit an annual report to the department. The annual report must include:

(A) the number and type of animals, whether in open confinement or housed under roof including beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other;

(B) estimated amount of total manure, litter, and process wastewater generated by the CAFO in the previous 12 months (tons/gallons);

(C) estimated amount of total manure, litter, and process wastewater transferred to other persons by the CAFO in the previous 12 months (tons/gallons);

(D) total number of acres for land application covered by the nutrient management plan developed in accordance with (1)(c)(i);

(E) total number of acres under control of the CAFO that were used for land application of manure, litter, and process wastewater in the previous 12 months;

(F) summary of all manure, litter, and process wastewater discharges from the production area that have occurred in the previous 12 months, including date, time, and approximate volume; and

(G) a statement indicating whether the current version of the CAFO's nutrient management plan was developed or approved by a certified nutrient management planner; and

(d) the design, monitoring, recordkeeping, reporting, and specifications for concentrated animal feeding operations must be prepared in accordance and comply with the criteria set forth with the technical standards for nutrient management, and effluent limit guidelines established in 40 CFR Part 412 and department Circular DEQ 9, "Montana Technical Standards for Concentrated Animal Feeding Operations," 2004 edition.

~~(3)~~ (2) The board ~~hereby~~ adopts and incorporates ~~herein~~ by reference 40 CFR 122.44(f), which is a federal agency rule setting forth "notification levels" for dischargers of pollutants that may be inserted in a permit upon a petition from the permittee or upon the initiative of the department and 40 CFR Part 412 (July 1, 2003 edition), which establishes the effluent limitation guidelines and best management practices for CAFOs, and department Circular DEQ 9, "Montana Technical Standards for Concentrated Animal Feeding Operations," 2004 edition. See ARM 17.30.1303 for ~~complete~~ additional information about all materials incorporated by reference. All material which is incorporated by reference may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The above changes adopt the CAFO permit requirements as listed in the revised federal regulations. These revised regulations require any permit issued to a CAFO to include: requirements to develop and implement a nutrient management plan; recordkeeping requirements; requirements relating to the transfer of manure or process wastewater to other persons; and annual reporting requirements. By including these requirements in each permit, the CAFO will be able to demonstrate that waste generated at the facility is properly managed and disposed. In addition, the revised federal regulations require the state to establish technical standards for nutrient management. Title 40, Part 412 of the Code of Federal Regulations, adopted by reference, requires large dairy cow, cattle, swine, poultry, and veal calf CAFOs to develop nutrient management plans in accordance with the state's technical standards for nutrient management. These technical standards have been established in Department Circular DEQ 9 as described below. These regulations allow the state to complement the EPA/USDA unified strategy to protect water quality and public health.

The proposed renumbering of the rule is necessary to meet Secretary of State formatting standards.

"Must" is changed to "shall" in several places throughout this rule. These are nonsubstantive amendments, which are necessary to standardize the terms used for mandatory requirements in administrative rules.

ADOPTION OF DEPARTMENT CIRCULAR DEQ 9

Department Circular DEQ 9, which is incorporated by reference in the amendments to ARM 17.30.1343, has been developed in order to establish technical standards for concentrated animal feeding operations. This circular not only establishes the technical standards for nutrient management as required in 40 CFR Part 123.36 (July 1, 2003 edition), but it also provides: design criteria for animal waste management systems; a method for calculating waste production; nutrient management plan requirements; best management practices to be implemented at all CAFOs; a description of appropriate methods to sample waste and soil; methods for calibrating land application equipment; and an outline of the recordkeeping requirements for CAFOs. This circular is intended not only to establish the state's technical standards for CAFOs, but also to provide useful information to producers so that they may more easily comply with the revised regulations.

Section 1: Animal Waste Management System Design

This section of the circular outlines the design criteria that must be considered for animal waste management systems and lists the information that must be submitted to the Department for review. Title 40, Part 412, of the Code of Federal Regulations (July 1, 2003 edition) specifies the effluent limitations applicable to large horse, sheep, dairy cow, cattle,

veal calf, swine, and poultry CAFOs. These effluent limitations state that discharges are only allowed whenever a precipitation event causes an overflow from a facility that is properly designed, constructed, operated, and maintained to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event. Large swine, poultry, and veal calf operations designed and built after April 14, 2003, are not allowed to discharge except as the result of an upset or bypass, and must have waste control facilities designed to contain all process-generated wastewaters plus the runoff and direct precipitation from a 100-year, 24-hour rainfall event.

While the revised federal regulations do not state any specific design criteria for animal waste management systems, these regulations do specify that systems must be properly designed, constructed, operated, and maintained. EPA guidance states that the design volume of the waste storage structures should reflect: the maximum length of time before emptying; all waste accumulated during the storage period; normal precipitation and evaporation during the storage period; normal runoff during the storage period; direct precipitation from a 25-year, 24-hour rainfall event (or 100-year, 24-hour rainfall event for large swine, poultry, and veal calf operations designed and built after April 14, 2003); runoff from a 25-year, 24-hour rainfall event (or 100-year, 24-hour storm event for new swine, poultry, and veal calf operations); residual solids after liquid has been removed; necessary freeboard to maintain storage integrity; and minimum treatment loading, if applicable.

In order to provide clarity to producers as to what constitutes a properly designed animal waste management system, the Department has compiled a list of applicable design criteria. These design criteria are based on other states' standards, NRCS standards, and DEQ Circular 2, Design Standards for Wastewater Facilities. Additionally, EPA's Economic Analysis of the Final Revisions to the National Pollutant Discharge Elimination System Regulation and Effluent Guidelines for Concentrated Animal Feeding Operations, December 2002, was consulted. The Department has included a provision to allow deviations from the proposed design criteria pending the formal public notice procedures necessary to obtain an MPDES permit, so that site-specific factors can be addressed if necessary.

Given the degree of technical knowledge required to properly design a waste management system, the Department will require the submittal of plans and specifications prepared by an individual qualified to design animal waste management systems. Additional supporting design information; a certification statement stating the animal waste management system was constructed as designed; and an operation and maintenance plan will also be required to be submitted. This information will be used to evaluate a facility's ability to comply with the applicable effluent limitations. This information will allow the Department to fully implement the CAFO regulations so that water quality is protected.

Section 2: Calculating Waste Production

This section of the circular outlines an acceptable method for calculating waste production. This section is provided in order to assist producers in determining an estimate of the amount of waste generated on-site. An estimate of generated waste is required to be reported in any MPDES permit application submitted for a CAFO. In addition, design considerations must be made to account for the amount of waste produced, stored, and land-applied by the CAFO. It is not required that producers use the listed method in calculating waste production as this section is included for informational purposes only so that producers can more easily comply with the revised CAFO regulations.

Section 3: Nutrient Management Plan

This section of the circular outlines the necessary elements for a nutrient management plan, as required in the proposed amendments to ARM 17.30.1343. Information showing the deadlines for the development and implementation of a nutrient management plan, as well as information detailing how often the plan must be updated is included. A nutrient management plan was identified in the EPA/USDA unified strategy as a strategy to protect water quality and public health.

Section 4: Best Management Practices

This section of the circular describes the best management practices that must be implemented at all CAFOs as required in the proposed ARM 17.30.1343. Best management practices listed in this section incorporate the requirements specified in the revised federal regulations, as well as establish necessary controls to prevent discharges of pollutants to state waters. Some examples of the best management practices to be implemented at CAFOs include maintenance of a buffer zone between any down-gradient surface waters and land application site(s); restrictions for land applying waste at or below agronomic rates; appropriate disposal methods for on-site chemicals and animal mortalities; and requirements to prevent animals from contacting state waters. These best management practices are expected to protect water quality and public health by preventing discharges of pollutants to state waters from both the production area and the land application area(s).

Section 5: Sample Collection and Calibration Procedures

This section of the circular describes some of the sampling requirements for waste and land application sites. Testing frequency, testing parameters, and appropriate sample methods are explained. In addition, information on acceptable methods for calibrating land application equipment is provided in order to assist producers. This section is intended to outline the requirements for the frequency of sample collection, as well as

provide information on proper sample collection and equipment calibration methods. This section is included so that producers can more easily comply with the revised CAFO regulations.

Section 6: Technical Standards for Nutrient Management

This section of the circular outlines the state's technical standards for nutrient management. This section describes acceptable methods for: conducting a field-specific assessment of the potential for nitrogen and phosphorus transport from the field to surface waters; estimating the expected crop yield for each field; determining the appropriate nutrient needs of the crop; and conducting a nutrient budget in order to determine land application rates. This section incorporates the Fertilizer Guidelines for Montana Crops published by Montana State University (Publication # EB161) and the Phosphorus Index Assessment for Montana developed by the Natural Resources Conservation Services (NRCS). Additionally, the use of NRCS Standards 590 (Nutrient Management) and 633 (Waste Utilization) have been adopted.

This section of the circular has been developed in accordance with the revised federal regulations. These revised federal regulations require that: a field-specific assessment of the potential for nitrogen and phosphorus transport from the field to surface waters be included; the form, source, amount, timing, and method of application of nutrients on fields be considered; appropriate flexibilities for any CAFO to implement multi-year phosphorus application on fields that do not have a high potential for phosphorus runoff be included; manure is sampled and analyzed annually for nitrogen and phosphorus content; soil is sampled and analyzed a minimum of once every five years for phosphorus content; land application equipment is inspected periodically for leaks; and setback requirements to down-gradient surface waters, open tile line intake structures, sinkholes, agricultural well heads, or other conduits to surface waters are maintained. These standards have been developed to address the required elements. It is expected that nutrient management plans developed in accordance with the state's technical standards will protect water quality and public health by minimizing the pollutants discharged from land application site(s).

Section 7: Recordkeeping Requirements

This section of the circular outlines the required recordkeeping for CAFOs, as listed in the proposed amendments to ARM 17.30.1343. This section is provided in order to assist producers with complying with the revised CAFO regulations. Only those records required to be maintained as specified in the revised federal regulations have been included. These recordkeeping requirements have been established to ensure that producers conduct routine visual inspections of various elements of their operation. By detecting and correcting any deficiencies noted during these routine inspections, it is

expected that discharges outside of precipitation events will be minimized.

4. 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 to the Board of Environmental Review, P.O. Box 200901, Helena, Montana 59620-0901, faxed to (406) 444-4386 or emailed to the Board Secretary at ber@state.mt.us and must be received no later than 5:00 p.m., February 4, 2005. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Thomas Bowe, attorney for the Board, has been designated to preside over and conduct the hearing.

6. The Board 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 and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to the Board of Environmental Review, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to the Board Secretary at ber@state.mt.us, or may be made by completing a request form at any rules hearing held by the Board.

7. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

James M. Madden By: *Joseph W. Russell*
JAMES M. MADDEN JOSEPH W. RUSSELL, M.P.H.,
Rule Reviewer Chairman

Certified to the Secretary of State December 6, 2004.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.38.106 pertaining to fees for review of public water and sewage system plans and specifications	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (PUBLIC WATER SUPPLY)

TO: All Concerned Persons

1. On January 14, 2005, at 1:30 p.m., the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., January 3, 2005, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@state.mt.us.

3. The rule proposed to be amended provides as follows, stricken matter interlined, new matter underlined:

17.38.106 FEES (1) remains the same.

(2) Fees for review of plans and specifications are based on (2)(a) through (e) and (3). The total fee for the review of a set of plans and specifications is the sum of the fees for the applicable parts or sub~~-~~parts listed in these citations. Approval will not be given until fees calculated under this rule have been received by the department.

(a) The fee schedule for designs requiring review for compliance with department Circular DEQ-1, 1999 edition, is set forth in Schedule I, as follows:

SCHEDULE I

Item	Fee	New Fee
Section 3.1 Surface water		
quality and quantity	$ ~~100~~	200
structures	$ ~~50~~	100
Section 3.2 Ground water	$ ~~275~~	600
Section 4.1 Clarification		
standard clarification	$ ~~250~~	500
solid contact units	$ ~~500~~	1,000
Section 4.2 Filtration		
rapid rate	$ ~~625~~	1,250
pressure filtration	$ ~~475~~	950
diatomaceous earth	$ ~~475~~	950
slow sand	$ ~~475~~	950
Section 4.3 Disinfection	$ ~~100~~	400
Section 4.4 Cation exchange softening	$ ~~150~~	500

Item	Old fee	New fee
Section 4.5 Aeration		
natural draft	$ ~~100~~	200
forced draft	$ ~~100~~	200
Section 4.6 Iron and manganese		
control-sequestering	$ ~~100~~	200
Section 4.8 Stabilization		
CO_2 addition	$ ~~150~~	300
Section 4.9 Taste and odor control		
powdered activated carbon	$ ~~100~~	400
Section 4.11 Waste disposal		
alum sludge	$ ~~125~~	250
lime softening sludge	$ ~~125~~	250
red water waste	$ ~~125~~	250
Chapter 5 Chemical application	$ ~~250~~	700
Chapter 6 Pumping facilities	$ ~~200~~	700
Section 7.1 Plant storage	$ ~~175~~	500
Section 7.2 Hydropneumatic tanks	$ ~~50~~	200
Section 7.3 Distribution storage	$ ~~175~~	500
Chapter 8 Distribution system		
< 1320 lineal feet with standard specs	$ ~~50~~	150
< 1320 lineal feet without standard specs	$ ~~225~~	450
> 1320 lineal feet with standard specs	$ ~~100~~	300
> 1320 lineal feet without standard specs	$ ~~275~~	600
Main extension certified checklist	$ ~~25~~	100

(b) The fee schedule for designs requiring review for compliance with department Circular DEQ-2, 1999 edition, is set forth in Schedule II, as follows:

SCHEDULE II

Item	Old fee	New fee
Chapter 10 Engineering reports and facility plans,		
engineering reports (minor)	$ ~~75~~	300
comprehensive facility plan (major)	$ ~~500~~	1,000
Chapter 30 Design of sewers		
< 1320 lineal feet with standard specs	$ ~~50~~	150
< 1320 lineal feet without standard specs	$ ~~225~~	450
> 1320 lineal feet with standard specs	$ ~~100~~	300
> 1320 lineal feet without standard specs	$ ~~275~~	600
Sewer extension certified checklist	$ ~~25~~	100
Chapter 40 Sewage pumping station		
100 gpm or less	$ ~~250~~	800
greater than 100 gpm	$ ~~500~~	1,200
Chapter 60 Screening grit removal	$ ~~500~~	1,000
Chapter 70 Settling	$ ~~400~~	800
Chapter 80 Sludge handling	$ ~~800~~	1,600
Chapter 90 Biological treatment	$ ~~1200~~	2,400
non-aerated treatment ponds	$ ~~400~~	800
aerated treatment ponds	$ ~~700~~	1,400
Chapter 100 Disinfection	$ ~~250~~	500
Appendices A, B, C & D (per design)	$ ~~350~~	700

(c) The fee schedule for designs requiring review for compliance with department Circular DEQ-4, 2004 edition, is as

specified in the fee schedule in ARM 17.36.802 for wastewater disposal systems.

(d) The fee schedule for designs requiring review for compliance with department Circular DEQ-3, 1999 edition, is ~~to be determined under~~ set forth in Schedule III, as follows:

SCHEDULE III

Section 3.2 Ground water........................	$ ~~250~~ 600
Chapter 6 Pump facilities.....................	$ ~~100~~ 250
Chapter 7 Finished Storage/Hydro-pneumatic tanks....	$ 200
Chapter 8 Distribution system.................	$ ~~100~~ 300

(e) The fee schedule for the review of plans and specifications not covered by a specific department design standard, but within one of the following categories, is ~~to be determined under~~ set forth in Schedule IV as follows:

SCHEDULE IV

Hypochlorinators...............................	$ ~~50~~ 200
Ozonators up to 10 gpm.........................	$ ~~150~~ 300
CT evaluations.................................	$ ~~100~~ 200
Reverse osmosis up to 10 gpm...................	$ ~~100~~ 300
Spring box and collection lateral..............	$ ~~100~~ 250
Cartridge/bag filters..........................	$ ~~150~~ 300

(3) remains the same.

(4) The fee for review of plans and specifications previously denied, for staff time over two hours, is $50 per hour, assessed in half-hour increments, multiplied by the time required to review the plans and specifications. The review time applied to each set of plans and specifications must be determined by the review engineer and documented with time sheets. The maximum fee for each review of denied plans and specifications is $500.

(5) The fee for review of deviations is $100 per deviation.

(4) and (5) remain the same, but are renumbered (6) and (7).

AUTH: 75-6-108, MCA
IMP: 75-6-108, MCA

REASON: The proposed amendments are necessary to collect fees commensurate with the costs associated with plan and specification review. The policy of the Montana legislature is that the Department collects fees for review work that is equal to the costs associated with doing that review. The Department's failure to do so has been noted in past legislative audits. These amendments and additions are intended to correct that issue. In fiscal year 2004, the Department conducted 425 plan and specification reviews at an estimated cost of $212,691. Total receipts for fees collected against those reviews equaled $99,510. The Department is estimating an increase of 20% in plan and specification submissions for fiscal year 2005, i.e.,

510. The proposed average fee increase of 220% is estimated to generate $234,497 in fees as opposed to the cost of review estimated at $225,000.

4. 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 to the Board of Environmental Review, P.O. Box 200901, Helena, Montana 59620-0901, faxed to (406) 444-4386 or emailed to the Board Secretary at ber@state.mt.us and must be received no later than 5:00 p.m, January 21, 2005. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Thomas Bowe, attorney for the Board, has been designated to preside over and conduct the hearing.

6. The Board 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 and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to the Board of Environmental Review, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to the Board Secretary at ber@state.mt.us, or may be made by completing a request form at any rules hearing held by the Board.

7. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

Reviewed by:		BOARD OF ENVIRONMENTAL REVIEW
James M. Madden	By:	*Joseph W. Russell*
JAMES M. MADDEN Rule Reviewer		JOSEPH W. RUSSELL, M.P.H., Chairman

Certified to the Secretary of State, December 6, 2004.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 1.3.102 regarding guidelines governing public participation at public meetings	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On January 18, 2005, the department proposes to amend ARM 1.3.102 regarding public participation at public meetings.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on January 11, 2005, to advise us of the nature of the accommodation that you need. Please contact Ali Bovingdon, Department of Justice, Office of the Attorney General, P.O. Box 201401, Helena, MT 59620-1401; (406) 444-2026; Fax (406) 444-3549; email contactdoj@state.mt.us.

3. The rule proposed to be amended provides as follows, stricken matter interlined, new matter underlined:

1.3.102 MODEL RULE 1 NOTICE OF AGENCY ACTION THAT IS OF SIGNIFICANT INTEREST TO THE PUBLIC (1) and (2) remain the same.

~~(3) Public comment on any public matter, as limited in 2-3-103(1)(b), MCA, that is within the jurisdiction of an agency must be allowed at any public meeting as defined by 2-3-202, MCA. The opportunity for public comment must be reflected on the meeting agenda and incorporated into the official minutes of the meeting. For purposes of this rule and 2-3-103(1)(b), MCA, contested case is defined at 2-4-102(4), MCA. Public matter does not include any matter involving an interest in individual privacy protected by Article II, Section 10 of the Montana Constitution, if the presiding officer determines that the demand of individual privacy clearly exceeds the merits of public disclosure.~~

(3) Public comment on any public matter, as limited in 2-3-103(1)(b), MCA, that is within the jurisdiction of an agency must be allowed at any public meeting as defined by 2-3-202, MCA. The opportunity for public comment must be reflected on the meeting agenda and incorporated into the official minutes of the meeting. For purposes of this rule and 2-3-103(1)(b), MCA, contested case is defined at 2-4-102(4), MCA. Public matter does not include any matter involving an interest in individual privacy protected by Article II, Section 10 of the Montana Constitution, if the

presiding officer determines that the demand of individual privacy clearly exceeds the merits of public disclosure.

AUTH: 2-4-202, 2-4-302, MCA
IMP: 2-3-103, 2-4-202, MCA

4. The amendment is necessary to implement the requirements of 2-3-103, MCA. The changes arise out of passage of House Bill 94 in the 2003 legislative session which is codified at 2-3-103, MCA and requires adoption of procedures to ensure adequate notice and to assist public participation before any agency action on a matter that is of significant interest to the public. The department proposed identical language on October 7, 2004, and adopted it November 18, 2004. However, in order to allow affected parties who contacted the department asking for an opportunity to comment on the proposed amendment to submit written comments, the department is amending the rule again.

5. Concerned persons may submit their data, views, or arguments concerning the proposed amendment to Ali Bovingdon, Department of Justice, Office of the Attorney General, P.O. Box 201401, Helena, MT 59620-1401; (406) 444-2026; FAX (406) 444-3549; email contactdoj@state.mt.us. Any comments must be received no later than January 13, 2005.

6. If persons who are directly affected by the proposed amendment wish to express their data, views, and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Ali Bovingdon, Department of Justice, Office of the Attorney General, P.O. Box 201401, Helena, MT 59620-1401; (406) 444-2026; FAX (406) 444-3549; email contactdoj@state.mt.us. A written request for hearing must be received no later than January 13, 2005.

7. If the agency receives a request for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision, or agency; or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 1000 based on the population of the state.

8. An electronic copy of this notice is available through the department's site at www.doj.state.mt.us/resources/administrativerules.asp.

9. The Department of Justice 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 which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding rules proposed by the Motor Vehicle Division, the Forensic Science Division, the Highway Patrol Division, the Fire Prevention and Investigation Bureau, the Division of Criminal Investigation, the Board of Crime Control or the Law Enforcement Academy, or proposed rules pertaining to certificates of public advantage for health care, or the model rules. Such written request may be mailed or delivered to Ali Bovingdon, Department of Justice, Office of the Attorney General, P.O. Box 201401, Helena, MT 59620-1401, faxed to the office at (406) 444-3549, or may be made by completing a request form at any rules hearing held by the department.

10. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

By: /s/ Mike McGrath
MIKE McGRATH, Attorney General
Department of Justice

/s/ Ali Bovingdon
ALI BOVINGDON, Rule Reviewer

Certified to the Secretary of State December 6, 2004.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 23.7.101A, 23.7.108, 23.7.109, 23.7.143, 23.7.301 and 23.7.302 to conform with the NFPA 1 Uniform Fire Code, and repeal 23.7.107, which was superseded by adoption of the NFPA 1 Uniform Fire Code	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On January 18, 2005, the department proposes to amend ARM 23.7.101A, 23.7.108, 23.7.109, 23.7.143, 23.7.301, and 23.7.302 to update the rules to conform with NFPA 1 Uniform Fire Code and to repeal 23.7.107, which was superseded by adoption of the NFPA 1 Uniform Fire Code.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on January 11, 2005, to advise us of the nature of the accommodation that you need. Please contact Ali Bovingdon, Department of Justice, Office of the Attorney General, P.O. Box 201401, Helena, MT 59620-1401; (406) 444-2026; Fax (406) 444-3549; email contactdoj@state.mt.us.

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

23.7.101A DEFINITIONS (1) through (24) remain the same.
(25) "Single family private house" means a dwelling unit as the term dwelling unit is defined ~~in the UFC~~ by NFPA 1/UFC section 3.3.66, no part of which is rented to another person.
(26) remains the same.

AUTH: 50-3-102, MCA
IMP: 50-3-102, MCA

23.7.108 SMOKE DETECTORS IN RENTAL UNITS (1) and (2) remain the same.
~~(3) 1997 UFC Appendix I-A - SECTION 6-SMOKE DETECTORS shall govern the installation of smoke detectors in all dwelling units rented to another person.~~

AUTH: 50-3-102, 70-24-303~~(1)(g)~~, MCA
IMP: 50-3-102, 70-24-303~~(1)(g)~~, MCA

23.7.109 CERTIFICATE OF APPROVAL FOR DAY CARE CENTERS FOR 13 OR MORE CHILDREN (1) through (6)(h) remain the same.

(i) Portable fire extinguishers shall be installed and maintained in accordance with ~~UFC Standard 10-1 or the national fire protection association's standard for portable fire extinguishers, NFPA 10 (1998)~~ NFPA 1/UFC.

(j) and (k) remain the same.

(l) Space under stairwells shall not be used for storage of any kind except as permitted by ~~UFC Sec. 1210.3 Exception~~ NFPA 1/UFC.

AUTH: 50-3-102, 52-2-734, MCA
IMP: 50-3-102, 52-2-733~~(5)~~, 52-2-734, MCA

23.7.143 APPROVAL OF EQUIPMENT (1) through (2)(f) remain the same.

(g) a copy of the most recently adopted edition of the ~~Uniform~~ ~~F~~fire ~~C~~code ~~Standards,~~; and~~;~~

(h) remains the same.

AUTH: 50-3-102, MCA
IMP: 50-3-102, MCA

23.7.301 ADOPTION OF NFPA UNIFORM FIRE CODE (1) through (5)(c) remain the same.

(d) Section 2.2. NFPA Publications, except for NFPA 101, Life Safety Code, 2003 edition and NFPA 5000, Building Construction and Safety Code, 2003 edition, is ~~not~~ adopted.

AUTH: 50-3-102, MCA
IMP: 50-3-103, MCA

23.7.302 ADMINISTRATION (1) remains the same.

(2) The following annexes are adopted as part of this code:

~~(a) Annex A Explanatory Material;~~

(b) through (e) remain the same but are renumbered (a) through (d).

AUTH: 50-3-102, MCA
IMP: 50-3-103, MCA

4. The department adopted the NFPA 1/UFC on April 8, 2004. These amendments are necessary to conform the department's current ARM to the provisions of the NFPA 1/UFC.

5. The department proposes to repeal the following rule:

23.7.107 FIRE ESCAPES FOR PUBLIC BUILDINGS found at pages 23-361.4 and 23-361.5 of the Administrative Rules of Montana.

AUTH: 50-3-102, MCA

IMP: 50-3-106, MCA

REASON: This rule was superseded by the department's adoption of the NFPA 1/UFC and is no longer necessary.

6. Concerned persons may submit their data, views, or arguments concerning the proposed actions to Ali Bovingdon, Department of Justice, Office of the Attorney General, P.O. Box 201401, Helena, MT 59620-1401; (406) 444-2026; Fax (406) 444-3549; email contactdoj@state.mt.us. Any comments must be received no later than January 13, 2005.

7. If persons who are directly affected by the proposed actions wish to express their data, views, and arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written comments they have to Ali Bovingdon, Department of Justice, Office of the Attorney General, P.O. Box 201401, Helena, MT 59620-1401; (406) 444-2026; Fax (406) 444-3549; email contactdoj@state.mt.us. A written request for hearing must be received no later than January 13, 2005.

8. If the agency receives a request for a public hearing on the proposed actions from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the appropriate rule review committee of the legislature; from a governmental subdivision, or agency; or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 15 based on the number of fire programs in the state.

9. An electronic copy of this notice is available through the department's site at www.doj.state.mt.us/resources/administrativerules.asp.

10. The Department of Justice 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 which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding rules proposed by the Motor Vehicle Division, the Forensic Science Division, the Highway Patrol Division, the Fire Prevention and Investigation Bureau, the Division of Criminal Investigation, the Board of Crime Control or the Law Enforcement Academy, or proposed rules pertaining to certificates of public advantage for health care, or the model rules. Such written request may be mailed or delivered to Ali Bovingdon, Department of Justice, Office of the Attorney General, P.O. Box 201401, Helena, MT 59620-1401, faxed to the office at (406) 444-3549, or may be made by

completing a request form at any rules hearing held by the department.

11. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

By: /s/ Mike McGrath
MIKE McGRATH, Attorney General
Department of Justice

/s/ Ali Bovingdon
ALI BOVINGDON, Rule Reviewer

Certified to the Secretary of State December 6, 2004.

BEFORE THE BOARD OF SANITARIANS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment of ARM 24.216.402, and ARM 24.216.502 pertaining to fee schedule and minimum standards for licensure	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On January 14, 2005, at 10:00 a.m., a public hearing will be held in room 489, of the Park Avenue Building, 301 South Park Avenue, Helena, Montana to consider the proposed amendment of the above-stated rules.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or who need an alternative accessible format of this notice. If you require an accommodation, contact Mr. Wayne Johnston no later than 5:00 p.m. January 10, 2005, to advise us of the nature of the accommodation you need. Please contact Mr. Wayne Johnston, Board of Sanitarians, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2370; Montana Relay 1-800-253-4091; TDD (406) 444-2978; Facsimile (406) 841-2305; e-mail dlibsdsan@state.mt.us.

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

24.216.402 FEE SCHEDULE

(1) Application fee $~~25~~ 50
(2) Examination ~~120~~ 150
(3) Reexamination ~~120~~ 150
(4) Renewal ~~30~~ 50
(5) Late renewal (in addition to renewal fee) ~~25~~ 50
(6) Sanitarian-in-training application fee ~~25~~ 50
(7) remains the same.

AUTH: 37-1-134, 37-40-203, MCA
IMP: 37-1-134, ~~37-1-304,~~ 37-40-302, ~~37-40-303,~~ 37-40-304, MCA

REASON: It is reasonable and necessary for the Board to amend ARM 24.216.402 in order to generate enough revenue to maintain the current level of services being offered. Pursuant to 37-1-134 and 37-40-304, MCA, the Board is required to set its fees commensurate with costs, and is the reason why these fees need to be increased now. If this rule is not approved at this time, the Board will be operating with a negative cash balance by the next renewal period therefore

creating an even larger cash deficit. This rule change is requested to fund existing services only, no new services are proposed at this time. Current total revenue for FY 2004 was $7,590.00, the beginning cash balance in FY 2004 was $6,035.00. The total expenditures for FY 2004 were $11,491.36. If the fees are left unchanged the projected revenue for FY 2005 will be $7,590.00, the remaining cash balance will be $2,133.64, the budget for FY 2005 is $11,528.00, this will leave a cash balance of -$1,804.36. The proposed fee increase will raise the revenue for FY 2005 to $12,150.00, this will also leave a positive cash balance of $2,755.64. This rule change will affect approximately 190 licensees. The Board's estimate of the aggregate fiscal impact of the proposed fee changes will be approximately an additional $4,560 paid per year by licensees and applicants.

24.216.502 MINIMUM STANDARDS FOR LICENSURE (1) The board will accept graduation from an accredited college or university with a bachelor's degree and including a minimum of 30 quarter or 20 semester hours in the physical and biological sciences, including ~~one or more~~ courses in chemistry, microbiology and biology as an equivalent qualification of a bachelors degree in environmental health as required by 37-40-302, MCA.

(2) remains the same.

AUTH: 37-40-203, MCA
IMP: 37-40-302, MCA

REASON: It is reasonable and necessary for the Board to amend ARM 24.216.502 to clarify the requirements for a Sanitarian license. The Board has decided that by making this change now, it will eliminate the apparent confusion surrounding what requirements must be met prior to licensure. The Board has recently become aware that such confusion exists.

4. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to: Mr. Wayne Johnston, Board of Sanitarians, Department of Labor and Industry, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdsan@state.mt.us and must be received no later than 5:00 p.m., January 21, 2005.

5. An electronic copy of this Notice of Public Hearing is available through the Department and Board's web site on the World Wide Web at http://www.discoveringmontana.com/dli/san. The Department strives to make the electronic copy of this Notice of Public Hearing 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. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

6. The Board of Sanitarians maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this Program. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Sanitarians administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Sanitarians, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsdsan@state.mt.us or may be made by completing a request form at any rules hearing held by the agency.

7. The bill sponsor requirements of 2-4-302, MCA, do not apply.

8. Lon Mitchell, attorney, has been designated to preside over and conduct this hearing.

DEPARTMENT OF LABOR AND INDUSTRY
BOARD OF SANITARIANS

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

Certified to the Secretary of State December 6, 2004.

DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment and transfer of ARM 8.77.101, 8.77.102, 8.77.103, 8.77.105, 8.77.107, 8.77.108, 8.77.109, 8.77.201, 8.77.203, 8.77.301 and 8.77.302, the proposed adoption of NEW RULES I through VII, the proposed repeal of ARM 8.77.104 and the proposed transfer of ARM 8.77.106, 8.77.303 and 8.77.304 all pertaining to weights and measures	)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND TRANSFER, ADOPTION, REPEAL, AND TRANSFER

TO: All Concerned Persons

1. On January 19, 2005, at 9:00 a.m., a public hearing will be held in Room B07, Park Avenue Building, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment and transfer, adoption, repeal, and transfer of the above-stated rules.

2. The Weights and Measures Bureau of the Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department no later than 5:00 p.m., January 13, 2005, to advise us of the nature of the accommodation that you need. Please contact Ms. Carol Larkin at P.O. Box 200516, Helena, Montana 59620-0516; 406-841-2240 (telephone); facsimile 406-841-2060; 406-841-0532 (TTD); e-mail clarkin@state.mt.us.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to amend and transfer the rules in ARM Title 8, Chapter 77 to ARM Title 24 in order to implement provisions of Chapter 483, Laws of 2001, which transferred various programs from the Department of Commerce to the Department of Labor and Industry. In addition to changing references from the Department of Commerce to the Department of Labor and Industry, there is reasonable necessity to make various technical amendments to clean up archaic, obsolete and unclear language present in the existing rules. There is reasonable necessity to update references to old editions of various technical manuals and publications in order to conform with current national standards. There is also reasonable necessity to amend the rules at this time as part of the Department's periodic review of its rules made in conjunction with the proposed transfers, and to update AUTH and IMP citations as appropriate.

There is reasonable necessity to repeal ARM 8.77.104 and adopt NEW RULES II through VII to clarify and improve the readability of the provisions related to the voluntary registration of individuals and agencies that perform installation, maintenance, repair, or reconditioning of commercial weighing or measuring devices. The existing rule contains repetitive provisions, is inconsistent in its use of terminology, and does not follow a logical order. NEW RULES II through VII are designed to address all of those problems, and to make it easier for the public and staff to follow and apply.

This general statement of reasonable necessity applies to all of the rule changes proposed, except where specifically noted.

4. The rules proposed to be amended and transferred provide as follows, stricken matter interlined, new matter underlined:

~~8.77.101~~ 24.351.227 SCALE PIT CLEARANCE (1) ~~On and after December 20, 1972, no~~ No new installations or replacements of vehicle or livestock scales ~~shall~~ may be placed in a pit~~,~~ where the clearance from the floor of the pit to the bottom of the ~~i~~I-beams is less than 42 inches.

(2) Scale pits ~~shall~~ are not ~~be~~ required for fully electronic scales unless the pit is necessary for the installation, operation or maintenance of the particular scale.

(3) Electronic scales which do not require a pit for their installation, operation or maintenance ~~shall~~ must be installed in strict compliance with the manufacturer's specification for each specific model and with the requirements of ~~National Institute of Standards and Technology (~~NIST~~)~~ Handbook 44, ~~1998~~ 2005 Edition.

(4) remains the same.

AUTH: 30-12-202, MCA
IMP: 30-12-202, MCA

~~8.77.102~~ 24.351.211 FEES FOR TESTING AND CERTIFICATION

(1) Special inspection fees ~~will be~~ are as follows:

(a) units over 5,000 pounds of testing weights, $2.50 a mile, measured by the distance the bureau's employee travels in connection with the special inspection;

(b) all other units, $1.25 a mile, as measured by the distance the bureau's employee travels in connection with the special inspection; and

(c) ~~additional~~ time for testing by inspection, $75 an hour.

(2) Where fees are not paid within 30 days after the special inspection, the equipment will be sealed and removed from service by the bureau ~~chief of weights and measures or his deputies,~~ until such fees have been paid. The ~~weights and~~

~~measures~~ bureau will coordinate the special inspections, whenever possible, with other inspection activities in an effort to keep charges as reasonable as possible.

AUTH: 30-12-202, ~~37-1-134,~~ MCA
IMP: 30-12-202, 30-12-203, MCA

REASON: There is reasonable necessity to amend the AUTH citation to delete a non-applicable statutory reference while this rule is otherwise being amended. Although 37-1-134, MCA, applies to the professional and occupational licensing programs administered by the Department, it does not provide statutory authority for rulemaking by the weights and measures bureau.

~~8.77.103~~ 24.351.201 NIST HANDBOOK 44 - SPECIFICATIONS, TOLERANCES AND OTHER TECHNICAL REQUIREMENTS FOR WEIGHING AND MEASURING DEVICES (1) The bureau, ~~of weights and measures~~ with the advice and counsel of ~~the~~ NIST, ~~hereby~~ adopts the specifications, tolerances and requirements for commercial weighing and measuring devices published in NIST Handbook 44, ~~- 1999~~ 2005 Edition, as the specifications, tolerances and requirements for commercial weighing and measuring devices for the state of Montana with the following exception:

(a) Section 3.31, Vehicle Tank Meters Code, UR.2.2. Ticket Printer; Customer Tickets ~~shall~~ is not ~~be~~ adopted or enforced.

(2) A copy of NIST Handbook 44 can be obtained from the United States Department of Commerce, National Institute of Standards and Technology, National Conference of Weights and Measures, Gaithersburg, Maryland 20899-0001.

AUTH: 30-12-202, MCA
IMP: 30-12-202, 30-12-205, 30-12-401, 30-12-406, 30-12-407, 30-12-408, 30-12-409, MCA

REASON: There is reasonable necessity to amend the IMP citation to add applicable statutory references while this rule is otherwise being amended.

~~8.77.105~~ 24.351.221 WEIGHING DEVICE LICENSE TRANSFER

(1) For all licenses administered by the one-stop licensing program, device license transfer is subject to the requirements established in 30-16-302, MCA. For all other licenses administered by the ~~weights and measures~~ bureau, the following ~~shall~~ apply:

(a) and (b) remain the same.

AUTH: 30-12-202, MCA
IMP: 30-12-203, MCA

~~8.77.107~~ 24.351.215 LICENSE FEE SCHEDULE FOR WEIGHING AND MEASURING DEVICES (1) Measuring device license fees ~~will be~~ are as follows:

(a) each gasoline meter, diesel meter, compressed natural gas dispenser or fuel oil meter with a listed maximum delivery rate of 20 or less gallons per minute (gpm) $16
~~shall be $16 per meter;~~

(b) each petroleum vehicle tank meter or stationary petroleum meter with a maximum listed delivery rate of between 130 gpm and 20 gpm 55
~~shall be $55 per meter;~~

(c) each petroleum vehicle tank meter or stationary petroleum meter with a maximum listed delivery of over 130 gpm 65
~~shall be $65 per meter;~~

(d) each liquefied petroleum ~~liquid~~ gas (LPG) meter ~~$~~ 80~~;~~

~~(e) each vapor meter $10;~~

~~(f) each petroleum and liquefied petroleum vehicle tank up to and including 2,000 gallons (7,570 liters) $60;~~

~~(g) each petroleum and liquefied petroleum vehicle tank over 2,000 gallons (7,570 liters) $60 plus $12 for each additional 1,000 gallons (3,785 liters).~~

(2) Weighing device license fees ~~shall be~~ are as provided in 30-12-203~~(3)~~, MCA.

AUTH: 30-12-202, 82-15-102, MCA
IMP: 30-12-203, 82-15-105, MCA

REASON: There is reasonable necessity to amend ARM 8.77.107 in order to present the license fee information in table form for ease of use by businesses, the public, and the Department. The Department notes that no changes to fee amounts are being proposed, and therefore there is no fiscal impact to license holders or to the public. Additionally, there is reasonable necessity to amend the rule to remove (1)(e), (f) and (g), as the described measuring devices are no longer used in commercial sales. There is reasonable necessity to amend the AUTH and IMP citations to identify the statutory authority used for the cross-reference to 30-12-203, MCA, while this rule is otherwise being amended.

~~8.77.108~~ 24.351.101 DEFINITIONS As used in ~~ARM 8.77.104 and~~ this ~~rule~~ chapter, the following ~~words and phrases will be construed to have the following meanings~~ definitions apply:

~~(1)~~(5) "Registered serviceperson" ~~shall be construed to mean~~ means any individual who for hire, award, commission or any other payment of any kind installs, services, repairs or reconditions a commercial weighing or measuring device, and who voluntarily applies for registration with the bureau ~~of weights and measures~~.

~~(2)~~(4) "Registered service agency" ~~shall be construed to mean~~ means any agency, firm, company or corporation that for hire, award, commission or any other payment of any kind installs, services, repairs or reconditions a commercial

weighing or measuring device, and that voluntarily registers itself as such with the bureau ~~of weights and measures~~. ~~Under agency registration, identification of individual servicepersons shall be required.~~

(1) "Bureau" means the weights and measures bureau of the Montana department of labor and industry.

~~(3)~~(2) "Commercial weighing ~~and~~ or measuring device" ~~shall be construed to include~~ means:

(a) any weight, ~~or~~ measure, ~~or~~ weighing or measuring ~~devices~~ device commercially used ~~or employed in establishing~~ to establish:

(i) the size, quantity, extent, area or measurement of quantities, things, produce or articles for distribution or consumption ~~purchased, offered or submitted for sale, hire or award,~~ that are offered or sold; or

(ii) any basic charge of payment for services rendered on the basis of weight or measure~~.~~; and

(b) ~~It shall also include~~ any accessory attached to or used in connection with a commercial weighing or measuring device when such accessory is so designed or installed that its operation affects, or may affect, the accuracy of the device.

(3) "NIST" means the national institute of standards and technology of the United States department of commerce.

AUTH: 30-12-202, MCA
IMP: 30-12-202, MCA

~~8.77.109~~ 24.351.204 UNIFORM REGULATION FOR NATIONAL TYPE EVALUATION (1) The ~~weights and measures~~ bureau ~~of the department of commerce~~ adopts and incorporates by reference ~~herein~~ the Uniform Regulation for National Type Evaluation, as found in ~~the~~ NIST Handbook 130, ~~1998~~ 2005 Edition,~~. A copy of NIST Handbook 130, 1998 Edition, can be obtained from the United States Department of Commerce, National Institute of Standards and Technology, National Conference of Weights and Measures, Gaithersburg, Maryland 20899-0001. Uniform Laws and Regulations 1998 Edition has been published in the National Conference on Weights and Measures, Publication 14 on page 127, "National Type Evaluation Program, Administrative Procedures, Technical Policy, Checklists, and Test Procedures"~~ and is adopted in its entirety with the following ~~exceptions~~ modifications:

(a) in Section 2.3, the term "director" is replaced by the term "bureau chief" and refers to ~~means~~ the bureau chief of the bureau ~~of weights and measures and not the director of the bureau of weights and measures~~;

(b) in Section 4, subsections 3 through 7, insert in all blank spaces the date of January 1, 1999; and

(c) in Section 8, insert in the blank space January 1, 1999, for the effective date for this regulation.

(2) A copy of NIST Handbook 130 can be obtained from the United States Department of Commerce, National Institute of

Standards and Technology, National Conference of Weights and Measures, Gaithersburg, Maryland 20899-0001.

AUTH: ~~30-12-201~~ 30-12-202, MCA
IMP: 30-12-202, MCA

REASON: There is reasonable necessity to amend the AUTH citation to correctly reflect the statutory rulemaking authority for the Department while the rule is otherwise being amended.

~~8.77.201~~ 24.351.301 NIST HANDBOOK 130 - UNIFORM LAWS AND REGULATIONS (1) The bureau, ~~of weights and measures~~ with the advice and counsel of ~~the national institute of standards and technology hereby~~ NIST, adopts the model regulations to provide accurate and adequate information on packages as to the identity and quantity of contents so that purchasers can make price and quantity comparison. The regulations are published in ~~the National Institute of Standards and Technology~~ NIST Handbook 130, 2005 Edition, Part IV, subparts:

(a) A~~.~~, Uniform Packaging and Labeling Regulation~~,~~;

(b) B~~.~~, Uniform Regulation for the Method of Sale of Commodities~~,~~; and

(c) C~~.~~, Uniform Unit Pricing Regulation~~, 1998 Edition~~.

(2) A copy of NIST Handbook 130 can be obtained from the United States Department of Commerce, National Institute of Standards and Technology, National Conference of Weights and Measures, Gaithersburg, Maryland 20899-0001.

~~(2) All provisions of all orders and regulations heretofore issued on this same subject that are contrary to or inconsistent with the provisions of this regulation, are hereby revoked.~~

AUTH: 30-12-202, MCA
IMP: 30-12-202, MCA

~~8.77.203~~ 24.351.311 RANDOM INSPECTION OF PACKAGES

(1) remains the same.

(2) The state is divided into ~~seven~~ inspection regions and it is anticipated that each inspection region will complete approximately ~~800 random package~~ 50 "package lot" inspections per year in random areas throughout the inspection region.

(3) The package inspections shall include all types of commodities as provided for in Title 30, chapter 12, parts 3 and 4, MCA~~, and Title 8, chapter 77, subchapter 2, Administrative Rules of Montana~~.

AUTH: 30-12-202, 30-12-207, MCA
IMP: 30-12-207, MCA

REASON: There is reasonable necessity to amend ARM 8.77.203 to reflect the current deployment of bureau staff in the state who are conducting the inspections. The bureau assigns its

inspectors to regions across Montana. Fluctuations in staff levels occasionally require revising the number of regions or the specific boundaries, which are internal agency matters and therefore not required to be described in rule. In addition, there is reasonable necessity to remove an unnecessary cross-reference.

~~8.77.301~~ 24.351.411 SAMPLING OF PETROLEUM PRODUCTS (1) ~~Sampling of petroleum products shall be made in accordance with ASTM "Manual on Measuring and Sampling".~~ All sampling will be done by employees of the ~~weights and measures~~ bureau~~, department of commerce, state of Montana~~. A random sampling of petroleum products of the manufacturer and importer will be made to ~~insure~~ ensure that proper standards are being met. ~~Cost~~ The cost of testing ~~these~~ samples ~~will~~ must be paid for by the manufacturer or importer.

(2) On complaint of an individual as to standards of a petroleum product, sampling will be made by employees of the ~~weights and measures~~ bureau ~~of the department of commerce, state of Montana~~. ~~A thorough~~ An investigation will be conducted by the ~~department of commerce~~ bureau to determine if a test is required for the petroleum product in question.

AUTH: 82-15-102, MCA
IMP: 82-15-107, MCA

~~8.77.302~~ 24.351.401 NIST HANDBOOK 130 - UNIFORM LAWS AND REGULATIONS (1) The ~~weights and measures~~ bureau, with the advice and counsel of ~~the national institute of standards and technology hereby~~ NIST, adopts, except as provided in (2), the regulations concerning fuel specifications and gasoline-oxygenate blends. The regulations are published in ~~the National Institute of Standards and Technology~~ NIST Handbook 130, 2005 Edition, Part IV, subpart G~~.~~, Uniform Regulation of Engine Fuels, Petroleum Products, and Automotive Lubricants~~, 1996 Edition~~.

(a) A copy of NIST Handbook 130 can be obtained from the United States Department of Commerce, National Institute of Standards and Technology, National Conference of Weights and Measures, Gaithersburg, Maryland 20899-0001.

(2) remains the same.

AUTH: 82-15-102, MCA
IMP: 82-15-103, MCA

4. The proposed new rules provide as follows:

NEW RULE I NIST HANDBOOK 133 - CHECKING THE NET CONTENTS OF PACKAGED GOODS (1) The bureau, with the advice and counsel of NIST, adopts the test methods and procedures as published in NIST Handbook 133, fourth edition, as the methods and procedures to be used for determining net weight of packaged commodities for the state of Montana.

(a) A copy of NIST Handbook 133 can be obtained from the United States Department of Commerce, National Institute of Standards and Technology, National Conference of Weights and Measures, Gaithersburg, Maryland 20899-0001.

AUTH: 30-12-202, 30-12-207, 30-12-301, 30-12-302, MCA
IMP: 30-12-202, 30-12-207, 30-12-301, 30-12-302, MCA

REASON: There is reasonable necessity to adopt NEW RULE I in order to place businesses and consumers on fair notice of the methodology the Department uses to check the net contents of packaged goods by adopting the most current edition of national standards.

NEW RULE II VOLUNTARY REGISTRATION PROGRAM FOR SERVICEPERSONS AND SERVICE AGENCIES (1) The bureau operates a voluntary registration program for individuals and entities that have demonstrated an ability to accurately install, service, repair or recondition a commercial weighing or measuring device.

(2) This rule does not preclude or limit the right and privilege of any individual or entity not registered with the bureau to install, service, repair or recondition a commercial weighing or measuring device.

(3) The bureau does not guarantee the work or fair dealing of a registered serviceperson or registered service agency.

(4) The bureau shall maintain and make public a list of registered servicepersons and registered service agencies.

AUTH: 30-12-202, MCA
IMP: 30-12-202, MCA

NEW RULE III INDIVIDUAL APPLICANTS FOR REGISTRATION

(1) An individual qualified by training or experience may apply for voluntary registration to service weighing devices or measuring devices. The applicant shall use the application form supplied by the bureau. The form must be signed by the applicant.

(a) The applicant must certify that the individual:

(i) is fully qualified to install, service, repair or recondition whatever devices for the service of which competence is being registered;

(ii) has in possession, or available for use, all necessary testing equipment and standards; and

(iii) has full knowledge of all appropriate weights and measures laws, rules and regulations.

(b) The individual applicant shall submit appropriate evidence or references demonstrating the applicant's qualifications. The bureau may independently verify the qualifications of each individual applicant.

(2) An individual applicant must have available sufficient standards and equipment to adequately test devices as set forth in the notes section of each applicable code in

NIST Handbook 44, 2005 Edition, "Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices." The equipment must meet the applicable specifications of:

(a) NIST Handbook 105-1, "Specifications and Tolerances for Reference Standards and Field Standard Weights and Measures, Specifications and Tolerances for Field Standard Weights (NIST Class F)";

(b) NIST Handbook 105-2, "Specifications and Tolerances for Reference Standards and Field Standard Weights and Measures, Specifications and Tolerances for Field Standard Measuring Flask"; or

(c) NIST Handbook 105-3, "Specifications and Tolerances for Reference Standards and Field Standard Weights and Measures, Specifications and Tolerances for Graduated Neck Type Volumetric Field Standards".

(3) Each individual applicant shall complete and pass a written test to determine the applicant's knowledge of the appropriate weights and measures laws, rules and regulations prior to the issuance by the bureau of the initial certificate of registration.

(a) Subsequent testing may be necessary due to changes in weights and measures laws and rules. Such testing shall be given whenever deemed necessary by the bureau. If such subsequent testing is appropriate, the bureau shall provide notice to registered servicepersons of the subsequent testing prior to the time of the next renewal of the certificate of registration.

(4) There is a $25 fee for registration as a serviceperson.

(5) Upon verification of an individual applicant's qualifications and the applicant successfully passing the examination, the bureau will issue a "certificate of registration" and assign a registration number to the individual.

(6) A certificate of registration expires on December 31, unless revoked earlier for good cause.

AUTH: 30-12-202, MCA
IMP: 30-12-202, MCA

NEW RULE IV AGENCY APPLICANTS FOR REGISTRATION (1) An entity may apply for voluntary registration as a registered service agency. The applicant shall use the application form supplied by the bureau. The form must be signed by the chief executive officer or manager of the applicant.

(2) The agency applicant must:

(a) certify that it has, or has available to it, sufficient standards and equipment to adequately test devices. The standards and equipment must conform with the requirements identified in [NEW RULE III];

(b) describe the standards and equipment it will use; and

(c) employ at least one individual who is a registered serviceperson, whose registration is recognized in Montana. The applicant must identify each registered serviceperson it employs who intends to work in Montana.

(3) The bureau may independently verify that the standards and equipment described in the application meet the appropriate standards.

(4) There is a $25 fee for registration as a service agency.

(5) Upon verification of an applicant's qualifications, the bureau will issue a "certificate of registration" and assign a registration number to the service agency.

(6) A certificate of registration expires on December 31, unless revoked earlier for good cause.

(7) A registered service agency must provide the bureau with a written list of the name of each registered serviceperson it employs. The list must be promptly updated by the registered service agency whenever it adds or loses a registered serviceperson in its employ.

AUTH: 30-12-202, MCA
IMP: 30-12-202, MCA

NEW RULE V PRIVILEGES AND OBLIGATIONS OF A CERTIFICATE HOLDER (1) An individual who holds a "certificate of registration":

(a) has the authority to remove an official rejection tag or mark placed on a weighing or measuring device by the authority of the bureau;

(b) may place in service, until such time as an official examination can be made, a weighing or measuring device that has been officially rejected; and

(c) may place in service, until such time as an official examination can be made, a new or used weighing or measuring device.

(2) A registered serviceperson or registered service agency may not use, in servicing commercial weighing or measuring devices, any standards or testing equipment that have not been certified by the bureau. Equipment calibrated by another state's weights and measures laboratory that can show traceability to the national institute of standards and technology will also be recognized as equipment suitable for use by registered servicepersons or registered service agencies in this state.

(3) A registered serviceperson or registered service agency is responsible for installing, repairing and adjusting devices such that the devices are adjusted as closely as practicable to zero error.

(4) Each registered serviceperson and registered service agency shall execute a "placed-in-service" report when a device is placed in service. The "placed-in-service" report must be on a form provided by the bureau. Such a form must:

(a) be executed in duplicate;

(b) include the assigned registration number; and

(c) be signed by the registered serviceperson responsible for each:

(i) rejected device restored to service; or

(ii) newly installed device placed in service.

(5) Within 24 hours after a device is restored to service, or placed in service, the original of the properly executed placed-in-service report, together with any official rejection tag removed from the device, must be mailed to the bureau at the Department of Labor and Industry, Bureau of Weights and Measures, P.O. Box 200516, Helena, Montana 59620-0516. The duplicate copy of the report must be given to the owner or operator of the device.

AUTH: 30-12-202, MCA
IMP: 30-12-202, MCA

NEW RULE VI RENEWAL OF CERTIFICATE OF REGISTRATION

(1) An existing certificate of registration may be renewed annually by a qualified individual or agency upon payment of the applicable renewal fee:

(a) serviceperson	$25.00
(b) service agency	25.00
(c) late renewal fee	12.50

(2) A registered serviceperson and a registered service agency shall submit, at least biennially, to the bureau for examination and certification, any standards and testing equipment that are used, or are to be used, in the performance of the service and testing functions with respect to weighing and measuring devices for which competence is registered. Failure to timely submit suitable standards and testing equipment may disqualify the individual or agency from renewing the certificate of registration.

(3) Renewals received by the bureau 30 days past the due date are subject to a late fee.

AUTH: 30-12-202, MCA
IMP: 30-12-202, MCA

NEW RULE VII REGISTRATION BY RECIPROCITY (1) The bureau may enter into a reciprocal agreement with any other state(s) that has similar voluntary registration policies. Under such an agreement, a registered serviceperson and a registered service agency from any state that is party to the reciprocal agreement is granted full reciprocal authority, including reciprocal recognition of standards and testing equipment, in all states that are a party to such an agreement.

AUTH: 30-12-202, MCA
IMP: 30-12-202, MCA

STATEMENT OF ESTIMATED FISCAL IMPACT: The Department estimates, based on the number of registered servicepersons and registered service agencies currently enrolled in Montana,

that approximately 117 individuals and 58 entities will be affected by NEW RULES II through VII. After review of the amount of time it takes to process registration documents, the Department concludes that the registration of both individuals and entities take approximately the same amount of time, and thus has set the fees at the same level, which are commensurate with the cost of registration. The late fee is based on the additional costs involved with sending out a reminder letter approximately 30 days after a registration has expired.

The Department estimates that the total fiscal impact of the proposed registration fees will be approximately $4,375 per year, based on the current number of registrations. The Department has no basis for estimating the impact of the late fee, because the Department does not have any historical data to support an estimate. The Department notes that fees for the voluntary registration program have not been changed since at least 1991.

5. The Department proposes to repeal the following rule:

8.77.104 VOLUNTARY REGISTRATION AND FEES OF SERVICEPERSONS AND SERVICE AGENCIES found at ARM pages 8-2206 through 8-2209.

AUTH: 30-12-202, MCA
IMP: 30-12-202, MCA

6. The Department advises interested persons that it intends to transfer the following rules without amendment:

8.77.106 (24.351.224) ACCESSIBILITY TO STOCK SCALES found at ARM pages 8-2209 and 8-2210.

AUTH: 30-12-202, MCA
IMP: 30-12-203, MCA

8.77.303 (24.351.421) CHARGES FOR LIQUEFIED PETROLEUM GAS found at ARM page 8-2236.

AUTH: 82-15-102, MCA
IMP: 82-15-109, MCA

8.77.304 (24.351.425) RECEIPT TO BE LEFT AT TIME OF DELIVERY found at ARM page 8-2236.

AUTH: 30-12-301, MCA
IMP: 30-12-407, MCA

7. Concerned persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Jack Kane, chief of the Weights and Measures Bureau, Business

Standards Division, Department of Labor and Industry, at P.O. Box 200516, Helena, MT 59620-0516, by facsimile to (406) 841-2060, or by e-mail to jkane@state.mt.us, and must be received no later than 5:00 p.m., January 26, 2005.

8. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://www.state.mt.us/dli/bsd/wm/index.htm. The Department strives to make the electronic copy of this Notice of Public Hearing 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. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

9. 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 mailing list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding any specific topic or topics over which the Department has rulemaking authority. Such written request may be delivered to Mark Cadwallader, 1327 Lockey St., room 412, Helena, Montana, mailed to Mark Cadwallader, P.O. Box 1728, Helena, MT 59624-1728, faxed to the office at (406) 444-1394, by e-mail to mcadwallader@state.mt.us, or made by completing a request form at any rules hearing held by the Department of Labor and Industry.

10. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

11. Judy Bovington, attorney, has been designated to preside over and conduct this hearing.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State December 6, 2004

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the proposed Adoption of New Rule I and Amendment of ARM 42.12.122 relating to liquor licensing	)	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On January 5, 2005, at 10:30 a.m., a public hearing will be held in the Director's Office (Fourth Floor) Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the adoption of New Rule I and amendment of ARM 42.12.122 relating to liquor licensing.

Individuals planning to attend the hearing shall enter the building through the east doors of the Sam W. Mitchell Building, 125 North Roberts, Helena, Montana.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Revenue no later than 5:00 p.m., December 29, 2004, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 459-2646; fax (406) 444-3696; or e-mail canderson@state.mt.us.

3. The proposed new rule does not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rule provides as follows:

<u>NEW RULE I SERVICE OF NOTICES</u> (1) A notice of proposed adverse action issued pursuant to 16-4-406, MCA, shall be served upon the licensee of record by sending a copy of the notice to the licensee by certified mail to the mailing address on file with the department.

(2) Service shall be considered complete three days after mailing the notice. Service shall not be considered incomplete because of refusal to accept delivery of the notice.

<u>AUTH</u>: Sec. 16-1-303, MCA
<u>IMP</u>: Sec. 16-4-406, MCA

<u>REASONABLE NECESSITY</u>: The department is proposing to adopt New Rule I because the department needs to clarify its methods of service of notices to the public. Section 16-1-303(2)(i), MCA, allows the department to prescribe the manner of giving and serving notices.

4. The rule proposed to be amended provides as follows, stricken matter interlined, new matter underlined:

42.12.122 DETERMINATION OF SUITABILITY OF PREMISES
(1) through (2)(g) remain the same.
(h) the premises to be used for the on-premises consumption of alcoholic beverages is physically separated from any business not directly related to the on-premises consumption of alcoholic beverages by four permanent walls. The walls must be floor to ceiling and shall not be moved without department approval of alterations to the premises pursuant to ARM 42.13.106. The premises can maintain inside access to each business conducted in the building through a doorway no larger than six feet wide with a door that can be closed and locked when not in use. Businesses directly related to the on-premises consumption of alcoholic beverages are a hotel, bowling alley, gambling casino, or restaurant; and
(i) ~~the premises is not within a 50-foot radius of gasoline pumps; and~~
~~(j)~~ the provisions of (3) are not violated.
(3) through (3)(c) remain the same.
(d) the on-premises operation is not physically separated from other businesses operated in the same building that are unrelated to the business of retail on-premises alcoholic beverages consumption, such as a grocery store, laundromat, clothing store, hardware store, flower shop, nursery, or preschool; and
(e) ~~the on-premises operation is within a 50-foot radius of gasoline pumps; and~~
~~(f)~~ the operator of the alcoholic beverages business intends to conduct some or all of the sale of alcoholic beverages through the use of a drive-up window.
(4) Premises currently licensed that do not meet the suitability standards would be required to meet the above standards upon department approval of completed alterations of the existing licensed premises in accordance with 16-3-311, MCA~~, except for the requirement that premises not be within a 50-foot radius of gasoline pumps. The restriction on premises being beyond a 50-foot radius of gasoline pumps applies only to transfers of licenses to new locations, or to new original licenses~~.
AUTH: Sec. 16-1-303, MCA
IMP: Sec. 16-3-311, 16-4-402, 16-4-404, 16-4-405, and 16-4-420, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.122 because the department has determined there is no statutory necessity for this requirement. The 50-foot requirement is being removed as it is considered unnecessary and the distance from fuel pumps is a matter for other state agencies to enforce.

5. 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 to:

Cleo Anderson
Department of Revenue
Director's Office
P.O. Box 7701
Helena, Montana 59604-7701
and must be received no later than January 14, 2005.

6. Cleo Anderson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

7. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at http://www.discoveringmontana.com/revenue, under "for your reference;" "DOR administrative rules;" and "upcoming events and proposed rule changes." The Department strives to make the electronic copy of this Notice of Public Hearing 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. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

8. The Department of Revenue 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, which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding particular subject matter or matters. Such written request may be mailed or delivered to the person in 5 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

9. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

<u>/s/ Cleo Anderson</u>	<u>/s/ Don Hoffman</u>
CLEO ANDERSON	DON HOFFMAN
Rule Reviewer	Acting Director of Revenue

Certified to Secretary of State December 6, 2004

BEFORE THE STATE COMPENSATION INSURANCE FUND
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.55.320 pertaining to classifications of employments	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 21, 2004, the Montana State Fund published MAR Notice No. 2-55-34 regarding the proposed amendment of the above-stated rule at page 2429 of the 2004 Montana Administrative Register, issue number 20.

2. The Montana State Fund Board of Directors has amended ARM 2.55.320 exactly as proposed.

3. No comments or testimony were received.

/s/ Nancy Butler
Nancy Butler, General Counsel
Rule Reviewer

/s/ Herb Leuprecht
Herb Leuprecht
Chairman of the Board

/s/ Dal Smilie
Dal Smilie, Chief Legal Counsel
Rule Reviewer

Certified to the Secretary of State December 6, 2004.

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 6.6.511 pertaining to sample forms outlining coverage	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 7, 2004, the State Auditor and Commissioner of Insurance published MAR Notice No. 6-154 regarding a public hearing on the proposed amendment of the above-stated rule at page 2336 of the 2004 Montana Administrative Register, Issue No. 19.

2. The State Auditor has amended ARM 6.6.511 as proposed but with the following changes, stricken material interlined, new material underlined:

6.6.511 ~~OPERATING RULES FOR THE ASSOCIATION~~ SAMPLE FORMS OUTLINING COVERAGE (1) through (2)(k) PLAN J or HIGH DEDUCTIBLE PLAN J MEDICARE (PART B) - MEDICAL SERVICES - PER CALENDAR YEAR remain as proposed.

The change to the catchphrase was made because the proposal notice inadvertently used an incorrect catchphrase. There was no change to the existing catchphrase.

3. No comments or testimony were received.

JOHN MORRISON, State Auditor
and Commissioner of Insurance

By: /s/ Alicia Pichette
Alicia Pichette
Deputy Insurance Commissioner

By: /s/ Christina L. Goe
Christina L. Goe
Rule Reviewer

Certified to the Secretary of State on December 6, 2004.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 10.10.301C relating to out-of-state attendance agreements	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 21, 2004, the Superintendent of Public Instruction published MAR Notice No. 10-10-112 regarding the proposed amendment of the above-stated rule concerning out-of-state attendance agreements at page 2441 of the 2004 Montana Administrative Register, Issue Number 20.

2. The Superintendent of Public Instruction has amended ARM 10.10.301C exactly as proposed.

3. No comments or testimony were received.

/s/ Linda McCulloch
Linda McCulloch
State Superintendent
of Public Instruction

/s/ Catherine K. Warhank
Catherine K. Warhank
Rule Reviewer

Certified to the Secretary of State December 6, 2004.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.38.101, 17.38.201A, 17.38.203, 17.38.205, 17.38.208, 17.38.215, 17.38.216, 17.38.225, and 17.38.234 pertaining to public water and sewage system requirements	NOTICE OF AMENDMENT (PUBLIC WATER SUPPLY)

TO: All Concerned Persons

1. On October 21, 2004, the Board of Environmental Review published MAR Notice No. 17-216 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2444, 2004 Montana Administrative Register, issue number 20.

2. The Board has amended the rules exactly as proposed.

3. The following comments were received and appear with the Board's responses:

COMMENT NO. 1: One commentor stated that he did not believe his campground should be regulated the same as a town of 9,000 people.

RESPONSE: Campgrounds are generally, and in this case, considered transient, non-community systems. A transient, non-community system is not required to sample the same as a community system. Transient, non-community systems are only required to sample for "acute" contaminants, i.e., total coliform bacteria and nitrate/nitrite. Community systems are generally required to sample for all contaminants regulated under the Safe Drinking Water Act and Montana Public Water Supply laws and rules.

COMMENT NO. 2: One commentor stated he did not think he should have to sample twice everyday for chlorine residuals.

RESPONSE: The requirements for conducting chlorine residual tests is set forth in ARM 17.38.225(2). Because the proposed rulemaking does not affect provisions of ARM 17.38.225(2), this comment is outside the scope of this rulemaking.

4. These rules will become effective January 1, 2005.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

James M. Madden	By: *Joseph W. Russell*
JAMES M. MADDEN	JOSEPH W. RUSSELL, M.P.H.
Rule Reviewer	Chairman

Certified to the Secretary of State, December 6, 2004.

BEFORE THE PETROLEUM TANK RELEASE COMPENSATION BOARD
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.58.311 and 17.58.326 pertaining to definitions and applicable rules governing the operation and management of petroleum storage tanks)	NOTICE OF AMENDMENT (PETROLEUM BOARD)

TO: All Concerned Persons

1. On October 21, 2004, the Petroleum Tank Release Compensation Board published MAR Notice No. 17-219 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2487, 2004 Montana Administrative Register, issue number 20.

2. The Board has amended the rules exactly as proposed.

3. The following comment was received, and appears with the Board's response:

COMMENT NO. 1: The Board should consider further amendment to ARM 17.58.326 by including within its scope federal standards promulgated by the Environmental Protection Agency, particularly that agency's regulations governing Spill Prevention Containment and Countermeasures. The Board's adoption of the referenced federal rules would result in more effective and equitable regulation of above-ground storage tanks (AST), fewer AST releases, and consequently would result in lessening the burden on the Petroleum Tank Release Cleanup Fund.

RESPONSE: The recommendation that the Board further amend ARM 17.58.326 by adopting federal rules pertaining to Spill Prevention Containment and Countermeasures exceeds the scope of the amendments proposed in the October 21, 2004, notice of public hearing. While the Board appreciates the recommendation, because that recommendation addresses subject matter that was not included in the notice of hearing, it is rejected.

Reviewed by:	PETROLEUM TANK RELEASE COMPENSATION BOARD
James M. Madden	By: *Barry Johnston*
JAMES M. MADDEN Rule Reviewer	BARRY JOHNSTON Chairman

Certified to the Secretary of State December 6, 2004.

BEFORE THE DEPARTMENT OF CORRECTIONS
OF THE STATE OF MONTANA

In the matter of the adoption of new rules I through VI pertaining to the establishment of the Eastmont chemical dependency treatment program in Glendive, Montana, for fourth offense DUI offenders)	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On August 19, 2004, the Department of Corrections published MAR Notice No. 20-7-32 regarding the public hearing on the proposed adoption of the above-stated rules pertaining to the establishment of the Eastmont chemical dependency treatment program in Glendive, Montana, for fourth offense DUI offenders, at page 1897 of the 2004 Montana Administrative Register, issue number 16.

2. The Department has adopted New Rule II (20.7.804) exactly as proposed.

3. The Department has adopted the following rules as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

NEW RULE I (20.7.801) DEFINITIONS As used in this sub-chapter, the following definitions apply:

(1) "Capacity" means no more than 40 program participants.

(2) "Center" means the chemical dependency treatment center established in the former Eastmont human services center in Glendive, Montana.

(2) and (3) remain as proposed but are renumbered (3) and (4).

~~(4)~~(5) "Eligible offender" means an offender who has been convicted of a fourth or subsequent offense of driving under the influence of alcohol or drugs or driving with excessive alcohol concentration and has been sentenced under 61-8-731, MCA. The term excludes persons convicted of a sexual or violent offense as defined in 46-23-502, MCA.

~~(5)~~(6) "Facility" means the department-owned buildings and real property that comprise the former Eastmont human services campus.

(6) and (7) remain as proposed but are renumbered (7) and (8).

AUTH: 53-1-203, MCA
IMP: 53-1-210 and 61-8-731, MCA

NEW RULE III (20.7.807) ADMISSION TO THE PROGRAM (1)

through (2)(e) remain as proposed.

(3) The department shall make applications available to eligible offenders. The screening committee shall review the applications, including the criminal records and other pertinent information, and:

(a) determine by majority vote of members present which applicants the program will accept;

(b) through (c)(iii) remain as proposed.

(4) The screening committee may only deny admission to an eligible offender who, in the committee's opinion, is inappropriate for the program, based on a conviction or criminal history that poses an undue risk to a community-based program. The committee shall state the reasons for the denial in writing.

AUTH: 53-1-203, MCA
IMP: 53-1-210 and 61-8-731, MCA

NEW RULE IV (20.7.810) REQUIREMENTS AFFECTING USE OF FACILITY (1) ~~By written contract, t~~The department ~~shall require~~ and the contractor shall ~~to~~ adhere to the following provisions that pertain to the use of the facility:

(a) through (2)(d) remain as proposed.

(3) Upon request, and in exchange for the benefit of the additional security created by a law enforcement presence, the department shall provide one ~~rent-free~~ office in the facility for the Dawson county sheriff's department and one ~~rent-free~~ office in the facility for the Glendive police department. Law enforcement personnel staffing these offices shall act independently of the department and have no supervisory duties with respect to program participants.

(4) remains as proposed.

AUTH: 53-1-203, MCA
IMP: 53-1-210 and 61-8-731, MCA

NEW RULE V (20.7.813) REQUIREMENTS AFFECTING PROGRAM PARTICIPANTS AND VISITORS (1) ~~By written contract, t~~The department ~~shall require~~ and the contractor shall ~~to~~ adhere to the following provisions that pertain to program participants and visitors:

(a) program participants must wear clothing of an easily identifiable style and color, of which the contractor shall notify the public;

(b) the transport of program participants to the program may only be conducted by law enforcement or other supervised form of transportation approved by the department, including but not limited to the contractor, department staff, state or local law enforcement agencies or contracted transportation providers; and

(c) remains as proposed.

(2) In the event a program participant is unaccounted for within the facility and is alleged to have escape~~s~~d from the facility, program staff shall immediately:

(a) notify appropriate law enforcement and corrections agencies; ~~and~~

(b) ~~activate a telephone message system developed by the contractor to notify the community and neighboring residents of the escape.~~ activate an alarm audible to residences in the Georgetown/Hillcrest areas; and

(c) notify all radio and television stations broadcasting in the area in order to alert the public.

AUTH: 53-1-203, MCA
IMP: 53-1-210 and 61-8-731, MCA

NEW RULE VI (20.7.816) EXPANSION OR MODIFICATION (1) remains as proposed.

(2) To document public support, the department shall conduct a survey of an unbiased representative sampling of the Glendive community and the Hillcrest and Georgetown subdivisions and a survey of the following public officials:

(a) through (h) remain as proposed.

(3) If the department ~~determines a majority of the community and public officials support~~ documents public support for a proposed expansion or change in the purpose of the program as set forth in (2), the department shall then conduct a public hearing in Glendive, Montana, in accordance with the Montana Administrative Procedure Act, 2-4-302, MCA. In addition to the notice requirements set forth therein, the department shall publish notice of the hearing in a newspaper of general circulation within the city of Glendive and Dawson County reasonably in advance of the hearing.

AUTH: 53-1-203, MCA
IMP: 2-4-302, 53-1-210 and 61-8-731, MCA

4. The department has thoroughly considered all commentary received. The following comments were received and appear with the department's responses:

COMMENT #1: Placement of the program at Eastmont is an improper use of the department’s authority under 53-1-203, MCA. Section 53-1-203, MCA, sets forth procedures to be followed in the siting, establishment, and expansion of prerelease centers. Additionally, the department should conduct an impact assessment pursuant to 2-10-103 and 2-10-105, MCA.

RESPONSE: The comment is rejected. The proposed use of the facility is not a "prerelease center" under 53-1-203, MCA. Therefore, the procedures required for a prerelease center are not applicable. This opinion is supported by the Letter of Advice issued in September of 2004 from the Attorney General’s office pursuant to a request for an opinion by Richard L. Burns, Glendive City Attorney.

Additionally, the proposed agency action has no taking or

damaging implications on private property that would require an "impact assessment" under the Private Property Assessment Act (2-10-101 through 2-10-105, MCA). The use of the agency's property is substantially related to the legitimate government interest of supervising and rehabilitating offenders according to the department's legislative mandate.

COMMENT #2: Provide Boys & Girls Club rent-free space.

RESPONSE: The comment is rejected. The Montana constitution prevents the department from providing "rent-free" space to any individual or entity. As a long-time occupant of the space, the Boys & Girls Club lease arrangement will not be revisited at this time. The rule respecting availability of office space to local law enforcement agencies is amended to acknowledge that the space is offered in consideration for the benefit of having a law enforcement presence at the facility.

COMMENT #3: Provide additional funding for local law enforcement to staff the satellite offices.

RESPONSE: The comment is rejected; however, the rules are amended to clarify that law enforcement staff occupying the building will not perform duties on behalf of the department.

COMMENT #4: The proposed rules fail to adequately address safety and security concerns with respect to offender supervision. The department, in order to address "safety, security and other concerns of residents in the immediate area surrounding Eastmont" should appoint a committee of "residents of the area directly impacted, local officials, along with a department of corrections representative" to write comprehensive rules.

RESPONSE: The comment is rejected. The proposed rules incorporate safety and security measures that were suggested by Glendive and Eastmont neighborhood residents at public meetings held by the department in the community. The drafting of rules by a quasi-public committee as suggested is an impermissible delegation of the department's legislative-mandated duties and is redundant to the notice and comment rulemaking process under MAPA. Additionally, all correctional facilities maintain certain restricted safety and security policies and procedures that are not available to the public pursuant to 2-6-103, MCA, nor should they be subject to the administrative rulemaking procedure in the event that they must be modified on an emergency or temporary basis.

The Georgetown Estates Homeowners Association (GEHA) requested that the department consider the following specific changes to the rules as proposed:

COMMENT #5: Develop a departmental prescreening process consistent with DOC Policy 5.8.1(3) to exclude offenders with

sexual or violent history or a history of crimes against children.

RESPONSE: The department has a prescreening process in place that takes into account these and other factors to ensure safety, security, and optimal rehabilitation for the offender. No amendment to the proposed rules is therefore necessary.

COMMENT #6: Install an alarm system audible to "all residences in the Georgetown/Hillcrest areas" to be activated immediately "if an inmate escapes or leaves the facility unattended by staff."

RESPONSE: The department accepts the comment and will add this language to Rule V.

COMMENT #7: For the "telephone message system" referred to in New Rule V(2)(b), utilize an "automated phone alert system" that is tested regularly by the contractor instead of a "phone tree" which would be a less effective method of notifying the adjacent community of an escape.

RESPONSE: The department rejects the comment. This is a more costly and less effective measure when compared to the alarm system suggested in comment #6. Therefore, the language regarding the telephone message system will be deleted.

COMMENT #8: Add language in New Rule V(2)(c) "In the event of an escape the contractor shall notify all radio and television stations broadcasting in the area in order to alert the public."

RESPONSE: The department accepts the comment as its current standard practice and will add this language to Rule V.

COMMENT #9: Requests further definition of fencing to be of sufficient height and constructed of materials designed to eliminate any visual contact between offenders and residents, designed with security in mind to lessen escape risk and to be "in harmony visually with the surrounding area."

RESPONSE: The comment is rejected. The current language sufficiently states that the department will install a fence to "provide heightened security from escape and reduce visual contact with the public." In addressing security, as well as aesthetic concerns, the department will install a 10-foot high fence at strategic intervals that secure all exterior doors and windows, to address the concerns expressed by the community.

COMMENT #10: Asks to equip all exits, windows, and potential exits with alarms.

RESPONSE: The comment is rejected. The current language

sufficiently states that "the department shall improve or install exit alarms on all doors and windows that do not face a fenced area and enhance security on all doors and windows that do not face the courtyard."

COMMENT #11: Asks to obscure any view from windows and doors in the facility facing residences where the public may be viewed by offenders.

RESPONSE: The comment is rejected. The current language sufficiently states that the department will install a fence to "provide heightened security from escape and reduce visual contact with the public."

COMMENT #12: Address use of buildings and property by adding language to provide that "any use of the Eastmont property and/or buildings, including, but not limited to the lease, rent or sale of any portion of the property or the property in its entirety would have to have the approval of citizens in the immediate geographic area and local city officials and be in accordance with local zoning."

RESPONSE: The department rejects the comment as an illegal delegation of authority of the Legislature over state-owned real property and buildings.

COMMENT #13: To ensure that the department "addresses issues in administrative rules and not just in contract language pertaining to the contractor," requests that Rules IV and V be amended to read "The department and contractor shall adhere to the following..." instead of "By written contract, the department shall require the contractor to adhere to the following...."

RESPONSE: The department accepts the comment and has made the suggested change.

COMMENT #14: Requests definition in Rule V(1)(b) of what other supervised forms of transportation would be approved of by the department.

RESPONSE: The Department accepts the comment and has inserted the suggested change.

COMMENT #15: Requests that the department submit an annual report to local officials and the community.

RESPONSE: The comment is rejected. The contractor will provide the department with an annual statistical report that will be available for public inspection or copying under public information statutes.

COMMENT #16: Requests that Rule III define "quorum" for voting purposes and specify that screening committee meetings

may only be held when a quorum is present. Requests specificity on how often the committee will meet, the term length of committee members, and provide for alternate community screening committee members to be appointed by the City Council to ensure the community has adequate representation at all screening committee meetings.

RESPONSE: The comment is rejected as requiring an unnecessary level of formality. The department has had success with similar committees and experienced active participation by public members operating by informal means. However, the rule will be amended to specify that a majority vote of members present will suffice to screen program participants in order to accomplish the department mission. It is hoped that screening committee public members will endeavor to attend these meetings or be replaced by someone who will.

COMMENT #17: Requests that the GEHA has a member on the local screening committee appointed by the city council from a list of GEHA members developed by the GEHA Board of Directors.

RESPONSE: The comment is rejected. The current language provides that the city council will appoint a resident of the subdivision and the department may not legally draft a rule that restricts participation on the screening committee to individuals who are members of a private association.

COMMENT #18: Requests in Rule VI(1) to add the underlined language below: "The department may not expand the capacity or modify the purpose of the program or expand programming for any other purpose set forth in these rules unless it documents public support of a majority of public officials, a majority of Georgetown/Hillcrest residents...."

RESPONSE: The comment is rejected because the language proposed to be added "or expand programming for any other purpose" is the logical and functional equivalent of the current language, "may not expand the capacity or modify the purpose of the program."

COMMENT #19: Requests in Rule VI(3) to insert the underlined language below: "If the department determines by the use of a unbiased, comprehensive survey that a majority of the community, a majority of Hillcrest and Georgetown subdivisions and a majority of local public officials support...."

RESPONSE: The comment is rejected in part and accepted in part. First, the rule is amended in (3) to clarify that a majority of each of three groups is required to document support for an expansion or modification of the program. The rule is further amended in (2) to include the word "unbiased." However, insertion of the word "comprehensive" is rejected on the basis that "comprehensive" may be interpreted to mean to include every member of the Glendive community and the

subdivision neighborhood when that is not feasible.

COMMENT #20: Requests the following language to be added to Rule IV: "All programming and offenders be permanently restricted to Buildings 1 and 2."

RESPONSE: The comment is rejected because the proposed language, "All programming and offenders be permanently restricted to Buildings 1 and 2...," is the functional and logical equivalent of the current language.

COMMENT #21: GEHA requested the department address several definitions, including: adding to the definitions of "expansion" and "escapes"; define "appropriate" and the criteria/process used to determine the appropriateness as used by the department; define "community" in New Rule V(b); and combine the definition of "eligible offender" and "program participant" in New Rule I(4) and (7).

RESPONSE: The comments are rejected in part and accepted as follows: "expansion" requires no further definition as the term means any use not articulated in the present rules; "escape" has its common sense meaning as well as its legal definition and as used in Rule V(2) will be modified by the term "alleged"; "inappropriate," as used in Rule III, will be defined to include criminal convictions or histories that pose an undue risk to a community-based program; and the definition of "eligible offender" cannot be combined with "program participant" because not all "eligible" offenders will pass the screening criteria and be accepted into the program.

COMMENT #22: The definition of "eligible offender" should exclude violent offenders, sexual predators, and pedophiles.

RESPONSE: The rule will be amended to the extent that "eligible offender" will be defined to exclude sexual or violent offenders as defined in 46-23-502, MCA.

COMMENT #23: Respecting Rule III, the comment asks what information the committee will have to make an informed decision and whether that will include "charges and convictions" and other pertinent information.

RESPONSE: The rule will be amended to define that the criminal record and criminal history, as is the current standard practice, will be available for the committee's review.

COMMENT #24: In Rule III(3)(b), eliminate "or near" in reference to capacity as it could be interpreted to mean more than 40.

RESPONSE: The definition of "capacity" in Rule I will be amended to mean no more than 40 program participants.

COMMENT #25: Rule V - make style and color of clothing known through public service announcements.

RESPONSE: The language is amended to require the contractor to notify the public of the style and color of clothing.

COMMENT #26: The public has a misconception that the program is only for alcoholics.

RESPONSE: "Eligible offenders" or persons who have been convicted under 61-8-731, MCA, pertains to persons who may have been under the influence of alcohol or drugs.

COMMENT #27: The comment sought to know what methodology would be used to determine a "representative sampling," what would constitute a "representative sampling," and who would conduct the survey.

RESPONSE: The methodology and manner in which the survey to measure and document public support is not known. At this time, the department has no intent to expand the program. The proposed rules are meant to reassure the community that the department will seek its input before expanding or modifying the program.

COMMENT #28: Add to Rule VI a minimum of two consecutive public notices and to have the hearing conducted after normal business hours.

RESPONSE: The comment is rejected in order to maintain consistency with the notice and comment provisions set forth in MAPA.

COMMENT #29: Include "real property" in the definition of "facility."

RESPONSE: The comment is accepted and the rule amended.

/s/ Bill Slaughter
BILL SLAUGHTER, Director
Department of Corrections

/s/ Colleen A. White
Colleen A. White, Rule Reviewer
Department of Corrections

Certified to the Secretary of State December 6, 2004.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 8.15.301 pertaining to boiler operating engineer license fees) NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 21, 2004, the Department of Labor and Industry published MAR Notice No. 8-15-5 regarding the public hearing on the proposed amendment of the above-stated rule relating to boiler operating engineer license fees, at page 2501 of the 2004 Montana Administrative Register, issue no. 20.

2. On November 12, 2004, a public hearing was conducted in Helena, Montana, and numerous members of the public spoke at the public hearing. In addition, several written comments were received prior to the closing of the comment period. In all, 18 individuals commented on the proposed amendment.

3. The Department has thoroughly considered all of the comments made. A summary of the comments received and the Department's responses are as follows:

COMMENT 1: A commenter questioned why the Department needed to generate annual program revenue of $110,000 when the program's budget was only $28,000 a year.

RESPONSE 1: The budget for the boiler operating engineer program for fiscal year 2004 was $129,936, not $28,000. The budget for the boiler operating engineer program for fiscal year 2005 is $134,361.

COMMENT 2: All but one of the commenters opposed the amount of the proposed fee increases. Many of the commenters stated that their renewal fees were being increased 150%.

RESPONSE 2: The budget for the boiler operating engineer program for fiscal year 2004 was $129,936, not $28,000. In fiscal year 2004, the Department received revenue for the boiler operating engineer program of only $78,066. Accordingly, there was a deficit for fiscal year 2004 of $51,870, roughly 40% of the budgeted amount. A similar deficit is projected for fiscal year 2005 unless license fees are increased. Section 50-74-309, MCA, requires that the Department set fees commensurate with the costs of administering the boiler operating engineer program.

However, as a result of the comments received, the Department re-calculated its revenue projections to determine whether the amount of the annual renewal fee could be reduced from the

proposed $50 per year. The Department concludes that an annual renewal fee of $45 per year will produce adequate revenue to sustain its operations and, over time, eliminate the existing program deficit. The Department has amended ARM 8.15.301 accordingly.

COMMENT 3: Jim Keane, Representative of House District 36 (Butte) stated that the fees should be $80 for a First Class license, $70 for a Second Class license, $60 for a Third Class license, $50 for an Agricultural license and the same for a Low Pressure and for a Traction license. He stated that annual renewals should be $30 and $30 to replace a lost license.

RESPONSE 3: The Department has calculated the revenue from the suggested fees as follows:

First Class applications: $80 x 8 applicants =	$ 640
Second Class applications: $70 x 3 applicants =	210
Third Class applications: $60 x 30 applicants =	1,800
Agricultural applications: $50 x 1 applicant =	50
Low Pressure applications: $50 x 105 applicants =	5,250
Traction applications: $50 x 1 applicant =	50
Annual renewals: $30 x 3,350 applicants =	100,500
License replacement: $30 x 6 requests =	180
annual license revenue:	$112,035

As noted in Responses 1 and 2, the boiler operator licensing program budget for fiscal year 2004 was $129,936, and for fiscal year 2005 is $134,361. The fee amounts suggested by the commenter do not cover the program's operating costs. The Department concludes that pursuant to section 50-74-309, MCA, it must charge fees commensurate with costs.

COMMENT 4: Dick Tombrink, president of the Montana Steam Engineers, suggested that it might be appropriate for the Department to "go to a lifetime license where you charge, in the case of traction engines,..., maybe $50 or $100 upfront for a lifetime license, and that takes care of the rest of your life on it."

RESPONSE 4: The Department notes that section 50-74-313(1), MCA, requires the licenses of operating engineers to be renewed "at periodic intervals." The Department concludes that based upon that provision of law, the Department does not have the statutory authority to issue lifetime licenses to traction engine or other boiler operating engineers.

COMMENT 5: One commenter stated that a secretary with a computer and mailing machine could run the renewal process for a fraction of the total proposed revenue amount of $175,000. The commenter asserted that the costs would be as follows:

Clerk	$30,000
Computer	2,000

Mailing Machine	3,000
Postage	2,600
Envelopes and license blanks	10,000
Total	$47,600

RESPONSE 5: While the commenter has taken into account some direct costs for the renewal process, there are other costs that the commenter has overlooked. The Department notes that in addition to the examination-related costs that are part of the boiler operating engineer licensing program, there are significant indirect costs associated with the program. Some of the indirect costs associated with the program include office rent, office fixtures and machinery, telephone service, computerized database system, including on-line licensee lookup information and on-line renewal, Internet connection for on-line information and services. Other indirect costs include employee training expenses and a proportionate share of management, legal and other support services expenses.

In addition to the direct and indirect costs attributable to license renewal, the program needs to generate sufficient revenue to repay the interagency loan that has covered the operating deficit identified in Response 2. The annual program revenue is estimated at $161,040 overall, based on the lowered $45 renewal fee. This will allow the program to pay back a loan that was issued to resolve FY 2004 shortfalls and maintain a budget that will meet expenses. The Department will review the program fees and lower them if appropriate once the loan has been paid back in full.

COMMENT 6: One commenter questioned a raise in the application fees for all classes of licenses. The commenter stated that the application cost was excessive if the applicant has to travel to Helena to take the exam.

RESPONSE 6: The Department has been working with local job services throughout Montana since spring of 2004 to allow approved examination applicants the option to sit for the examination at a local job service. The examinations are still offered in Helena the first Friday of each month, but the option of taking the examination at a local job service will continue.

COMMENT 7: A concern was raised concerning licensees on fixed incomes who just maintain the license for future work. The commenter suggested a maintenance fee for those who are still holding their license but not using it for actual income. In addition, the commenter went on to state that they were aware of the need for instructors for future training.

RESPONSE 7: State law does not currently allow for a retired or inactive status for boiler engineers licensees. Changes by the legislature would need to be made to accommodate this request. As far as training provided to

those trying to obtain any class of licensure, by state law they must gain such experience under the supervision of a licensed boiler operator with at least the same level or higher of the license being sought. If an applicant had provided time earned under a retired or inactive status licensee, their experience would not be acceptable. The Department concludes that, pursuant to section 50-74-309, MCA, it must charge fees commensurate with costs.

COMMENT 8: A comment was received that the higher classes of boiler operators could probably afford the increase in renewal fees while the lower licensing classes could not because of the differences in pay.

RESPONSE 8: The Department recognizes that boiler operators do get paid different pay scales, but services provided by the Department are uniform in nature and therefore all licensee renewals are set at the same rate. The Department concludes that pursuant to section 50-74-309, MCA, it must charge fees commensurate with its costs.

COMMENT 9: One commenter supported the proposed rule amendments.

RESPONSE 9: The Department acknowledges and appreciates the commenter's support.

4. After consideration of the comments, the Department has amended ARM 8.15.301 as proposed but with the following changes, deleted matter interlined, new matter underlined:

8.15.301 FEE SCHEDULE FOR BOILER OPERATING ENGINEERS
(1) remains as proposed.
(2) Annual renewal of license (all classes) ~~50~~ 45
(3) through (5) remain as proposed.

AUTH: 50-74-101, MCA
IMP: 50-74-309, 50-74-313, MCA

DEPARTMENT OF LABOR AND INDUSTRY

/s/ WENDY J. KEATING
Wendy J. Keating Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

Certified to the Secretary of State December 6, 2004

BEFORE THE BOARD OF NURSING
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 8.32.406, licensure for foreign nurses	)))	CORRECTED NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On June 3, 2004, the Board of Nursing (Board) published MAR Notice No. 8-32-62 regarding the proposed amendment of the above-stated rule at page 1277 of the 2004 Montana Administrative Register, issue no. 11. On October 7, 2004, the Board published the notice of amendment of ARM 8.32.406 at page 2393 of the 2004 Montana Administrative Register, issue no. 19.

2. In preparing replacement pages for the fourth quarter of 2004, the Board discovered that in the notice of amendment a word was inadvertently left out of ARM 8.32.406(2)(b), although it had been shown correctly in the original proposal. The rule, as amended, reads as follows, deleted matter interlined, new matter underlined:

8.32.406 LICENSURE FOR FOREIGN NURSES (1) through (2)(a) remain as proposed.

(b) those applicants who have passed the NCLEX or the state board test pool examination and who have graduated from a college, university or professional training school located in:

(i) through (3) remain as proposed.

AUTH: 37-1-131, 37-8-202, MCA
IMP: 37-8-101, 37-8-406, 37-8-416, MCA

/s/ MARK CADWALLADER	/s/ WENDY KEATING
Mark Cadwallader,	Wendy Keating, Commissioner
Alternate Rule Reviewer	DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State December 6, 2004

BEFORE THE BOARD OF RADIOLOGIC TECHNOLOGISTS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the transfer of ARM 8.56.101 through 8.56.801, pertaining to the board of radiologic technologists	NOTICE OF TRANSFER

TO: All Concerned Persons

1. Pursuant to Chapter 483, Laws of Montana 2001, effective July 1, 2001, the Board of Radiologic Technologists was transferred from the Department of Commerce to the Department of Labor and Industry, ARM Title 24, Chapter 204.

2. The Department of Labor and Industry has determined that the transferred rules will be numbered as follows:

OLD	NEW	
8.56.101	24.204.101	Board Organization
8.56.201	24.204.201	Procedural Rules
8.56.202	24.204.202	~~Citizen~~ Public Participation Rules
8.56.409	24.204.401	Fee Schedule
8.56.607	24.204.404	Permit Fees
8.56.609	24.204.406	Abatement Of Renewal Fees
8.56.402	24.204.408	Radiologic Technologists Applications
8.56.408	24.204.411	Replacement Licenses And Permits
8.56.604	24.204.414	Hardship Temporary Permits
8.56.413	24.204.415	Inspections
8.56.602	24.204.501	Limited Permit Application - Types
8.56.602A	24.204.504	Permits - Practice Limitations
8.56.602B	24.204.507	Course Requirements For Limited Permit Applicants
8.56.602C	24.204.511	Permit Examinations
8.56.414	24.204.2101	Continuing Education
8.56.415	24.204.2102	Waiver Of Continuing Education Requirement
8.56.801	24.204.2301	Unprofessional Conduct

3. The transfer of rules is necessary because this board was transferred from the Department of Commerce to the Department of Labor and Industry by the 2001 legislature by Chapter 483, Laws of Montana 2001.

BOARD OF RADIOLOGIC TECHNOLOGISTS

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

Certified to the Secretary of State December 6, 2004.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

In the matter of the amendment and transfer of ARM 24.11.815 and 42.17.507, pertaining to unemployment insurance tax matters	CORRECTED NOTICE OF AMENDMENT AND TRANSFER

TO: All Concerned Persons

1. On September 23, 2004, the Department of Labor and Industry published MAR Notice No. 24-11-188 regarding the proposed amendment and transfer of the above-stated rules pertaining to unemployment insurance tax matters at page 2149 of the 2004 Montana Administrative Register, Issue No. 18. On November 18, 2004, the Department published the notice of amendment and transfer of ARM 24.11.2515 (formerly ARM 24.11.815) and of ARM 24.11.2701 (formerly ARM 42.17.507), at page 2808 of the 2004 Montana Administrative Register, Issue No. 22.

2. The reason for the correction to ARM 24.11.2515 is that it was listed with an incorrect and inappropriate AUTH citation. The reason for the correction to ARM 24.11.2701 is that the IMP citation contained a transposition of digits. The corrected rule amendments read as follows, stricken matter interlined, new matter underlined:

24.11.815 (24.11.2515) PAYMENTS THAT ARE NOT WAGES--JUROR FEES, INSURANCE PREMIUMS, ANNUITIES, DIRECTOR AND PARTNERSHIP FEES (1) through (5) remain as adopted.

AUTH: 39-51-301~~,~~ and 39-51-302, ~~and 39-51-2407,~~ MCA
IMP: 39-51-201 and 39-51-1103, MCA

42.17.507 (24.11.2701) POSTING NOTICE TO WORKERS (1) remains as adopted.

AUTH: 39-51-301 and 39-51-302, MCA
IMP: ~~39-51-1110~~ 39-51-1101, MCA

/s/ MARK CADWALLADER	/s/ WENDY J. KEATING
Mark Cadwallader,	Wendy J. Keating, Commissioner
Alternate Rule Reviewer	DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State: December 6, 2004

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

In the matter of the amendment of ARM 36.12.101, definitions and the adoption of new rules I through XXIX regarding complete and correct application, department actions, and standards regarding water rights	)	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On September 23, 2004, the Department of Natural Resources and Conservation published MAR Notice No. 36-12-101 regarding a public hearing on the proposed amendment of ARM 36.12.101 concerning definitions and adoption of new RULES I through XXIX concerning a complete and correct application, department actions, and standards regarding water rights at page 2163 of the 2004 Montana Administrative Register, Issue Number 18.

2. The department has amended ARM 36.12.101 with the following changes, stricken matter interlined, new matter underlined:

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 (4) remain as proposed.

(5) "Application" for purposes of ARM 36.12.120, through 36.12.122, 36.12.1301, 36.12.1401, 36.12.1501, and 36.12.1601 means an application for beneficial water use permit, form no. 600, including criteria addendum form no. 600a, 600b, or 600acf, or application to change a water right, form no. 606, including criteria addendum form no. 606a, 606b, 606asw, or 606t.

(6) remains as proposed.

(7) "Associated right" means multiple ~~those~~ water rights filed by the same or different appropriators that share the same ~~source of supply,~~ point of diversion, place of use, or place of storage.

(8) "Augmentation plan" means a plan to provide water to a source of supply and its tributaries to mitigate the depletion effects of a permit or change authorization. The augmentation water right priority date is important to the success of any augmentation plan since call can be made on that water right. Examples of augmentation include, but are not limited to augmenting the source of supply with water from a nontributary source, or retiring all or a portion of senior water rights in the same source of supply in amounts equal to or greater than the ~~net~~ depletion effects of the permit or change application.

(9) remains as proposed.

~~(10) "Beneficial use" defined at 85-2-102, MCA, includes:~~

~~(a) the amount of water reasonably needed for the intended purpose, without waste;~~

~~(b) the amount needed for conveyance to the intended purpose, without waste; and~~

~~(c) water used for instream flow.~~

(11) through (16) remain as proposed but are renumbered (10) through (15).

~~(17)~~ <u>(16)</u> "Consumptive use" means the annual volume of water used for a beneficial purpose, such as water transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products<u>,</u> that does not return to ground or surface water~~s of the state~~.

(18) remains as proposed but is renumbered (17).

~~(19)~~ <u>(18)</u> "Criteria addendum" means that additional portion of an application on which substantial credible information must ~~be provided~~ <u>address</u> ~~to prove by a preponderance of the evidence that~~ the criteria ~~for approval of a permit or change authorization~~ listed in 85-2-311 and 85-2-402, MCA~~, are met~~.

~~(20)~~ <u>(19)</u> "Dam" means an artificial barrier <u>created by man-made means</u> and designed to form a basin to hold water and create a pond or reservoir.

(21) through (28) remain as proposed but are renumbered (20) through (27).

~~(29) "Form no. 600" means an application for beneficial water use permit.~~

~~(30) "Form no. 606" means an application to change a water right.~~

<u>(28) "General abstract" means a department-generated document that reflects certain water right elements from the department's database.</u>

~~(31)~~ <u>(29)</u> "Gpm" means a flow rate of water in gallons per minute.

~~(32) "Ground water" as defined in 85-2-102, MCA, means any water beneath the ground surface.~~

(33) remains as proposed but is renumbered (30).

~~(34)~~ <u>(31)</u> "Hydraulically connected" means a saturated water-bearing zone or aquifer in ~~direct~~ contact with surface water <u>or other water-bearing zone</u> where <u>the rate of exchange of water</u> ~~free exchange of water may occur~~ between the two sources <u>depends on the water level of the water-bearing zone or aquifer</u>.

(35) remains as proposed but is renumbered (32).

~~(36)~~ <u>(33)</u> "Immediately or directly connected to surface water" means ground water which<u>, when pumped at the flow rate requested in the application and during the proposed period of diversion,</u> induces surface water infiltration ~~directly from a stream or other source of surface water~~.

(37) and (38) remain as proposed but are renumbered (34) and (35).

~~(39) "Legally available" means that water is physically available from the source of supply to satisfy existing legal demands in the source of supply or its tributaries and the requested amounts in an application.~~

(40) remains as proposed but is renumbered (36).

(37) "Median year" means that water flow would be at the 50th percentile. Half of the years would have had higher flows and the other half would have had lower flows.

~~(41)~~ (38) "Multiple domestic use" means a domestic use by more than one household or dwelling characterized by long-term occupancy as opposed to guests. Examples are domestic uses by:

(a) colonies;

(b) condominiums;

(c) townhouses; and

(d) subdivisions~~; and~~.

~~(e) public water supply systems.~~

~~(42)~~ (39) "Municipal use" means ~~uses associated with a~~ water appropriated by and provided for those in and around ~~system for~~ a municipalit~~ies~~y ~~and incorporated~~ or an unincorporated town~~s and cities~~.

~~(43) "Net depletion" means the amount of water removed from an aquifer or surface water source by an appropriator, that does not return to a ground or surface water source and becomes unavailable to other appropriators.~~

~~(44)~~ (40) "Notice area" means ~~the~~ a geographic area determined by the department which may include water rights affected by an application ~~in which applicants must evaluate current water rights~~.

(45) and (46) remain as proposed but are renumbered (41) and (42).

~~(47) "Overlapping rights" means multiple water rights filed by different individuals and used on the same or a portion of the same place of use.~~

~~(48)~~ (43) "Owner of record" means a person who, according to the department's records, is the current owner of a water right.

(49) through (56) remain as proposed but are renumbered (44) through (51).

(52) "Priority date" means the clock time, day, month, and year assigned to a water right application or notice upon department acceptance of the application or notice. The priority date determines the ranking among water rights.

(57) through (59) remain as proposed but are renumbered (53) through (55).

~~(60)~~ (56) "Return flow" means that part of a diverted flow which is applied to irrigated land and is not consumed and returns underground to its original source or another source of water, and to which other water users are entitled to a continuation of, as part of their water right. Return flow is not wastewater. Rather, it is irrigation water seeping back to a stream after it has gone underground to perform its nutritional function. Return flow results from use and not from water carried on the surface in ditches and returned to the stream.

~~(61) "Salvage water" means seepage, waste, or deep percolation water that may be appropriated by the appropriator, moved to other lands, leased, or sold after implementing a water-saving method and proving lack of adverse effect to other~~

~~water rights.~~

(62) remains as proposed but is renumbered (57).

~~(63)~~ (58) "Seepage water" means that part of a diverted flow which is not consumptively used and which slowly seeps ~~returns~~ underground and eventually returns ~~through small cracks and pores~~ to a surface or ground water source, and which other water users can appropriate, but have no legal right to its continuance. Typical examples of seepage water include underground losses from an irrigation ditch or pond.

(64) remains as proposed but is renumbered (59).

~~(65)~~ (60) "Source aquifer" means the specific ground water ~~aquifer~~ source from which water is diverted for a beneficial use.

~~(66)~~ (61) "Source of supply" means the specific surface or ground water ~~body~~ source from which water is diverted for a beneficial use.

(67) through (74) remain as proposed but are renumbered (62) through (69).

(a) a surface water source feeding another surface water source; or

~~(b) ground water discharge to a surface water source;~~

~~(c) surface water recharge to an aquifer;~~

~~(d) an overlying aquifer recharging an underlying aquifer or vice versa; and~~

(e) remains as proposed but is renumbered (b).

~~(75) "Unappropriated water" means water which is not yet legally appropriated pursuant to law or which is not reserved, and is therefore available for new beneficial uses obtained in accordance with the requirements of 85-2-311, MCA, and these rules.~~

(76) remains as proposed but is renumbered (70).

(71) "Use of water for the benefit of the appropriator" means:

(a) the amount of water reasonably needed for the intended purpose;

(b) the amount of water needed for conveyance to the intended purpose; and

(c) water used for instream flow.

~~(77)~~ (72) "Volume" means the acre-feet of water. Twelve acre-inches or 325,851 gallons are equal to one acre-foot.

~~(78)~~ (73) "Waste water" means that part of a diverted flow which is not consumptively used and which returns as surface water to any surface water source, and which other water users can appropriate, but have no legal right to its continuance. A typical example is an irrigator who turns into the individual furrows traversing the irrigator's field from the head ditch more water than can seep into the ground. The water that stays on the surface and is not absorbed into the earth and which remains at the end of the furrow and is collected in a wastewater ditch is waste water.

(79) through (83) remain as proposed but are renumbered (74) through (78).

3. The department has adopted NEW RULES V (36.12.112), VII

(36.12.114), and IX (36.12.1301) exactly as proposed.

4. The department has adopted the following NEW RULES as proposed but with the following changes, stricken matter interlined, new matter underlined:

RULE II (36.12.109) EVAPORATION STANDARDS (1) through (1)(b) remain as proposed.

(c) Evaporation Pond Design for Agricultural Wastewater Disposal, USDA Soil Conservation Service, Montana Technical Note: Environment No. 7, February 1974; ~~and~~

(d) Evaporation from Lakes and Reservoirs, a study based on 50 years of weather bureau records, Minnesota Resource Commission, June 1942~~.~~; and

(e) A standard USGS evaporation pan is acceptable. The standard pan is four feet in diameter and 10 inches deep and measured daily.

(2) and (3) remain as proposed.

RULE III (36.12.110) LEGAL LAND DESCRIPTION STANDARDS

(1) and (1)(a) remain as proposed.

(b) lot, block, subdivision, ¼ section, section, township, range and county;

(2) remains as proposed.

(3) Transitory diversions must be described as the most upstream diversion point and a measurement in stream miles downstream from the upstream point ~~on the source~~. For example, the transitory diversion will extend from the upstream point to approximately one mile downstream.

(4) and (5) remain as proposed.

RULE IV (36.12.111) MAP STANDARDS (1) through (3) remain as proposed.

~~(4) The applicant must provide a notice area map that identifies water rights that may be affected by the proposed appropriation.~~

(5) through (7) remain as proposed but are renumbered (4) through (6).

RULE VI (36.12.113) RESERVOIR STANDARDS (1) remains as proposed.

(2) The application must include information explaining how the storage reservoir will be managed to satisfy senior water rights. Senior water users are not entitled to water that has been legally stored.

(3) If applicable, preliminary ~~D~~design specifications for a reservoir's primary and emergency spillways must be included.

(4) and (4)(a) remain as proposed.

(b) any losses that may occur with the means of conveyance must be calculated and identified.

(5) remains as proposed.

(6) Water tanks or cisterns that are a part of a ~~public~~ water ~~supply~~ system are not considered storage reservoirs and ~~no~~ a water right application is not needed to add a water storage

tank or cistern as long as the flow rate and volume of a water right is not being increased. ~~to a water system.~~

(7) If the application is for a reservoir for which the above standards are not applicable, the applicant must explain the reason why the standard is not applicable.

RULE VIII (36.12.115) WATER USE STANDARDS (1) through (2) remain as proposed.

(a) for domestic use, for one household, 1.0 acre-foot per year of water for year-round use; ~~. The 1.0 acre-foot does not include water needs for lawn, garden, shrubbery, or shelterbelts;~~

(b) and (c) remain as proposed.

~~(d) for irrigation, the number of acres to be irrigated, the type of crop, the method of irrigation, soil type, means of conveyance, and the climatic area determine a reasonable volume of water to irrigate a project. The NRCS Irrigation Guide for Montana dry year figures will be used as the standard;~~

(e) remains as proposed but is renumbered (d).

(e) For irrigation, the following table applies:

Irrigation Standards

	Climatic Area[1] Acre Feet per Acre				
	I	II	III	IV	V
Sprinkler Irrigation 70% Efficiency	2.63 - 3.04	2.30 - 2.69	2.08 - 2.41	1.76 - 2.07	1.26 - 1.48
Level Border 60% Efficiency Design Slope Level	3.07 - 3.55	2.69 - 3.15	2.43 - 2.81	2.06 - 2.41	1.47 - 1.73
Graded Border 70% Efficiency Slope Group Design Slope .10% Design Slope .20% Design Slope .40%	2.63 - 3.04	2.30 - 2.69	2.08 - 2.41	1.76 - 2.07	1.26 - 1.48
Graded Border 65% Efficiency Design Slope .75% Design Slope 1.5%	2.84 - 3.28	2.48 - 2.90	2.24 - 2.59	1.90 - 2.23	1.36 - 1.60
Graded Border 60% Efficiency Design Slope 3.0%	3.07 - 3.55	2.69 - 3.15	2.43 - 2.81	2.06 - 2.41	1.47 - 1.73
Furrow 70% Efficiency Design Slope .10% Design Slope .20% Design Slope .40%	2.36 - 2.74	2.11 - 2.44	1.87 - 2.16	1.39 - 1.70	NA
Furrow 65% Efficiency Design Slope .75%	2.54 - 2.95	2.27 - 2.63	2.02 - 2.33	1.50 - 1.83	NA
Furrow 60% Efficiency Design Slope 1.5%	2.75 - 3.19	2.46 - 2.85	2.19 - 2.52	1.62 - 1.98	NA
Contour Ditch 60% Efficiency Design Slope .75%	3.07 - 3.55	2.69 - 3.15	2.43 - 2.81	2.06 - 2.41	1.47 - 1.73
Contour Ditch 55% Efficiency Design Slope 1.5% Design Slope 3.0%	3.35 - 3.87	2.93 - 3.43	2.65 - 3.07	2.24 - 2.63	1.60 - 1.88
Contour Ditch 45% Efficiency Design Slope 6.0%	4.10 - 4.73	3.58 - 4.19	3.24 - 3.75	2.74 - 3.22	1.96 - 2.30

[1] The irrigation climatic areas are identified in the 1986 Irrigation Climatic Areas of Montana map. Climatic area I is high consumptive use, climatic area II is moderately high consumptive use, climatic area III is moderate consumptive use, climatic area IV is moderately low consumptive use, and climatic area V is low consumptive use.

(3) A permit is required when a reservoir is proposed to include fire protection purposes and the volume of water reasonably needed for fire ~~prevention~~ protection must be explained and must reference reliable industry sources.

(4) through (6) remain as proposed.

RULE XII (36.12.120) BASIN CLOSURE AREA EXCEPTIONS AND COMPLIANCE (1) and (2) remain as proposed.

(3) The department will determine whether an application in a basin closure area can be processed based on the information received from the applicant and will document its findings before it will review the application to determine whether it is correct and complete.

(4) While the department may determine that an application located in a basin closure area can be processed, an objector is able to refute the department's determination.

~~(4)~~ (5) In a basin closure area ~~that allows applications for nonconsumptive uses~~, evaporation losses must be mitigated. ~~A pond is considered consumptive because evaporation and seepage losses typically occur.~~

~~(5)~~ (6) ~~In basin closure areas that allow augmentation plans and applications for nonconsumptive uses, the department must approve the augmentation plan prior to processing the application.~~ Augmentation plans are allowed in basin closure areas. An augmentation plan must mitigate the effects to the surface water source that would be depleted because of a proposed application.

(7) Augmentation must occur in the depleted reach and during the season of depletion.

(8) An augmentation plan must include a measuring plan to ensure that the source being depleted is receiving the benefits of the augmentation.

(9) If an augmentation plan requires more than one application, all applications will be processed simultaneously. If any of the augmentation applications is terminated or denied, all related applications will be terminated or denied.

(10) If an augmentation plan includes the filing of a Notice of Completion of Groundwater Development, the water must be from a nontributary source. The Notice of Completion must be filed with the department as soon as the water is used for augmentation.

(6) remains as proposed but is renumbered (11).

~~(a)~~ (12) The department will not determine an application to be for a permit to appropriate ground water unless the department can determine from the information provided that the cone of depression or zone ~~radius~~ of influence of a pumping well will not ~~intercept~~ induce surface water ~~by inducing~~ infiltration during the proposed period of diversion.

~~(b)~~ (13) The department hydrologist ~~staff~~ shall make a written determination that the evidence submitted by an applicant is sufficient on which to base a determination that the proposed source aquifer ~~ground water use~~ is not hydraulically connected or if hydraulically connected to surface water, will not induce surface water infiltration.

~~(c)~~ (14) An applicant must address whether the source aquifer is hydraulically connected to any surface water sources that lie within an estimated or actual delineated zone of influence. An applicant may use the results of an appropriate

nearby aquifer test to approximate the zone of influence. Depending on circumstances, such as proposed flow rate and volume, cyclic pumping, well depth, or distance to surface water, an applicant may be able to demonstrate that there is not nor will there be a hydraulic connection to surface water when water is pumped at the proposed flow rate during the period of diversion.

~~(i)~~ (a) High and low transmissivity and storativity values can be evaluated and used to estimate a zone ~~radius~~ of influence. The applicant must determine if the source aquifer is hydraulically connected to surface water within the delineated zone of influence. ~~If the estimated radius of influence lies near a surface water source, then the applicant must determine if the source aquifer is hydraulically connected to the surface water source.~~

(ii) remains as proposed but is renumbered (b).

~~(iii)~~ (c) Water level data may be obtained from existing wells located within the zone of influence ~~near~~ or at the surface water source.

~~(iv)~~ (d) If existing wells are not available, the installation of small diameter wells, pits, wellpoints, or piezometers, including those adjacent to or in the surface water source, can be used to determine the existence of a hydraulic connection ~~obtain these data~~.

~~(d)~~ (e) If an applicant demonstrates ~~and provides a technical explanation concluding induced surface water infiltration will not occur when~~ that the static ground water level is greater than 10 feet below the bed of a surface water source, the source aquifer is ~~will~~ not ~~be~~ considered hydraulically connected to surface water at that location. Further testing for induced surface water infiltration at the tested location is not required.

~~(e)~~ (f) If an applicant demonstrates ~~and provides a written technical explanation concluding~~ that the static ground water level is less than 10 feet below the bed of a surface water source, additional proof is required to show whether the source aquifer is ~~considered to be~~ hydraulically connected to surface water. Additional proof must include an evaluation of capillary pressure, saturation, and unsaturated flow between the bed of the surface water source and the water table, and diurnal and seasonal fluctuations of static water levels. If additional proof is not provided, the source aquifer is considered to be hydraulically connected to surface water at that location. ~~at the tested location and f~~Further testing must be conducted to determine whether pumping the proposed well will induce surface water infiltration during the proposed period of diversion.

~~(f) Induced surface water infiltration can be best evaluated by conducting an aquifer test. The following rules address the evaluation of whether the proposed well will induce surface water infiltration.~~

~~(7)~~ (15) An aA~~A~~quifer test~~s~~ must be conducted using methods described in ARM 36.12.121 that will determine the aquifer properties needed to determine the zone of influence for the period of diversion and the potential for drawdown to induce ~~the~~

infiltration of surface water within the zone of influence.

(a) remains as proposed.

(b) Staff gage(s) must be installed in surface water source(s) adjacent to the observation well(s) to monitor stage(s) during the aquifer test for comparison ~~to~~ with ground water level(s).

~~(c) Relative or absolute elevations of all monitoring points must be surveyed to accurately determine hydraulic gradients.~~

(d) and (e) remain as proposed but are renumbered (c) and (d).

(e) An applicant must evaluate whether a surface water body or reach is losing or gaining to evaluate whether a proposed well will induce surface water infiltration.

(i) If the applicant projects that drawdown will reach a losing surface water source that is hydraulically connected to ground water during the period of diversion, the department will determine that pumping the proposed well will induce surface water infiltration.

(ii) For gaining surface water sources, the hydraulic gradient must be compared with the slope of the cone of depression that would be created during the period of diversion.

~~(f) The hydraulic gradient must be compared with the slope of the cone of depression near the surface water source(s) for the period of diversion.~~ If the comparison shows that the slope of the cone of depression is greater than the hydraulic gradient, the department will determine that pumping the proposed well will induce surface water infiltration.

~~(8)~~ (16) For ground water pits, the department will determine that evaporation losses ~~alone~~ do not ~~cannot~~ induce surface water ~~streambed~~ infiltration.~~, therefore, no hydraulic connection exists with surface water unless water is being pumped from the pit.~~ If water is being pumped from the pit, then a hydraulic analysis is required to determine if~~, by~~ pumping~~, water~~ will ~~is~~ induce~~d from a~~ surface water infiltration ~~source~~.

RULE XIII (36.12.121) AQUIFER TESTING REQUIREMENTS

(1) There are numerous tests that can be performed on wells and aquifers, with a variety of objectives and procedures. An adequate ~~The type of~~ aquifer test~~ing~~ will ~~required~~ depend~~s~~ on factors such as whether the well is located in a basin closure area (see ARM 36.12.120), the expected pumping schedule ~~typical use~~ of the well, the potential interference with existing water rights and the characteristics of the aquifer in which the well is completed.

(2) ~~Outside of a basin closure area, and depending on other circumstances, some flexibility regarding aquifer testing may be allowed; therefore~~ A~~a~~pplicants are encouraged to confer with department staff ~~experts~~ prior to designing an ~~the~~ aquifer test~~ing~~ to ensure that the test will not have to be repeated, which may require additional expense.

(a) Department staff ~~experts~~ will provide guidance on testing procedures, monitoring, and reporting, but will not

provide technical support or assistance.

~~(b) The department staff will determine the adequacy of the test design or test conducted.~~

(3) Aquifer testing must follow standard procedures that are discussed in hydrogeology textbooks and professional literature. The following are preferred ~~apply to~~ aquifer testing procedures:

(a) A hydrogeologist, hydrologist, or engineer familiar with aquifer testing procedures must supervise the aquifer test, however, the supervisor does not need to be on site. ~~, analyze data, and report results and conclusions.~~

(b) remains as proposed.

(c) Pumping must be maintained at a constant discharge rate equal to or greater than the ~~requested~~ proposed pumping rate for the entire duration of the test. If the discharge rate varies, the applicant must note the clock time and discharge rate. ~~If unforeseeable circumstances prevent the applicant from pumping at or above the proposed discharge rate, a discharge rate of not less than 75% of the proposed discharge rate can be accepted.~~

(d) through (h) remain as proposed.

(4) The following procedures are preferred ~~must be used~~ to ensure monitoring is adequate:

(a) One or more observation well~~(s)~~ must be completed in the same water-bearing zone(s) or aquifer as the proposed production well and close enough to the production well so that drawdown is measurable and far enough that well ~~pumping~~ hydraulics do not affect the observation well.

(b) One or more observation well~~(s)~~ must be completed in the overlying water-bearing zone(s) or aquifer if the proposed production well is purported to be completed in a hydraulically disconnected deeper aquifer.

(c) remains as proposed.

(d) New observation wells must be constructed as described in ARM Title 36, chapter 21, subchapter 6. However, ~~some~~ observation wells ~~may be shallow and~~ less than 10 feet deep are not subject to those rules. In those cases, observation wells might be constructed by simple excavation, or installing PVC pipe, perforated black pipe, or a sand point.

(e) remains as proposed.

(f) Ground water levels in the production, at least one of the observation wells in the source aquifer, and at least one observation well in the overlying water-bearing zone or aquifer ~~Ground water levels in the production and all of the observation wells~~ must be monitored at frequent intervals for at least two days prior to beginning the aquifer test to evaluate background water-level trends and the prepumping hydraulic gradient. An applicant must evaluate and correct for background water-level trends.

(g) Ground water-level drawdown in the production well and monitored observation well(s) during the pumping phase of the aquifer test must be measured with 0.01-foot precision according to the schedule specified on form no. 633.

(h) Ground water-level recovery in the production and

monitored observation well(s) must be measured with 0.01-foot precision according to the schedule specified on form no. 633 or at a minimum, according to the specified schedule on form no. 633 for the first 24 hours of recovery and four ~~several~~ times per day until end of the recovery test.

(5) A report describing the ~~all~~ testing and monitoring procedures and presenting analyses, interpretations, and conclusions must be submitted with the application. The following reporting requirements are preferred ~~and must include the following~~:

(a) a topographic map with labeled locations of production and observation wells, discharge point, surface water monitoring sites, ~~other well monitoring sites,~~ and a scale bar and north arrow;

(b) through (d) remain as proposed.

(e) a narrative description or conceptual model that describes the aquifer system ~~of the distribution of aquifers and confining layers, and locations of aquifer boundaries~~;

(f) through (j) remain as proposed.

RULE XIV (36.12.122) CONTACTS (1) through (3) remain as proposed.

(4) A contact cannot represent an applicant at a hearing unless the contact is an attorney.

RULE X (36.12.1401) PERMIT AND CHANGE APPLICATION MODIFICATION (1) remains as proposed.

(2) An applicant may change the name on an application before publication by notifying the department in writing. For name changes after an application has been published and objections have been received, an applicant must notify the department and all parties in writing.

(2) remains as proposed but is renumbered (3).

~~(3)~~ (4) Republication is required if a modification ~~an application substantially~~ changes the nature or scope of the permit or change application information ~~criteria from the original application~~. The following require republication:

(a) through (h) remain as proposed.

(i) the period of use is expanded, unless the application involves a use from a reservoir and the~~, because the~~ impact would not change; and

(j) any modification ~~change~~ where the effect on the source of supply or its tributaries ~~could~~ changes the ~~cause a different~~ impact described from the originally published information.

~~(4)~~ (5) For modifications made after an application has been published, ~~Depending on the circumstances, the applicant may be responsible for~~ the cost of republication and mailing of individual notices must be paid by the applicant.

~~(5)~~ (6) A new analysis of the application criteria must be submitted when an application modification requires republication and the department will make a new correct and complete determination on the modifications prior to republication.

(7) If an applicant decides at any point in the water

right application process to complete a different application for the same project, the applicant must complete a new application form. The date received will be the date the new application is submitted to the department. The department will review the application based on the requirements for that type of application.

RULE XI (36.12.1501) PERMIT AND CHANGE APPLICATION DEFICIENCY LETTER AND TERMINATION (1) If the department determines the application does not contain the information requested in ARM 36.12.1601, the department will notify the applicant in one ~~a~~ deficiency letter of any defects in a permit or change application within 180 days of receipt of the application. The defects and the administrative rule not met will be identified in the deficiency letter.

(2) If all of the requested information in the deficiency letter is postmarked and submitted to the department within 30 days of the date of the deficiency letter or an extension of time of no more than 15 days, the priority date on a permit application will not be changed, or for change applications, the date received will not be changed. A request for extension of time must be submitted in writing.

(3) If all of the requested information in the deficiency letter is postmarked or submitted within 31 to 90 days of the date of the deficiency letter unless extended under (2), the permit application priority date will be changed to the date when the department receives all of the requested information, or for a change application, the date received will be changed.

(4) If all of the requested information in the deficiency letter is not postmarked or submitted within 90 days of the date of the deficiency letter, the permit or change application will be terminated and the application fee will not be refunded.

~~(5) If a second or follow-up deficiency letter is required, the 90-day period does not start over.~~

RULE I (36.12.1601) WATER RIGHT PERMIT AND CHANGE - CORRECT AND COMPLETE DETERMINATION (1) An application deemed correct and complete can advance to the next stage of the application process.

(2) An application deemed correct and complete does not entitle an applicant to a provisional permit or change authorization.

(3) Providing correct and complete information is not necessarily the same as proving the statutory criteria. The department, with or without receipt of objections can only grant an application if the criteria for issuance of a permit or change application are met.

~~(1)~~ (4) A water right permit application will be deemed correct and complete if a permit applicant's information, required to be submitted by ARM 36.12.109 through 36.12.115, 36.12.120, 36.12.121, 36.12.1301, 36.12.1401, 36.12.1701 through 36.12.1707, and 36.12.1802, conforms to the standard of substantial credible information and all the necessary parts of the application form requiring the information, including a

criteria addendum, have been filled in with the required information.

~~(2)~~ (5) A water right change application will be deemed correct and complete if an applicant's information, required to be submitted by ~~an application is in substantial compliance with~~ ARM 36.12.109 through 36.12.115, 36.12.121, 36.12.1301, 36.12.1401, 36.12.1801, 36.12.1802, 36.12.1901 through 36.12.1904, and 36.12.2001, conforms to the standard of substantial credible information and all the necessary parts of the application form requiring the information, including a criteria addendum, have been filled in with the required information.

RULE XV (36.12.1701) FILING A PERMIT APPLICATION (1) An application for beneficial water use permit (form no. 600) must be filed when an ~~individual~~ applicant desires to use ~~surface water or~~ ground water that exceeds 35 gallons per minute or a volume of 10 acre-feet, or ~~and~~ for ground water sources within a controlled ground water area, or for all surface water appropriations.

(2) An application must contain sufficient factual documentation to constitute probable believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the application. ~~be considered substantial credible information as defined at 85-2-102, MCA.~~

(3) Form no. 600 and the applicable criteria addendum must be completed and must describe the details of the proposed project. The form and addendums must be filled in with the required information.

(4) Each source of supply requires a separate application. For example, if an application is for two diversions, one on an unnamed source and another on a ~~the~~ source to which it is tributary, ~~downstream tributary of the unnamed source,~~ two separate applications must be submitted, one for each source of supply.

(5) and (6) remain as proposed.

(7) Separate applications are required if multiple purposes are supplied by different points of diversion on the same source, except if the entire project is manifold into one system, then a single application is allowed. "Manifold" means two or more diversions from the same source, which are connected into a single system for the same project or development. An example of a manifold system is two pumps on one source or two wells pumping from the same aquifer which divert water into the same reservoir or cistern.

(8) Calculations, references, and methodologies used to determine flow rate, volume, or ~~and~~ reservoir capacity must be included in the application materials.

(9) through (13) remain as proposed.

(14) The permit application materials must include a general project plan stating when and how much water will be put to beneficial use. For appropriations over 4,000 af or more and 5.5 cfs or more, or for water marketing, additional information is required by 85-2-310(4)(a), MCA.

(15) Photographs must include the name of the photographer, the date taken, and an explanation of what fact or issue the photograph is offered to verify. ~~purports to show.~~

(16) remains as proposed.

~~(17) If after receipt of an application the ownership of the property changes, the original applicant must submit written documentation requesting or consenting to a change in the applicant name.~~

~~(18)~~ (17) If a permit application is to supplement ~~acres that are irrigated under~~ another water right, the water right numbers and abstracts of the associated water rights must be included in the application.

~~(19)~~ (18) An explanation of why supplemental ~~irrigation~~ water is needed and how the associated water rights will be managed must be included in the application materials.

(20) remains as proposed but is renumbered (19).

~~(21)~~ (20) An application to only increase the flow rate or volume must reflect a value of zero in the nonapplicable field. For example, if an applicant is applying to only increase the flow rate of water taken from a source, but no additional volume is needed, the application flow rate blank should be completed with the additional flow of water requested and the blank for acre-feet (volume) should reflect zero.

(22) remains as proposed but is renumbered (21).

(22) An applicant shall explain why required information is not applicable to the applicant's proposed project.

RULE XVI (36.12.1702) PERMIT APPLICATION CRITERIA - PHYSICAL SURFACE WATER AVAILABILITY (1) Substantial credible information must be provided showing there is surface water physically available at the flow rate and volume that the applicant seeks to appropriate for the proposed period of diversion.

(2) If actual stream gaging records are available, they should be used to estimate the flow rates and volumes ~~measurements are available for the~~ at the source of supply in the amount the applicant seeks to appropriate, the following is required:

(a) the medians ~~average~~ of the monthly average flow rates and volumes for the stream gaging station period of record ~~a median year for each month~~ during the proposed months ~~period~~ of diversion;

(b) a legible copy or excerpt of the data source, study or report(s) used in documenting water availability in the source of supply; and

(c) a description of ~~the~~ all conclusions, calculations, data, and assumptions used in estimating ~~determining~~ water availability.

(3) If actual flow rate and volume data ~~there~~ are not available ~~adequate flow data and volume measurements~~ to estimate the monthly median ~~median monthly~~ flows ~~in a median year~~, then the applicant will need to use an accepted method for estimating surface water flow rates and volumes in conjunction with discharge measurements to validate the estimation technique

used. Some accepted methods are listed in (6). ~~the most appropriate method listed in (5) and follow the appropriate steps in this rule. This information must then be correlated with known data from another similar or comparable surface water source.~~

(4) When stream flow gaging station data are not available and monthly median flow estimation techniques are used, the following stream discharge data must be collected:

(a) Stream flow measurements in cfs or gpm must be collected at least once every month during the ~~entire~~ proposed period of diversion at the most suitable location on the source of supply, and at or directly upstream of the proposed point of diversion. Measurements taken and submitted under this method must include:

(i) and (ii) remain as proposed.

(iii) the dates measurements were taken, with a description of current weather conditions. Weather conditions include sky conditions, noting any rain and snow, approximate temperature, and approximate wind conditions, e.g., "partly cloudy, light wind, about 60 degrees" or "light rain, calm, about 65 degrees" or "clear, moderate wind, about 40 degrees".

(iv) and (v) remain as proposed.

~~(b) If one of the methods identified in (6) is used, the applicant must also include a brief description of the method used and assumptions, calculations, and estimations used in establishing flow rates and volume per year.~~

(4) and (4)(a) remain as proposed but are renumbered (5) and (5)(a).

(b) information and data that show the amount of water to be stored is physically available during a median year and in the amount the applicant seeks to appropriate using the methods described in (2) and (3); and

(c) projected evaporation and seepage losses. ~~; and~~

~~(d) for proposed storage facilities with a capacity of 50 acre-feet or more, the application must also include the following information:~~

~~(i) the proposed storage capacity of the reservoir and the average monthly inflows into the reservoir; or~~

~~(ii) if no or insufficient information is available on flow rates into the proposed facility, the applicant must use the methods in (3). The applicant must also conduct a drainage basin analysis that includes the average monthly flow rate and volume produced by the basin from which water will be collected and describe all conclusions, data, measurement techniques, calculations and assumptions used in determining available storage volumes and flow rates.~~

(5) through (5)(i) remain as proposed but are renumbered (6) through (6)(i).

~~(6)~~ (7) ~~Any~~ O~~o~~ther professionally documented hydrologic methods for estimating stream flow or annual runoff which may be applicable and acceptable to the department, including the Orsborn method, Mannings equation, U.S. natural resources and conservation service-developed mean annual runoff data, and drainage area information paired to gaged streams in similar

type basins may be acceptable. The department will determine the acceptability of other methods on a case-by-case basis.

(a) If one of these methods is used, the applicant must also include a brief description of the method used and assumptions and calculations used in estimating flow rates and volumes.

RULE XVII (36.12.1703) PERMIT APPLICATION CRITERIA - PHYSICAL GROUND WATER AVAILABILITY (1) Applicants for ground water must provide substantial credible information demonstrating that water is available for their use from the source aquifer in the amount the applicant seeks to appropriate during the proposed period of diversion.

(2) Information demonstrating physical ground water availability must include an evaluation of drawdown in the applicant's production well for the maximum pumping rate and total volume requested in the permit application.

(3) The drawdown projected for the proposed period of diversion must be compared to the height of the water column above the pump in the proposed production well to determine if the requested appropriation can be sustained.

~~(2)~~ (4) The requirements of ARM 36.12.121 must be followed.

RULE XVIII (36.12.1704) PERMIT APPLICATION - EXISTING LEGAL DEMANDS (1) Legal demands usually exist on the source of supply or its downstream tributaries and ~~that~~ may be affected by a proposed water right application, including prior appropriations and~~,~~ water reservations~~, or unperfected permits~~. These existing legal demands will be senior to a new application and the senior rights must not be adversely affected.

~~(2) The applicant must provide a notice area map that will be used to identify senior water rights that may be affected by the proposed appropriation.~~

~~(3) For surface water, the notice area map must extend the applicable distances in Table 1. If there are no diversions by other water users within the applicable distance, then the map must extend to the applicable number of diversions shown in Table 1.~~

~~Table 1~~

~~Application Flow Rate~~	~~Miles Downstream from the most upstream proposed point of diversion~~	~~Points of Diversion downstream from the most downstream proposed point of diversion~~
~~Less than 100 gpm~~	~~2 miles~~	~~Next 3 diversion points~~
~~100 - 1000 gpm~~	~~5 miles~~	~~Next 6 diversion points~~
~~Greater than 1000 gpm~~	~~10 miles~~	~~Next 12 diversion points~~

~~(4) For applications to only increase volume or that do not require a flow rate, an estimate of the maximum flow rate of the source of supply must be made and based on the estimate, using the figures in Table 1.~~

~~(5) For ground water, the notice area for pumping wells is the cone of depression created during the plan of operation. The notice area map must show the limit of the cone of depression that is created during an aquifer test.~~

~~(6) When the vertical projection of the outer limits of the cone of depression intersects a surface water source, the notice area map must also display the applicable distances or points of diversion from Table 1. The starting point of the notice area distance must be measured from the most upstream intersection point of the vertical projection.~~

~~(7) The application must include an index, or general abstract of water rights found in the department records, that are located within the identified notice area and must include state water reservations, instream water uses, and unperfected permits. The index or general abstract of each water right must contain, but is not limited to, the following information:~~

~~(a) water right number;~~

~~(b) priority date;~~

~~(c) source of supply name;~~

~~(d) point of diversion;~~

~~(e) period of diversion;~~

~~(f) purpose of use;~~

~~(g) period of use;~~

~~(h) flow rate; and~~

~~(i) volume.~~

(2) The applicant must identify the existing legal demands on the source of supply and those waters to which it is tributary and which the applicant determines may be affected by the proposed appropriation.

(3) The applicant must provide an abstract of those water rights identified.

~~(8)~~ (4) After an application is deemed correct and complete, for public notice purposes the department shall, independent of the information provided by the applicant under this chapter, identify existing water right owners that may be affected by the proposed application.

RULE XIX (36.12.1705) PERMIT APPLICATION CRITERIA - COMPARISON OF PHYSICAL WATER AVAILABILITY AND EXISTING LEGAL DEMANDS (1) To determine if water is legally available, the applicant must compare the physical water supply at the proposed point of diversion and the ~~existing~~ legal demands within the area of potential impact. An applicant ~~One~~ must become familiar with senior water rights operations to accurately evaluate the effect to the senior water right.

(2) Applicants must analyze ~~all of~~ the senior water rights on a source of supply and those waters to which it is tributary ~~its downstream tributaries~~ within the area of potential impact and provide a written narrative comparing the physical water supply at the point of diversion during the period of diversion

requested and the legal demands that exist for the water supply during that same period.

(3) If known patterns of use differ from the legal water rights filings, an explanation may be submitted explaining the current water use operation. For example, if a water reservation has not been perfected, ~~prior appropriator uses less water than was claimed or a water right has not been in use for a number of years,~~ that information may help to explain ~~show why~~ water is legally available.

RULE XX (36.12.1706) PERMIT APPLICATION CRITERIA - ADVERSE EFFECT (1) Adverse effect for permit applications is based on the applicant's plan showing the diversion and use of water and operation of the proposed project can be implemented and properly regulated during times of water shortage so that the water rights of prior appropriators will be satisfied.

(2) A written narrative must be provided addressing the potential adverse effect to ~~all of~~ the water rights identified ~~listed~~ in ARM 36.12.1704.

(3) and (4) remain as proposed.

~~(5) An applicant may propose conditions to eliminate or mitigate potential adverse effects to senior water rights.~~

RULE XXI (36.12.1707) PERMIT APPLICATION CRITERIA - ADEQUATE DIVERSION MEANS AND OPERATION (1) remains as proposed.

~~(2) The applicant must show any conditions required to protect prior water appropriators can and will be implemented.~~

(3) through (5) remain as proposed but are renumbered (2) through (4).

~~(6)~~ (5) Preliminary d~~D~~esign plans and specifications for the diversion and conveyance facilities and the equipment used to put the water to beneficial use must be submitted including the following:

(a) through (d) remain as proposed.

(e) the flow rate and operation of ~~secondary~~ diversions must be described.

(7) remains as proposed but is renumbered (6).

RULE XXII (36.12.1801) PERMIT AND CHANGE APPLICATIONS - BENEFICIAL USE ~~(1) Beneficial use consists of two components:~~

~~(a) first, the purpose for which the water right is used must be beneficial; and~~

~~(b) second, the annual flow rate and volume requested must be reasonable for each use without waste as defined in 85-2-102, MCA.~~

(2) through (2)(c) remain as proposed but are renumbered (1) through (1)(c).

(d) ~~unless provided otherwise by statute~~ or for other person's use, according to law.

~~(3)~~(2) The ~~following information must be included in an application to show that the water use is beneficial and that the flow rate and volume of water is reasonable for each purpose~~ applicant must explain the following:

(a) how the purpose for the water benefits the applicant

~~appropriator~~; and

(b) remains as proposed.

~~(4)~~(3) An application to change must contain information explaining why the requested flow rate and volume to be changed are reasonable for the intended purpose.

RULE XXIII (36.12.1802) PERMIT AND CHANGE APPLICATIONS - POSSESSORY INTEREST (1) An applicant or a representative shall sign the application affidavit to affirm the following: ~~who has power of attorney shall sign the application form affidavit to affirm the following information:~~

(a) remains as proposed.

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

~~(2) If the applicant is a corporation, a corporation officer must sign the application and provide their corporation title, such as president or treasurer.~~

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

~~(3) A copy of the document transferring power of attorney must be submitted if a representative who has power of attorney signs the application.~~

(4) remains as proposed but is renumbered (3).

RULE XXIV (36.12.1901) FILING A CHANGE APPLICATION

(1) An application to change a water right (form no. 606) and applicable addendum must be filed when an applicant ~~individual~~ desires to change the point of diversion, place of use, purpose of use, or place of storage of a~~n~~ water ~~existing~~ right.

(2) A change application must contain sufficient factual documentation to constitute probable believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the application. ~~A change application must contain sufficient factual documentation to be considered substantial credible information as defined at 85-2-102, MCA.~~

(3) The department must consider historical use in determining whether changing the water right ~~a proposed change~~ would constitute an enlargement in historic use of the original water right.

~~(4) The applicant must show that each water right to be changed has been used and must explain the extent of the historic use.~~

~~(5)~~ (4) ~~Form no. 606 must be completed and must describe the details of the proposed project. The f~~ Form no. 606 and applicable addendum~~s~~ must be filled in with the required information.

~~(6)~~ (5) The application must contain a brief narrative explaining the general nature of the requested changes to the water right and why it is being requested.

(7) remains as proposed but is renumbered (6).

~~(8)~~ (7) A current detailed water right abstract of each water right being changed must be submitted with proposed changes noted on the abstract. The abstract should reflect how the water right would appear if the change application was granted. ~~If the information supplied in the application is changed, the modifications must be submitted to the department.~~

~~(9) Final water court approved stipulations, master's reports, or examination information related to the water right being changed must be submitted with the application.~~

~~(10) A change application must include all water rights owned by the individual making the change that have the following in common:~~

~~(a) source of supply;~~

~~(b) purpose; and~~

~~(c) same or a portion of the same place of use.~~

(11) remains as proposed but is renumbered (8).

~~(12)~~ (9) The legal descriptions for the point of diversion and place of use must be identified as required ~~under~~ in ARM 36.12.110.

~~(13)~~ (10) Calculations showing how the historic ~~existing~~ and proposed flow rate, volume, and capacity were determined must be included in the application materials and the methodology employed must be described.

(14) remains as proposed but is renumbered (11).

~~(15)~~ (12) The proposed diverted and consumed volume of water must be identified for each changed right. The diverted volume will likely be greater than the consumed volume. The consumed volume may include plant use, seepage water, wastewater, and deep percolation water. The consumed volume cannot include return flow.

~~(16) A comparison between the historic consumptive use of the water rights being changed and the consumptive use under the proposed change to those rights must be included with the application.~~

~~(17) If a portion of a water right with multiple owners is to be changed, documentation must address how the water right will be operated under the changed conditions. For example, if an applicant will no longer be using water from a ditch, but will be taking it directly from the source of supply, the loss of carriage water in the ditch must be addressed.~~

~~(18) The potential effect to all water sources involved in a change must be evaluated and documented.~~

~~(19) An applicant shall compare historical acres irrigated to acres identified as irrigated in the Water Resources Survey, if applicable for the place of use. If the Water Resources Survey does not support the historical irrigation alleged in the~~

~~application, the applicant shall explain why. Information from irrigation journals or logs or old aerial photographs can be submitted for consideration.~~

~~(20)~~ (13) The time needed to complete and put the changed project into operation must be identified. Information must be included in the application materials that justify the requested time. The justification must include information that would lead a person not familiar with the project to conclude the period requested is reasonable and needed to complete the change and put the changed water right to use.

(21) remains as proposed but is renumbered (14).

(a) form no. 606 must be completed and must describe the details of the proposed project. ~~The f~~ Form no. 606 and applicable addendum~~s~~ must be filled in with the required information;

(b) a current department generated water right abstract of each water right being changed must be submitted. The proposed changes must be noted on the abstract. The abstract should reflect how the water right would appear if the change application was granted.

(b) and (c) remain the same but are renumbered (c) and (d).

(15) An applicant shall explain why required information is not applicable to the applicant's proposed project.

RULE XXV (36.12.1902) CHANGE APPLICATION - HISTORIC USE

~~(1) A change applicant shall bear the burden of proving their actual historic beneficial use of water no matter how that water right was described in previous claims, applications, district court decrees or Montana water court decrees.~~

(1) Final water court approved stipulations, master's reports, or examination information related to the water right being changed must be submitted with the application, however, this information or a~~A~~n abstract of a water right from the department or the Montana water court by itself is not sufficient to prove the existence or extent of the historical use ~~right~~.

(2) The amount of water being changed for each water right cannot exceed or increase the flow rate historically diverted under the historic ~~existing~~ use, nor exceed or increase the historic volume consumptively used under the existing use. ~~, nor increase the net depletion from the source of supply or its tributaries.~~

(3) An applicant shall compare historical acres irrigated to acres identified as irrigated in the Water Resources Survey, if available for the place of use. If the Water Resources Survey does not support the historical irrigation alleged in the application, the applicant shall explain why. Information from irrigation journals or logs or old aerial photographs can be submitted for consideration.

~~(3)~~ (4) If an applicant provides a "best available estimate" to any element or requirement in (5) through (7) ~~the following seections~~, an explanation of how the estimate was derived must be included. For example, best available estimates might be based on the following:

(a) aerial photographs depicting irrigated land;

(b) aerial or other photographs showing diversion or conveyance structures;

(c) Water Resources Survey book information;

(d) Water Resources Survey field notes;

(e) water commissioner field notes;

(f) natural resources conservation service information;

(g) affidavits from persons with first-hand knowledge of historic use;

(h) calculation of historic ditch capacities;

(i) log books or diaries of previous irrigators; or

(j) other information that provides independent corroboration of the historic use that allows reasonable estimates of historic diversion and historic consumption.

~~(4)~~ (5) The applicant shall provide a narrative of the historic use of each water right being changed. The description must be based on actual physical measurements when available and use commonly accepted hydraulic ~~engineering~~ principles. The narrative must contain the following:

(a) the maximum flow rate diverted from each point of diversion listed on the water right ~~in each month~~ during the period of diversion;

(b) ~~the~~ total volume of water consumed ~~from each point of diversion~~ for each ~~listed on the~~ water right ~~for each month~~ during the period of diversion;

(c) a description of how and when unconsumed water returns to a ground or surface water source and how that return flow volume was calculated; and

(d) remains as proposed.

~~(5)~~ (6) The applicant shall provide written documentation explaining the historic use and how the information was acquired to substantiate ~~the historic use about~~ the following elements of each water right proposed to be changed ~~being changed including, but not limited to, the following~~:

(a) through (k) remain as proposed.

(6) remains as proposed but is renumbered (7).

~~(7) A report must be included specifying the flow rate of water diverted, the volume of water consumed, conveyance or other losses, and the volume of water that returned (return flow) to either a ground water or surface water source and how the return flow volume was calculated.~~

RULE XXVI (36.12.1903) CHANGE APPLICATION - ADVERSE EFFECT

~~(1) Both junior and senior water appropriators are entitled to the maintenance of the stream conditions similar to those that existed when they began appropriating water.~~

(1) The applicant must identify the water rights which the applicant determines may be affected by the changes the applicant is proposing to make and must provide a department general abstract of the water rights identified.

~~(2) Individuals applying to change a water right must identify the effect their change application will have and then, based on that information, determine the area of potential impact to both junior and senior water rights.~~

(2) The applicant must identify, analyze, and document the effects to the other water rights including, but not limited to, the following:

(a) water rights using the existing or proposed point of diversion;

(b) other ditch users;

(c) down-slope water users;

(d) the effect to water rights dependent on the return flow;

(e) the effects of changing the historic diversion pattern including rate and timing of depletions;

(f) for ground water applications, the applicant shall explain how the changed water right will affect water levels in wells of junior and senior water rights and the rate and timing of depletions from hydraulically connected surface waters, and what effect those changes will have on those water rights within the notice area.

(3) A comparison between the historic consumptive use of the water rights being changed and the consumptive use if the change application was granted must be included with the application.

~~(3) The applicant must provide a description for the proposed use of each water right being changed containing the same information as shown in [New Rule XXV].~~

~~(4) The applicant must compare the information requested in this section and [New Rule XXV] and then identify both surface water and ground water sources that would be affected by the proposed change and the magnitude and timing of the effect.~~

~~(5) The applicant must provide a notice area map which will be used to identify junior and senior water rights that may be affected by the proposed change.~~

~~(6) For surface water, the notice area map must extend the applicable distances in Table 2. If there are no diversions by other water users within the applicable distance, then the map must extend to the applicable number of diversions shown in Table 2.~~

~~Table 2~~

~~Total Flow Rate of Water Rights being Changed~~	~~Miles Downstream from the most upstream existing or proposed point of diversion~~	~~Points of Diversion downstream from the most downstream existing or proposed point of diversion~~
~~Less than 100 gpm~~	~~2 miles~~	~~Next 3 diversion points~~
~~100 - 1000 gpm~~	~~5 miles~~	~~Next 6 diversion points~~
~~Greater than 1000 gpm~~	~~10 miles~~	~~Next 12 diversion points~~

~~(7) For changes to ground water rights, the notice area map must show the vertical projection of the limits of the cone~~

~~of depression that is created during the aquifer test. See [New Rule XIII].~~

~~(8) When the vertical projection of the outer limits of the cone of depression extends to a surface water source, the notice area map must also display the applicable distances and points of diversion from Table 2. The starting point of the notice area distance must be measured from the most upstream intersection point of the vertical projection.~~

~~(9) For changes in point of diversion, the notice area map must identify the water rights between the past and proposed points of diversion in addition to (6), or (7) and (8).~~

~~(10) The application materials must include an index or general abstracts of junior and senior water rights found in the department records, that are located within the notice area, and must also include state water reservations, instream water uses, and unperfected permits. The index or general abstract of each water right must contain, but is not limited to, the following information:~~

~~(a) water right number;~~

~~(b) priority date;~~

~~(c) source of supply;~~

~~(d) purpose of use;~~

~~(e) period of use~~

~~(f) point of diversion;~~

~~(g) period of diversion;~~

~~(h) flow rate; and~~

~~(i) volume.~~

~~(11) An analysis must be provided addressing the potential effect of the change to all of the water rights identified in (10) and must explain why the change will not adversely affect those rights. Further, the analysis must include effects of other water rights including:~~

~~(a) those using the existing or proposed point of diversion;~~

~~(b) other ditch users;~~

~~(c) down-slope water users; and~~

~~(d) the effect to water rights dependent on the return flow.~~

~~(12) For surface water applications, the applicant shall explain any changes in the rate and timing of depletions, from the source of supply and its tributaries, resulting from the change and what effect those changes will have on junior and senior water rights.~~

~~(13) For ground water applications, the applicant shall explain how the proposed change will affect water levels in wells of junior and senior water rights and the rate and timing of depletions from hydraulically connected surface waters, and what effect those changes will have on those water rights within the notice area;~~

~~(14) If an application is for a water right that has not been used for a period of 10 successive years and there was water available for use, the applicant must provide information showing that beginning to exercise the water right again will not create an adverse effect to other water rights.~~

~~(15) A change applicant shall provide an explanation showing how the changed use will be controlled so that the legal entitlements of junior or senior appropriators will be satisfied.~~

~~(16) An applicant may propose conditions to eliminate or mitigate potential adverse effects to other water rights.~~

~~(17)~~ (4) After an application is deemed correct and complete, for public notice purposes, the department shall, independent of the information provided by the applicant under this chapter, identify existing water right owners that may be affected by the proposed application.

RULE XXVII (36.12.1904) CHANGE APPLICATION CRITERIA - ADEQUATE DIVERSION MEANS AND OPERATION (1) remains as proposed.

~~(2) The applicant must show any conditions required to protect prior water appropriators can and will be implemented.~~

~~(3)~~ (2) Preliminary d~~D~~esign plans and specifications for the current and/or proposed diversion and conveyance facilities and the equipment used to put the water to beneficial use must be submitted with the application including the following:

(a) a description of the historical operation, including the typical diversion schedule from the point of diversion to the place of use;

(b) a description of how the proposed water right ~~system~~ will be operated, from point of diversion through the place of use and on through the discharge of water, if any;

(c) remains as proposed.

(d) the historic efficiency and the projected overall efficiency, including diversion, conveyance, and system efficiencies~~; and~~ .

~~(e) the system design, construction, or operation features which are intended to reduce or eliminate adverse effects to other water rights.~~

~~(4) For applications where a different type of diversion will be used for the proposed system, the applicant shall describe why a new type of diversion means was selected over the historic type used.~~

(5) remains as proposed but is renumbered (3).

RULE XXVIII (36.12.2001) SALVAGE WATER APPLICATIONS

(1) Salvage water, defined at 85-2-102(16), MCA, includes seepage, wastewater, or deep percolation water and may be used by the appropriator, moved to other lands, leased, or sold after implementing a water saving method and proving lack of adverse effect to other water rights.

~~(1)~~ (2) In addition to the rules for change applications, a salvage water application must include a ~~professional~~ report documenting the volume of water that is being saved by the proposed water saving method.

~~(2)~~ (3) For the purpose of implementing 85-2-419, MCA, the destruction of phreatophytes is not a water saving method. For example, one cannot deforest the cottonwoods or other trees or brush on a source to obtain salvage water.

(3) remains as proposed but is renumbered (4).

5. The following comments were received and appear with the department's responses:

ARM 36.12.101 - Definition Comments

COMMENT 1: A conservation organization suggests adding definitions of: drought year, non-drought year, median and low flow years, public water supply (to distinguish from municipal supply), State Water or Water of the State.

RESPONSE 1: The terms, "drought year", "non-drought year", "low flow", "State water", and "water of the State" are terms that are not used in these rules, therefore, the department has not defined those terms. The department has added a definition for "median year" and has amended the municipal use definition.

COMMENT 2: What happened to the definition of surface water? If you aren't going to supply the definition, you should at least reference a source for its definition.

RESPONSE 2: The term "surface water" is defined in ARM 36.12.101(69). No amendment was made to the existing definition.

COMMENT 3: Beneficial Use: What does reasonable mean and who determines it?

RESPONSE 3: Rules cannot unnecessarily repeat statutory language, therefore, the term "beneficial use" is defined in 85-2-102(2), MCA, and has been removed from this rule. However, the rule now defines "Use of water for the benefit of the appropriator" and the term "reasonably needed" is included in the definition. Reasonably needed means an amount of water requested that does not constitute waste. Reasonably needed is dependent on the type of purpose for which the water will be used. In some cases, (see Water Use Standards), the department has been able to set typical "standards" that would be considered reasonable. The standards were typically obtained from literature describing water use. For example, the NRCS irrigation guide is recognized as a reasonable standard for new irrigation uses. If a standard has not been developed, an applicant must provide information that shows the requested amount of water is reasonable for the purpose.

COMMENT 4: ARM 36.12.101(2) does not discuss animal unit equivalencies.

RESPONSE 4: ARM 36.12.101(3) Animal Unit Month, identifies animal unit equivalencies.

COMMENT 5: ARM 36.12.101(2) Amount: Sometimes volume figures or flow rate amounts are not decreed. An amount should only be for what a right has actually been recorded for.

RESPONSE 5: The department interprets this comment to be related to claimed water rights where for some basins and uses no volume of water has been identified. In those cases, an applicant must determine the historic volume used or must identify a best available estimate.

COMMENT 6: Overlapping rights definition - The definition is vague and could apply to several individuals using the same source or point of diversion. The definition for overlapping rights means multiple water rights filed by different individuals and used on the same or a portion of the same place of use. The definition for associated right and overlapping rights could be interpreted the same, at least for the place of use.

RESPONSE 6: The department agrees with the comment. The definition for associated rights has been amended and the definition for overlapping rights has been removed.

COMMENT 7: ARM 36.12.101(8) Augmentation Plan - by definition all groundwater is tributary, what about 602's?

RESPONSE 7: The department agrees with the comment and has amended the definition of tributary. This change in definition would allow evaporation losses from a pond surface to be made up from ground water that is not hydraulically connected to surface water. A Notice of Completion of Groundwater Development could be filed if the amount to be augmented falls within the statutory limits of up to 35 gpm and not to exceed 10 acre-feet.

COMMENT 8: ARM 36.12.101(19), "Criteria addendum," should be deleted. A criteria addendum cannot be used in the determination of a correct and complete application under 85-2-302, MCA. If the department wants to have a process in which they ask the applicant for more information to aid in the determination of statutory criteria for the granting or denial of an application, the agency may do so under 85-2-310, MCA. It appears from the above rules that the intent of the department is to use the criteria addendum in the determination of a correct and complete determination. If this is its intent, the rules must be amended. If this is not the intent of the department, then the rules must be clarified.

RESPONSE 8: A permit or change application form includes a criteria addendum. The application form and the criteria addendum must include substantial credible information to deem an application correct and complete. The definition of criteria addendum has been amended to eliminate the reference to "preponderance of evidence" and "for approval of a permit or change authorization".

COMMENT 9: (10) Beneficial use - reference to instream flow is not statutorily recognized. Post-1973, instream uses are not permitted except for water reservations. Could be construed to authorize a permit for instream use.

RESPONSE 9: The beneficial use definition has been eliminated.

COMMENT 10: (10) "Beneficial Use" and (17) "Consumptive Use." Again, you have not addressed the contentious issue of beneficial use and consumptive use for fish/wildlife/recreation.

RESPONSE 10: Rules cannot unnecessarily repeat statutory language, therefore, the term "beneficial use" defined in 85-2-102(2), MCA, has been removed from these rules. The statutory definition includes fish and wildlife and recreation uses. The words "water used for a beneficial purpose" are included in the definition of consumptive use and therefore fish and wildlife and recreation are considered a beneficial use.

COMMENT 11: (10), (61) The definitions of "beneficial use" and, particularly "salvage water" may conflict with statute. I think these are marginal and you would be better off taking a different approach. Rules must be consistent with statute. See 2-4-305(6), MCA. Instead of defining "beneficial use," define "a use of water for the benefit of the appropriator" and use the same definition that you used for beneficial use. The definition of "salvage water" conflicts with the definition in statute. I suggest taking any concepts that are not in statute and putting them in Rule XXVIII.

RESPONSE 11: The department agrees with the comment. The definition of beneficial use has been removed and a definition for "use of water for the benefit of the appropriator" has been added. The salvage water definition has been removed and applicable information has been added to the salvage water ARM 36.12.2001.

COMMENT 12: (20) - "Dam." A state agency thinks it necessary to further define what is meant by "artificial barrier." Does this mean a human-made barrier or just some artificial materials that are used in making a barrier, such as cement or concrete brought in for the purpose of making a barrier. If it is intended to be just a human-made barrier regardless of material, then this definition should be clarified to read something like the definition in ARM 36.12.101(54) - i.e., "created by manmade means."

RESPONSE 12: The department agrees with the comment and has amended the rule accordingly.

COMMENT 13: ARM 36.12.101(20) Deep Percolation: Exactly what and how is this determined or measured and what does it have to do with other water users?

RESPONSE 13: Deep percolation as defined is the water that is not used by the plant and percolates beyond the root zone and is not connected to surface water or used by other appropriators. Deep percolation must be analyzed with other water losses such as seepage, wastewater, and return flow. Further, to determine the amount of water that may be lost to deep percolation, the applicant will need information about the root development of the plant and the geology of the ground beneath the crop. For these rules, deep percolation is used in the section related to salvage water. If deep percolation can be shown, an applicant can salvage that water.

COMMENT 14: (23)(g) - domestic use. A state agency questions the need to have up to five acres included under domestic use. Subdivision and domestic water use is reaching a level where it is having serious impacts on ground and surface water in some areas. This would be an ideal time to reexamine the definition of domestic use.

RESPONSE 14: The standard is the same as that allowed under the adjudication exemption. While the department agrees that the standard is high, it is reluctant to change the standard without public input. It is important to the department to finalize these rules and therefore will leave the acreage at five, but it will look into the effects of this standard at a later date.

COMMENT 15: ARM 36.12.101(23)(g) Domestic includes up to 5 acres irrigation, but Rule VIII(2)(a) states domestic use does not include irrigation.

RESPONSE 15: The department agrees the rules could cause confusion and has clarified the rule.

COMMENT 16: ARM 36.12.101(29) "Form no. 600" means an application for beneficial water use permit and all maps and addendums.

RESPONSE 16: The term "Form no. 600" is defined in ARM 36.12.102(1)(a). No amendment was made to the existing definition.

COMMENT 17: ARM 36.12.101(30) "Form no. 606" means an application to change a water right and all maps and addendums.

RESPONSE 17: The term "Form no. 606" is defined in ARM 36.12.102(1)(g). No amendment was made to the existing definition.

<u>COMMENT 18:</u> Hydraulically connected might be better defined as a saturated water-bearing zone or aquifer in contact with surface water or other water-bearing zone where the rate of exchange of water between the two sources depends on the water level of the water-bearing zone or aquifer.

<u>RESPONSE 18:</u> The department agrees with the comment and has amended the rule accordingly.

<u>COMMENT 19:</u> ARM 36.12.101(32) I would eliminate proposed ARM 36.12.101(32) because it repeats statute. I would encourage you to avoid repeating statute at all costs. Otherwise, you will adopt the rules in December and the Legislature will meet in January and revise the statute and the rules will be unnecessarily out of date. If you left the section that repeated statute out of the rule, no harm would be done. Also, the law provides that rules may not unnecessarily repeat statute. See 2-4-305(2), MCA.

<u>RESPONSE 19:</u> The department agrees with the comment. As provided in 2-4-305(2), MCA, rules cannot unnecessarily repeat statutory language, therefore, the term "ground water" which is defined in 85-2-102(11), MCA, has been removed from these rules.

<u>COMMENT 20:</u> The last topic I want to spend a short amount of time on is the issue of immediate or direct, as it's expressed in, I think in New Rule XII. I probably should, for the record, acknowledge at the front in that Trout Unlimited has been involved in a lawsuit with the Agency over the meaning of immediate or direct. And acknowledge there is some fundamental disagreement between what we think it should be and what the Agency has expressed in that lawsuit. Nonetheless, you know we are given the opportunity to state our peace. So once again, I want to urge the department to consider, not only looking at induced infiltration, with regard to the term immediate or direct, but also to consider, to include within a closure to groundwater, groundwater which is, the capture of groundwater, which is tributary to surface water.

I again, you'll get some thorough written description of that, but basically, we think that the Department's definition right now gives effect only to the term immediate. And that is, water that is pulled directly from the stream and yet, you can have water that is captured on its way to the stream by the groundwater development that might be days away from making it to the stream or perhaps even hours, and yet for reasons that escape me, the Department has chosen not to look at the capture of tributary groundwater as part of that definition. I've heard the justification made, by some members of the department that "Well, so what, you can always file an objection to that application and if there is an adverse impact, then that person is going to be able to stop that development from happening." And that's true; in fact, it may very well be true in most of the cases.

I don’t know if the Department’s ever gone out and figured out, in these closed basins, of the applications they’ve gotten for groundwater development, how many of them, that met the, that went outside the induced infiltration test. In other words, were viewed as an exception of the closure, how many of those were actually finally denied, based on adverse impact. I don’t know if it’s 10%, or 40% or 80%. But as a practical matter, in the few I’ve been involved in, in most cases, it was not a very far line down the road to go from that capture to finding that there would be an adverse impact in these closed basins. Part of the problem here is that, number one, to the extent that you suggest that the induced infiltration test is the test that ought to be applied, I think you mislead some applicants to their disservice into thinking that "well, if we’re outside immediate or direct test, there’s no adverse impact, we’re going to go through this process." I’m not sure that that serves the process very well at all.

In addition, what you do is you place the burden back on a lot of existing water users to go in and make their objection in cases where, in many instances, it should have been fairly obvious at the front in that while this well might not have been pulling water through the induced infiltration test, it was pretty directly otherwise connected to the surface in a way that should have made it clear to people that down the road it was going to happen. The point of a closure, in part, is to insulate the existing water user from having to object to everything that walks through the door. In addition, sort of consistent with that, we suggest that you look at modifying your definition of hydraulically connected to be consistent with our version of what we think the immediate or direct rule should be. I think, with that, I’m going to stop.

Other than to say that we will give you some more extensive comment on the issue of aquifer testing. We thought about doing that today, but as we looked through, the way our comments were developing, we weren’t sure we could verbally get those words out of our mouths and keep them coherent because it’s a pretty complex session. So, anyways, as I said, we will supplement these comments with further comments and I appreciate you giving us the opportunity to present.

RESPONSE 20: This has been the Department's position on this statute since 1993 when the statute was enacted. A state agency was expressly asked in a letter from the former Department Water Resources Division Administrator to seek further legislative changes if they were not satisfied with the Department’s interpretation. The statute is not well written, the Department has interpreted in a fashion that it believes carries out the legislature’s intent of having a statutory exemption for ground water. The basin was not entirely closed to new consumptive appropriations; witness the exceptions to the closer to municipal, domestic and stock uses. All permit applicants, however, still must carry their burden of proof of lack of adverse effect and that provides the protection envisioned by the Water Use Act.

COMMENT 21: ARM 36.12.101(34) Hydraulically connected - definition appears to greatly expand legislative intent or previous DNRC provisions.

RESPONSE 21: The term hydraulically connected is a technical term that is not determined by legislative intent as is the case with the term "immediate or direct connection". Hydraulic connection, hydraulic gradient, and induced infiltration are technical terms used in the rules to define the department's interpretation of legislative intent.

COMMENT 22: ARM 36.12.101(34) after the term 'surface water' insert 'or other water bearing zone'. This change is suggested because the term 'hydraulic connection' is not related only to surface and ground water interactions, but also to interactions of different ground water bearing zones.

RESPONSE 22: The department agrees with the comment and has amended the rule accordingly.

COMMENT 23: ARM 36.12.101(36) Immediately or directly connected - definition does not make sense. How does ground water induce surface water infiltration?

RESPONSE 23: The department agrees with the comment and has amended the rule.

COMMENT 24: ARM 36.12.101(36) - "Immediately or directly connected to surface water." A state agency questions whether the legislature intended to limit this connection to only "ground water which induces surface water infiltration." A state agency would like to see this definition encompass the situation where a proposed well is intercepting groundwater that would otherwise have gone to the surface water. The connection between the pumping well and the surface water need only be present. DNRC, in its proposed rules has taken this further by requiring proof that there is actual infiltration from surface water (in order to prove the connection) where the statute does not require this. The basin closure statutes are intended to close any new consumptive uses and the addition of the interception situation would further the purposes for which the basin closure statutes were enacted. Further, the use of the word "directly" in the definition of the words "directly connected" is redundant and not helpful.

RESPONSE 24: This has been the Department position on this statute since 1993 when the statute was enacted. A state agency was expressly asked in a letter from the former Department Water Resources Division Administrator to seek further legislative changes if they were not satisfied with the Department's interpretation. The statute is not well written, the Department has interpreted in a fashion that it believes carries out the legislature's intent of having a statutory exemption for ground

water. The basin was not entirely closed to new consumptive appropriations; witness the exceptions to municipal, domestic and stock uses. All permit applicants, however, still must carry their burden of proof of lack of adverse effect and that provides the protection envisioned by the Water Use Act.

COMMENT 25: ARM 36.12.101(36) The definition of "Immediately or directly connected to surface water" ARM 36.12.101 Definitions (36) does not comply with the basin closure statutes and is insufficient. A conservation organization recommends a change to the definition of "immediately or directly connected" as follows: "Immediately or directly connected to surface water" means ground water pumping that captures ground water tributary to surface water or, that captures surface water by induced streambed infiltration. See ARM 36.12.101(36). We strongly recommend amending this definition to capture of tributary ground water. To do otherwise does not grant full meaning to the legislative language of "immediate or direct." Induced infiltration describes "immediate" connection. Tributary ground water is "directly" connected to surface water. Meaning must be given to both the words "immediate" and "direct" in order to accomplish the statutory purpose of a basin closure.

Further, DNRC's proposed definition ignores the fundamental purpose of the closure. The closure to new surface water in the upper Missouri basin was based, in large part, on DNRC's own report that asserted that surface waters in the basin were fully appropriated. Thus, any further depletions of surface waters would inevitably adversely affect prior appropriators. The definition of groundwater as that which is not immediately or directly connected to surface water, should protect surface waters from further depletion. DNRC's own Cumulative Environmental Assessment in the Smith River case makes it abundantly clear that wells which do not show induced infiltration may nonetheless have a substantial, predictable, and direct depletive effect on a stream. Further, the work of DNRC's hydrologists support the proposition that groundwater which is tributary to surface water is indeed directly connected to surface water.

Finally, DNRC's interpretation of "immediate or direct" suffers from a serious lapse in logic. If the logical conclusion that groundwater not "immediately or directly connected to surface water" is that the use of such water will not deplete surface flows, then the next logical conclusion would be that there will be no adverse effects on downstream users. In effect, DNRC's finding of no immediate or direct connection to surface water based on this narrow test is to suggest to the applicant that there will be no adverse impact. Yet, DNRC's response to the evidence that there will in fact be adverse impacts to downstream water users seems to be "well, water users can still object." Part of the rationale for the Missouri basin closure was to protect water users from having to object. DNRC's unrealistically narrow test ill serves both applicants for groundwater use and existing water users.

RESPONSE 25: The Department is implementing the basin closure statute in a way it believes complies with the intent of the statute and provides for an exception. Getting an application accepted by the Department is only part of the process. Impacts to surface water will still need to be addressed by the applicant and lack of adverse effect has to be proven by a preponderance of the evidence before the department could grant an application. The department has made clear since 1993 that the legislature can be asked to change the law and test if everyone is dissatisfied with the department's interpretation and implementation. The legislature is free to completely close the basin or to make clearer how and when applications can be processed.

COMMENT 26: ARM 36.12.101(36) Amendment to this cite lacks any spatial references and does not address how streams actually function. They gain or lose water along their length, rarely uniformly.

RESPONSE 26: The applicant must provide sufficient information on which to base a determination that the proposed ground water use is not hydraulically connected or if hydraulically connected, will not induce surface water infiltration during the period of diversion. The department has amended ARM 36.12.120(13)(e) to clarify the evaluation of induced infiltration from surface water under losing and gaining conditions. The site-specific spatial and temporal complexity of exchange between ground water and surface water are not addressed in the rules. An applicant will be requested to provide additional proof if the information submitted is not sufficient on which to base a determination.

COMMENT 27: ARM 36.12.101(37) Induced surface water infiltration. See comments to new Rule XIII (ARM 36.12.121).

RESPONSE 27: The department interprets this to mean that the comments provided to new Rule XIII (ARM 36.12.121) are applicable to the definition of induced surface water infiltration. New Rule XIII pertains to aquifer testing and no reference to induced surface water infiltration exists in ARM 36.12.121.

COMMENT 28: ARM 36.12.101(39) Legally available - comment "compare to statutory definition".

RESPONSE 28: The department agrees with the comment and has removed the definition.

COMMENT 29: Under ARM 36.12.101(42), a municipal use of water "means uses associated with a water system for municipalities and incorporated or unincorporated towns and cities." This provision is ambiguous. It is not clear whether municipal uses are all those uses of water which are of a type

that one would commonly find in towns and cities, or whether municipal uses are those uses of water commonly made by cities and towns. The latter construction is inconsistent with Montana law and the law of prior appropriation as applied by other Western states.

Ordinarily, the designation of the type of use reflected by an appropriation would not be expected to trigger issues of substantive import for the purposes of determining a correct and complete application under 85-2-311, MCA. However, as the Rules note, applications for new water use permits now identify issues of whether the proposed use qualify under various basin closure statutes. As municipal uses are exempt from such basin closures, see e.g., 85-2-343(2)(c), MCA, the doctrinal framework that defines such uses will now be central to many new appropriations. As a result, the DNRC's New Rules should not use language that creates ambiguities for such central terms.

Appropriations are classified into different purposes of use based on the type of use manifested in that appropriation, and not by the character of the appropriator. Accordingly, a "beneficial use" of water "means a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses." 85-2-102(2), MCA. As a result, a municipal use results from a use of water for municipal purposes, regardless of whether the appropriator is a municipality. Were this not true, a city or town would lose the right to continue to irrigate with an acquired irrigation right, unless and until they changed that water right to municipal purposes pursuant to 85-2-402, MCA.

The DNRC has consistently applied the reach and meaning of the term "municipal" in accordance with this common law meaning of this term. Accordingly, the DNRC has issued two water use permits to Mountain Water Company, a private company, for the use of water for municipal purposes. See water right applications no. 76H-14489 and 76H-70436. The DNRC has otherwise through its claims examination process confirmed a municipal description for a municipal use by a private company, and the Water Court has incorporated that description in its temporary, preliminary decrees. See water right applications no. 76H-35167, 40149, 40155, 40156, 40164, and 40166.

The DNRC's treatment of municipal uses is well-grounded in the basic precepts of the prior appropriation system. Municipal uses are inherently public uses of water, and this public character of the underlying use distinguishes municipal appropriations from an amalgamation of domestic, commercial, and irrigation uses.

Consequently, municipal uses reflect water demands not just for potable supplies and the irrigation of lawns and gardens, but also for the irrigation of parks and other public spaces and other public uses such as fire fighting and fire suppression. The "appropriation of water for a municipal use by public water districts, cities, and public utility corporations contemplates such public uses for the benefit of the citizenry as fire

protection, sprinkling of streets, watering of parks, and use in public buildings, as well as personal use of individual citizens in connection with their business establishments as well as their homes and lawns." Hutchins, Water Right Laws in the Nineteen Western States, Vol. 1, p 532.

The inherently public character of a municipal appropriation is reflected by Montana's system of regulating the rates at which such necessary services are provided. Pursuant to 69-3-101, MCA, a public utility includes "every corporation, both public and private, company, individual, association of individuals, their lessees, trustees, or receivers appointed by a court" that furnishes "water for business, manufacturing, [and] household use, 69-3-101(1)(e), MCA, except for such privately owned and operated water, sewer, or combination systems that do not service the public." 69-3-101(2)(a), MCA. See Sherlock v. Greaves, 106 Mont. 206, 76 P.2d 87 (1938) (Water systems become clothed with a public interest where they are used in a manner that makes them of public consequence, and that depends on the extent and character of the underlying use.)

The legislature has ratified this common law understanding as recently as 1999. Pursuant to 85-2-227(4), MCA, a "water right claimed for municipal use" from a source classified under specific water quality designations by the DEQ is subject to a specific standard of abandonment, as "such a claim by a city, town, or other public or private entity that operates a public water supply system" warrants special standards.

This common law and statutory treatment of municipal appropriations also underscores that municipal appropriations need not be confined to places of use wholly within the boundaries of a city or town. Thus, a rule that contemplates that private entities may make municipal appropriations, but only for use within the boundaries of cities and towns, is equally at odds with the character of a municipal appropriation. The proposed rule appears to reflect this understanding, as there is no "municipal area" for unincorporated cities and towns. As a result, the rule in this respect gives effect to more modern developments such as water and sewer districts, see 7-13-2201, MCA, et seq., through which municipal uses are commonly exercised.

The confusion suggested in the present language of ARM 36.12.101(42) is underscored when that language is read with the text of ARM 36.12.101(41). ARM 36.12.101(41) announces the term "multiple domestic use," and defines it as a domestic use by more than one household or dwelling, including such uses by colonies, condominiums, townhouses, subdivisions, and public water supply systems." The problem of course is that many if not all public water supply systems reflect municipal uses of water. See 75-6-102(16), MCA, (A public water supply system is one for the provision of water for human consumption that has at least 15 service connections or that regularly serves at least 25 persons daily for any 60 or more days in a calendar year.) As a result, this provision suggests that the DNRC construes ARM 36.12.101(42) as limiting municipal appropriations to cities and towns.

It may well be that these proposed New Rules in some fashion anticipate the issue of the dividing line between an aggregation of domestic and commercial uses on the one hand, and a true municipal appropriation on the other hand. Because municipal uses are what may in other contexts simply be a domestic use, a commercial use, an irrigation use, or a fire-fighting use, an issue may arise as to when an aggregation of such uses is sufficiently large to reflect the necessary public dimensions of a municipal appropriation. Such an issue is inherent in the common law and statutory definition of municipal uses. See Sherlock v. Greaves, supra. In any event, it is difficult to see how the language of ARM 36.12.101(42) and ARM 36.12.101(41) does other than further confuse the issue. Given this context, I suggest that the appropriate course of action would be to amend ARM 36.12.101(41) as follows: "Multiple domestic use" means a domestic use by more than one household or dwelling characterized by long-term occupancy as opposed to guests and that is not a municipal use." ARM 36.12.101(42) should be amended to define a municipal use as follows: "Municipal use" means a public water supply system as defined in 75-6-102, MCA, that provides water for domestic, commercial, and/or industrial uses through an integrated system, where the appropriator also supplies water for the irrigation of parks or other public areas, and/or water for fire-fighting purposes, and/or water for public buildings or other common areas, and/or water for other uses enjoyed in common by residents and businesses in the area or the public generally."

RESPONSE 29: The department has amended the "municipal use" definition to water appropriated by and for those in and around a municipality or town. The department did not include the entities suggested by the commenter because those entities' actual appropriation and water use is better defined as water for rent, sale, or distribution or combined as water marketing. Further, if the department were to define the water use by the entities suggested by the commenter as municipal use, then those entities would be considered exempt from the basin closure statutes. The department believes the legislature only intended to exempt municipal uses by cities and towns.

COMMENT 30: ARM 36.12.101(43) Net Depletion - See comment to ARM 36.12.1901. The department interprets this to mean that the comments provided to ARM 36.12.1901 are applicable to the definition of net depletion. The term "net depletion" is found in ARM 36.12.1901(2). The comment to subsection 2 is, "This section mixes several concepts of an existing water right. The proposed rule is also very confusing. In addition, "net depletion" is extremely vague. If "net depletion" means a change in use could not affect return flows the rule is overly broad and contrary to law."

RESPONSE 30: The department is intending to say that the historical flow rate diverted and historic amount consumptively used cannot be increased. The term "net depletion" has been

removed from the definition rules and has been removed from the historic use rules. The commenter's statement that a change in use could not affect return flows is correct. Other water users have a right to return flow.

COMMENT 31: ARM 36.12.101(57), (59), and (74) The proposed rules' current definitions of the terms "waste," "seepage" and "return flow" do not clearly differentiate between and among them. In other jurisdictions, the term "return flows" in particular is exclusively reserved for water that is both diverted and applied to irrigated crops, but that is not consumed and returns underground to the original source or another source.

The definition of "return flow" in the proposed rules could benefit from the following addition: "Return flow means that part of a diverted flow that is applied to irrigated crops, but which is not consumed and returns underground to its original source or another source of water, and to which other water users may be entitled to use as part of their water right."

Waste water is, as its name implies, water wasted or not used by the irrigator. The typical example is that of the irrigator who turns into the individual furrows traversing his field from his head ditch more water than is needed to seep into the ground. That which is not absorbed into the earth remains at the end of the furrow and is collected in a waste ditch. The contents of the waste ditch is waste water....Return flow is not waste water. Rather, it is irrigation water seeping back to a stream after it has gone underground to perform its nutritional function....Return flow results from use and not from water carried in the surface in ditches and wasted into the stream.

Similarly, the "seepage" definition could be made clearer by including a sentence such as "typical examples of seepage water include underground losses from an irrigation ditch or pond." See ARM 36.12.101(63) [new cite]. The "waste water" definition would also be clearer with an addition such as, "waste water stays on the surface, as in over-land flow during flood irrigation."

RESPONSE 31: The department agrees with the comment and has amended the rule accordingly.

COMMENT 32: If an irrigator lines a leaky irrigation ditch, he may not necessarily be able to put that conserved water to a new consumptive use, even though another appropriator does not have a right to the continuation of the seepage from the ditch if that new consumptive use will increase the net depletion on the stream. See ARM 36.12.1901(2), "Change Application - Historic Use." Yet, DNRC's definition of "water saving methods," and its definition of "salvaged water" appear to allow seepage to be salvaged and put to new consumptive uses that would result in a net depletion to a stream. Apparently based, in part, on the recognition that downstream users don't have a right to the continuation of seepage and in part on DNRC's view that section 85-2-419, MCA, the salvaged water

statute, was passed in the contemplation of allowing seepage to be captured and put to new consumptive uses that would increase the net depletion on a stream.

In a basin that is still open to new surface water appropriations (i.e., to additional depletions to the stream) that might arguably be a plausible result, if the new consumption is treated as a new use, requiring a water use permit. In a closed basin, however, it will only serve to exacerbate any existing water shortages. The problem with DNRC's position as expressed in ARM 36.12.101(61), defining salvage water is that, in a closed basin, this could lead to the anomalous result of increasing net depletions on a stream under the guise of a change statute, contrary to the prohibition expressed in ARM 36.12.1901(2). In effect, this would allow new appropriations, with additional depletions to the surface flow, in a matter totally inconsistent with the goal of virtually all the closure statutes. In order to be consistent, any such salvage operation which allows additional consumptive use ought to be treated as an application for a new water use permit, and in a closed basin, any increase in surface water consumption through the application of salvage should simply not be allowed.

On the other hand, it seems perfectly reasonable to allow the salvage of seepage for a new nonconsumptive use. In an example typical of our work, when a leaky ditch is either lined or replaced with a pipe, the conveyance loss is changed to an instream use. The important differences between these two cases in terms of water returning to the source are muddled in the proposed rules' definitions of "water saving methods" and "salvage water." See ARM 36.12.101(61) and (82). We propose a clarification that would reserve "water saving methods" for actions that make additional water available to the source; and, introduce a new term, "efficiency improvements," for actions that do not increase the water available to the source, but may make water available for other uses. The key difference is that water saving methods always reduce water consumption, whereas efficiency improvements do not necessarily reduce consumption use to restore stream flows within a designated reach to which those flows have been lost because of the diversion by the leaky ditch. The new definition of "water saving methods" would "mean a change to the actual water use system or management of water in which the modification being made would decrease the amount of water diverted and consumed to accomplish the same result. Water saving methods might include (1) changing management of a water system to decrease water consumed, (2) recovering flows into sinks or contaminated zones, or (3) reducing evaporation from reservoirs or open ditches through an impermeable layer or covering, (4) changing to a less water-consumptive crop, or (5) reducing the irrigated area."

"Efficiency improvement" would then "mean a change to the conveyance or management of water in which the modification being made would decrease the amount of water diverted to accomplish the same result. An efficiency improvement might include 1) changing from a ditch conveyance to a pipeline, 2) lining an earthen ditch with concrete or plastic, or 3) changing

from a high pressure wheel line to low pressure sprinkler system." An efficiency improvement that does not reduce the quantity of water consumed is not a water savings method. We recommend that the definition of "salvage water" be modified to mean "water that may be retained by the appropriator, moved to other lands, leased, or sold after implementing water saving methods and/or efficiency improvements" and proving lack of adverse effect to other water rights.

The amount of water salvaged is the amount which would increase the flow of water in the source, or in a specific reach of surface-water source, after the water saving method or efficiency improvement has been implemented. The addition of the phrase "or in a specific reach of surface-water source" is necessary for the efficiency improvements that do not actually increase the total amount of water to a source, but that may change the timing or the location of the water returned to the source by the elimination of seepage or waste. In addition to these proposed changes to the definitions, we also urge DNRC to insert language in the rule that makes it clear that, in a closed basin, any salvaged water that is put to use in a way that increases net depletions to a stream will not be allowed.

RESPONSE 32: The Department is left to implement the salvage statutes as enacted, and they provide for the right to obtain "salvaged water" under the "salvage" statute and definitions as enacted. The legislature has mandated that the change process and statutes be used where "salvage water" applies. To require new water use permits in such instances is beyond what the Department can do with these rules. What is requested would require a legislative change. Anyway, the Department disagrees that someone can increase their net consumptive use in a change proceeding whether it involves salvage or not, and the change process and the right to object remains for anyone as a means of stopping any increased consumptive uses that they allege may occur.

COMMENT 33: Return Flow: This makes no sense. How is a water user entitled to return flows? Does this mean a water user is compelled to continue to supply return flows even if they are not appropriating their water or they change their irrigation system and it becomes more efficient and does not supply the "return flows"? How is this different in relation to seepage water and wastewater? Seepage Water: Exactly what is "slowly returns through small cracks and pores" and what is the difference between this and return flows in a legal sense? Waste water: Again what is the legal difference in relation to return flows?

RESPONSE 33: The department recognizes that understanding the various differences in return flow, seepage water, and waste water is difficult, however, because the terms are defined in case law, they must be referred to separately. Neither return flow water, wastewater, nor seepage water is consumed by the purpose intended. Seepage typically occurs with supply ditches

or reservoirs. Return flow water is for example applied to land for irrigation, goes underground where a portion is used by the plant, and the left over water returns to a ground or surface water source. Wastewater is typically collected in a ditch located at the end of a field. Other water users are entitled to return flow water but, they are not entitled to seepage or wastewater. If a water user wanted to line a ditch, thus eliminating seepage water, other water users cannot prohibit the water user from lining the ditch. However, even though other users are not entitled to seepage or wastewater, if the water user who lined the ditch wants to increase acreage and wants to use the seepage water for the additional acreage, the water user would have to prove that by using the seepage water he will not adversely impact other water users.

COMMENT 34: ARM 36.12.101(58) Recreational Use - comment, "why is this defined?"

RESPONSE 34: Recreation use is not defined by statute and these rules want to provide some examples of recreational uses for which the department has granted water use permits. It is not exclusive, but it is meant to give an idea of recognized recreational uses.

COMMENT 35: ARM 36.12.101(59), "Reservoir," should be amended to include all possible facilities that serve as reservoirs of water. (59) "Reservoir" means a natural or manmade facility that impounds and stores water for beneficial use, including, but not limited to, a pond, pit, or pit-dam, or pipeline storage.

RESPONSE 35: The definition for reservoir has not been changed. The definition contains the words, "including, but not limited to ..." which would allow an applicant make a case for other types of storage facilities.

COMMENT 36: ARM 36.12.101(60) Return Flow - comment, "explain how the definition is consistent with existing law." DNRC must define and analyze how other appropriators are entitled to return flow. Other appropriators cannot demand if they can reasonably exercise their water rights.

RESPONSE 36: Western water law is clear that downstream appropriators are entitled to rely on return flows, and this is one of the matters at the heart of the "no injury rule" that applies in change cases. 85-2-401(1), MCA, is not read by the Department to mean there is no right to return flows, rather, it is read as meaning that statute and the concept of some objector to a change still being able to reasonably exercise their water right has to be taken into account in assessing whether changes in water conditions constitute "adverse effect" under 85-2-402, MCA.

COMMENT 37: (60) - "Return flow." Along with water that returns underground to its original source or another source of water, the definition should include water that returns above ground along the surface of the land to a source of water.

RESPONSE 37: The definition properly defines what is return flow. Water that runs off the surface is considered "waste water" and this definition is meant to make that distinction. A water user below has no legal right to that "waste water" but they do have a legal right to the "return flow."

COMMENT 38: ARM 36.12.101(60), "Return flow," ARM 36.12.101(63) "Seepage water," and ARM 36.12.101(78) "Waste water" The technical portions of the definitions are appropriate. The legal effect stemming from the character of the water should not be part of the definition.

RESPONSE 38: The Department is trying to make clear the legal distinctions of these terms based on existing law in order to make a confusing area clear to the general public as well as potential applicants for permits and changes.

COMMENT 39: ARM 36.12.101(61) - "Salvage water." A state agency believes that this definition should NOT include "waste." If water meets the statutory definition of "waste" found at 85-2-102(20), MCA, then it is, by definition, the unreasonable loss of water through design or operation OR the application of water for other than a beneficial use. A state agency believes that an appropriator should not have the benefit of using this water if it is wasteful.

RESPONSE 39: The department agrees that waste as defined in statute is not water that can be salvaged. The definition of salvage has been deleted. In ARM 36.12.2001(1), the department has clarified what water can be salvaged.

COMMENT 40: ARM 36.12.101(61) Further, the duplication of definitions of the same words in rule and in statute, may create confusion. Both the words "salvage" and "waste" are defined in statute. The interplay between the statutory definitions and the rule definitions could pose further problems for applicants to determine which definitions apply at different times (i.e., when determining correct and complete as opposed to proving the criteria during a hearing).

RESPONSE 40: The department agrees with the comment and has amended the rule accordingly.

COMMENT 41: ARM 36.12.101(62) Secondary diversion - See comment to Rule III. The department interprets this to mean that the comments provided in Rule III are applicable to the definition of secondary diversion. The comment to section (3) is, "Should clarify that secondary points of diversion only

needed if from a water source or if using natural features (i.e., streams, coulees, etc.) used for conveyance. The rule should not be construed to require an identification of all points where water may be diverted from a conveyance system (i.e., ditch or pipeline)."

<u>RESPONSE 41:</u> The department defines secondary diversion as those that are not from the same source as the primary diversion. A secondary diversion might typically be a pump in a ditch or a pipeline from a reservoir. The department included the secondary diversion rule in response to the public who have asked for the ability to describe the secondary diversion and see it printed on their water right. Identification of a secondary diversion is not required.

<u>COMMENT 42:</u> ARM 36.12.101(63) Seepage water - Compare to definition of return flow. The definitions seem to conflict.

<u>RESPONSE 42:</u> The definition of seepage water and return flows do not conflict. Both seepage water and return flow water return as surface or ground water, however, while other water users may appropriate seepage water, the water user has no legal right to its continuance. Whereas with return flow water, a water user may appropriate the water and they are entitled to its continuance.

<u>COMMENT 43:</u> ARM 36.12.101(66), "Source of supply," means the specific surface water body or pipeline from which water is diverted for a beneficial use.

<u>RESPONSE 43:</u> The rule is to define source of supply which can be either surface or ground water. The rule is not intended to define means of diversion. The rule has been amended to include ground water.

<u>COMMENT 44:</u> For ARM 36.12.101(74)(e) Tributary means ground water hydraulically connected to a surface water source, the commenter refers the department to comments made to the aquifer testing rules.

<u>RESPONSE 44:</u> The term tributary has been amended, but still contains the reference to ground water that is hydraulically connected to a surface water source. The definition as written is needed to clarify for these rules what water is considered tributary water.

<u>COMMENT 45:</u> ARM 36.12.101(75) Unappropriated water - "why is this term defined?"

<u>RESPONSE 45:</u> The department defined the term "Unappropriated" because it is used when talking about water rights. However, because the term is not used in these rules, the department has eliminated the rule definition.

COMMENT 46: ARM 36.12.101(77) "Volume" means the acre-feet of water. Twelve acre-inches are equal to one acre-foot or 325,851 gallons.

RESPONSE 46: The department agrees with the comment and has amended the rule accordingly.

COMMENT 47: ARM 36.12.101(78) I strongly urge you to revise this definition. Saving water means reducing water consumption, i.e., evapotranspiration. In contrast, DNRC's proposed definition makes no distinction between reducing consumption (example c) and reducing diversions (examples a and b). The distinction between water use, or diversion, and water consumption is critical to sustainable water management.

RESPONSE 47: The proposed definition incorporates the intent of 85-1-101, MCA, which is to encourage the conservation and full use of water. The salvage water law 85-2-419, MCA, allows an applicant who incorporates water saving methods to retain the right to the water salvaged. The statute, as currently written does not allow DNRC to require an applicant to reduce water consumption. However, an applicant for salvage water cannot reduce return flow if an adverse effect will occur to other water rights.

General Comments

COMMENT 48: Components should be withheld until DNRC revises the proposal or eliminates certain positions taken. Rules conflict with Montana Constitution, Water Use Act, and established water law principles. Historic Use, Change Adverse Affect and Change Adequate Diversion should be tabled pending development of a more practical and legal manner to administer change authorizations.

RESPONSE 48: The rules as written reflect statutory and case law. The department can find no reason to delay adoption of the rules. Conflict with the rules can be handled on a case-by-case basis.

COMMENT 49: Will have significant impact on property rights and as proposed will likely require statewide EIS under MEPA.

RESPONSE 49: The department sent out a preliminary draft of the rules to about 300 people, held meetings with various individuals who work with water right applicants, and held 3 public meetings prior to publishing the proposed rules in ARM. The broad rulemaking effort the department used with notice and public comment is the functional equivalent of a MEPA environmental review. Further, the majority of these rules are to set forth process and procedures that have been used for many years.

COMMENT 50: A conservation organization applauds DNRC for its thorough effort to create rules implementing the Water Use Act. In their view, this effort will greatly enhance the DNRC's ability to consistently and accurately administer water right claims in Montana.

These rules will improve the Department's ability to assess applications to change the purpose or place of use of existing water rights, and assess new surface and groundwater right applications. Through the proposed rules' conscientious focus on historic use, they believe the Department will be better prepared to process change applications and new water right applications consistently across regional offices. In addition, they believe that the proposed rules will lead to more thorough and better-documented applications for changes and new groundwater rights, which will also benefit the Department's administration of water rights.

The organization invested substantial time in making extensive comments on the proposed rules. They invested this time because they believe that the Department's rulemaking effort under the Water Use Act is a necessary and timely effort, which will be beneficial to streams and water users alike.

RESPONSE 50: The department acknowledges the time and effort put forth by the commenter and appreciates their interest.

COMMENT 51: The purpose of the rules is to comply with the legislative mandate asking the Department to clarify what constitutes a correct and complete application. In addition the purpose of the proposed rules is to avoid "unnecessary processing delays" and economic or other harm to water right applicants.

RESPONSE 51: The department spent considerable time and effort drafting the correct and complete rules and other peripheral rules that were needed. In an informal process, the department provided the MAR notice to over 300 interested people. The department also held individual meetings with people who represent various types of applicants, including attorneys, consultants, hydrologists, and water user associations. The department also held three public meetings. The published rules were a compilation of the comments by individuals and a result of the department's processes and procedures used over the last 30 years.

COMMENT 52: These rules do not achieve their intended purpose. Requiring water right applicants to comply with these proposed rules will significantly increase the cost of the application process, as well as significantly lengthen the time necessary to process an application.

Enactment of these rules will guarantee a substantial slow down in the processing of applications, and will serve as a formidable barrier to any applicant who wishes to change an

existing water right to a more efficient new use, or an applicant who wishes to appropriate water for a new purpose.

The Department needs to implement a much simpler solution to the correct and complete issue raised by the legislature.

The Department was asked by the legislature to provide rules useful in determining whether a permit or change application is correct and complete. The Department was also requested by the legislature to make the application process less expensive and faster. These proposed rules do not accomplish any of the objectives established by the legislature. They are certain to result in a substantial volume of new litigation, a substantial increase in the cost of filing a permit or change application, and substantial delays in the analysis and processing of such applications. I urge the Department to reject these rules in their entirety and adopt a simpler, common sense approach to addressing the legislature's request.

The requirement that an application be correct and complete is intended to be a threshold requirement. It was not intended to create additional requirements or criteria for issuance of a permit. It is my experience that some field offices often require the applicant to submit additional maps and information on an as needed basis further demonstrating that the criteria have been met after the application is filed, and will assist the applicant in determining what information is appropriate under the circumstances. I suggest that such a process is more appropriate than requiring applicants to submit voluminous, unnecessary, and potentially duplicative information in the initial application and then terminating their application if information is incomplete rather than providing assistance to the applicant. There are several other areas of the rules that engraft additional requirements onto the permitting process.

RESPONSE 52: The department agrees that correct and complete is a threshold requirement. The vast majority of the requirements in these rules have existed as policy and procedures for many years. The correct and complete rules are necessarily designed to assist a water user in providing a level of information that meets the standard of substantial credible information. Many of the comments received by the department prior to drafting these rules criticized the department for the inconsistencies in applying existing policies. The rules will be very helpful to both the department and the public in that both the public and the department will know what is required. This combination will ensure that the public will be treated equitably. The department will continue to provide assistance when it is able to do so. The department agrees that the correct and complete determination is not a substitute for a hearing.

COMMENT 53: My general observations are that the new proposed rules attempt to clarify and define what a correct and complete application is, however they may be unattainable and

unrealistic requirements that will effectively close the entire state to any new appropriations or change authorizations.

HB 720 did not direct DNRC to restrict the permitting process or impose additional criteria, rather it sought to have DNRC clarify for the public its existing procedures for the threshold determination of when applications are considered correct and complete. Several portions of the rules appear to exceed their legislative mandate.

The proposed rules contain serious defects concerning the determination of existing water rights by the Department that are contrary to Montana law. The rules fail to acknowledge that there are existing statutory procedures for determinations of historical use in change proceedings through the certification process in 85-2-309, MCA. The legislature simply directed DNRC to clarify its procedures concerning the determination of what constitutes a correct and complete permit application. The proposed rules, on the other hand, appear to expand the Department's jurisdiction and insert additional criteria and requirements into an already burdensome process. The proposed rules should be revised and simplified so as not to go beyond the mandate of House Bill 720.

The Proposed Rules apparently answer to the legislative directive that DNRC add substantive content to its "correct and complete" determinations. Under the Montana Water Use Act, applications are "correct and complete" where there is substantial credible evidence that an applicant can demonstrate the statutory requirements for a new water use permit or an authorization to change a water right. "Substantial credible evidence" means "probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information." 85-1-101(17), MCA. The Proposed Rules often go far beyond this statutory context. The substantial credible evidence standard is similar to the summary judgment standards commonly employed by courts in the State of Montana.

See M.R.Civ.P. 56. In other words, the correct and complete determination is designed to cull those applications only where the lack of evidence would convince a reasonable decision maker that it is most unlikely that such evidence, if believed, would sustain an application after hearing. Indeed, this is why the statute calls for only evidence that supports only a "reasonable" legal theory. Disputes over the evidence and the law are to be resolved in the hearing process, and thus the correct and complete determination is not a substitute for a hearing. This limited role of the correct and complete standard is otherwise evident from 85-2-310(2), MCA. Pursuant to this provision, the DNRC must accord an applicant a hearing where the DNRC modifies or denies an application even in those instances in which there are no objections. This statute of course implicitly acknowledges that there may factual or legal issues the DNRC chooses to contest in an administrative hearing even where the application itself is correct and complete.

RESPONSE 53: When an applicant provides the required information and the department deems the application correct and complete, an applicant is entitled to a hearing if the department proposes to deny the application or the application receives valid objections. The correct and complete rules do not interfere with that entitlement.

The Department is informing the general public and water users in particular about what it needs in their applications to consider them correct and complete so that they can proceed further through the permit or change process. It is unclear what all of the defects alleged are. Historical use has always been a matter that has to be examined in a change proceeding, and these rules do not create that requirement for the first time nor expand it. That 85-2-309, MCA, exists does not mean it is the only way a change application can be handled, i.e., certifying the issue of historical use to the Water Court. That is an option but it is not a requirement, and it certainly is not exclusive. The Department, in issuing or denying a change application based on its findings as to historical use, is not adjudicating that right or that historical use, and that is clear in change proceedings in all of the western states.

The Department has the obligation to look at historical use, and it merely grants, denies or modifies change applications based on what it finds. Water users whose change applications have been denied by the Department based on not showing historical use have not had their water rights adjudicated by the Department and are free to keep exercising those rights - but they are not authorized to change them. The Department does not believe its rules on correct and complete applications go beyond what was asked by HB 720. Rather, they let the general public and water users in particular know what is required of their applications and why, and provides uniformity across the state.

COMMENT 54: A water quality protection district strongly supports the adoption of rules that provide for the submittal and review of more specific and accurate data and will allow the DNRC to more accurately track, evaluate and enforce water right in a fair manner. Standardization and consistency of review and enforcement will be enhanced by the proposed rules. The district is increasingly turning to DEQ and DNRC to provide scientific guidance and standards for local applicants to follow. In particular, the aquifer testing requirements section of this proposal will provide guidance.

RESPONSE 54: The department acknowledges the time and effort put forth by the commenter and appreciates their interest.

COMMENT 55: Rules don't appear to address a problem that faces a diligent applicant. A less than diligent applicant can essentially put in an incomplete application to gain a priority date and use the next 3 - 6 months to develop the information that should have accompanied the application in the first

instance. Adopt a rule that requires the department to do an initial review within the 1st week of submittal. If the department does not adopt such a rule it will not be long before facially deficient applications become the norm. Also, the department should adopt a rule that rewards diligent applicants where application would be prioritized for processing through the entire process. Such rule would not harm prior applicants because their applications would still carry an earlier priority date. This is an important rule because it is an economic issue for water related developments that incur substantial costs pending the department's determination.

RESPONSE 55: The department believes that with the adoption of the correct and complete rules, the time taken to review an application will be reduced significantly. The department will therefore be able to make the determination of correct and complete timely and backlogs that have been experienced in recent years will not occur. Additionally, the department will only send one deficiency letter on an application and that will also save the department time, time that can be used to act on applications more quickly. If the department is incorrect in its belief that new applications will contain the required information, then the suggestion by the commenter may be an option.

COMMENT 56: We appreciate the added detail regarding what is required in an application, and what methods are acceptable to the Department.

RESPONSE 56: The department acknowledges the time and effort put forth by the commenter and appreciates their interest.

COMMENT 57: House Bill #720 enacted by the 2001 legislature directs the department to adopt rules to determine whether a water right application is correct and complete. This rule is reasonably necessary because the public and the department need to understand what action will be taken if a water right application is not correct and complete. Yes, but "actions" should be fair and reasonable and afford the applicant due process.

RESPONSE 57: The department agrees the rules should be fair, reasonable, and allow due process. With the adoption of the correct and complete rules, applicants will be treated equitably because the public and the department will know the requirements. The majority of the rules include department policies that have been in place for many years. An applicant who meets the requirements of the rules is certainly entitled to due process and that entitlement will not be compromised by the correct and complete rules.

COMMENT 58: Why adjudicate in the first place? To protect against claims from downstream users in other states. To

create an all inclusive record in order to determine how water rights relate to one another on a basin-wide scope and, in my view to create a historical basis which can be counted upon through the change process as recognized legitimate historic water use. What does recognized and confirmed mean in the Montana Constitution? It is my view that recognized and confirmed means that the benefit of the doubt be given to historic existing water rights, and the work done by the Montana Water Court, until the adjudication process is complete. The DNRC assures this is an attempt to define a correct and complete standard.

Correct and complete used to mean filling in all the blanks on the form. But, in reality, the draft rules act as a mechanism to shut down the change process. The drafters appear to duplicate the work of the water court and re-adjudicate the underlying water rights. In my view, the draft rules deny applicants due process, for virtually any reason. At bureaucratic whim the application can be unilaterally declared, "not correct and complete". A black hole? The draft rules lack a method to resolve legitimate disputes between department and private sector experts to the department's understanding or lack of understanding of a specific application. Further it declares the department staff as the penultimate knowledge authority and expertise. I would argue otherwise. The defacto administrative rules are an end-run around the legislative process and work completed by the Montana Water Court ignores previous documentation, history and analysis of a specific water right. New definitions that do not appear in statute suddenly appear.

Legislation that was not able to make it through the legislative process reappears without legislative oversight. The proposed rules impose a huge burden and financial hardship for all applicants in the form of endless study. The proposed rules do not make the process more efficient and, to add insult to injury, are being retroactively imposed. The draft rules makes an already cumbersome process slower, less efficient and ignores on-the-ground reality and excludes any common sense solutions in relation to a specific physical/legal problem. Applicants can now expect any change or permit process to take three to four years, as opposed to the already unacceptably slow two years. Applicants will face substantial additional costs in permits and change applications to prove-up on the myriad of new hoops to jump through. The proposed Draft Rules, if implemented, re-adjudicate the underlying right, diminishes a valid decreed water right and appear to overrule the Water Court and historic District Court decrees.

It makes me wonder what happens to the balance of the decreed water right when reduced by the department? In the rules the State of Montana is not an active objector in the adjudication process. In my view, it is the State's responsibility not only to ensure that the decrees are technically accurate, but also to protect the prima facia status of existing water rights, recognized and confirmed by the Montana Constitution until ultimately adjudicated. There is a disconnect between the legislature's intent – to quantify and

protect existing water rights from demands of downstream states – and current DNRC policy. The defacto DNRC policy to re-adjudicate the underlying water right raises issues of abandonment unnecessarily, and generally shuts down the process. Unused portions of existing water rights are treated as abandoned, when the obvious alternative is to bank the unused portion as instream flows for future use.

I remain concerned with the diminutions in existing, decreed water rights by the DNRC-imposed volumes in the change process where none existed in the underlying water right. From a policy perspective, continued reductions in flow and volume, particularly in closed basins, shortchange the citizens of the State's ability to use and/or change these waters within the State. If this trend continues to its logical conclusion, instream flows will be enhanced, but there will be net loss in available water for economic development activities that may result in jobs. Montana is becoming a net exporter of water to downstream states.

As a result, there will be few options left to adequately address future water needs and the inevitable changes in water-use patterns. If the State is genuinely aggrieved by a historic claimed water right, it should participate in the adjudication process at the outset and not set up extra judicial process through rule making. The logical solution for the State of Montana is not to use the change process to re-adjudicate each and every change. The State must exercise its waiver of sovereign immunity, granted by the McCarran Amendment, and participate as an institutional objector or allow the on-motion process in the adjudication process to make historic water rights the undisputed basis for change applications. Water markets cannot be expected to fully develop in Montana until the underlying water rights are adjudicated and the interim prima facia claims protected by the State are adopted as is.

RESPONSE 58: The Department's change process occurs independent and separate from the Water Court's adjudication of water rights. As discussed in other comments in the change process the Department does not adjudicate water rights. Rather, in proving lack of adverse effect a change applicant must show what their historic use was and how their new use will not exceed their historic use. This is the same in all western states, and is at the heart of the "no injury rule" in change law. In the adjudication, historic volume of water used is not adjudicated, nor is a historic consumptive volume. The adjudication's volume requirement for irrigation water rights was challenged and ruled constitutional by the Montana Supreme Court in the McDonald case (McDonald v. State, 220 Mont. 519, 722 P.2d 598 (Mont., 1986) (requiring final decrees and preliminary decrees, respectively, of the water courts to state amount of water, rate, and volume included in the water right, did not violate Montana Constitution as to direct flow irrigation water rights which have not been historically decreed or defined in terms of volume). But thereafter the Montana legislature removed the volume requirement for irrigation water

rights. Therefore, there is nothing in water right decrees that establishes the historic volumetric use of existing water rights that could be used in a change proceeding.

It is also noteworthy that the "Ross Report," the independent report to the Montana legislature in the late 1980s regarding the accuracy of Montana's adjudication, noted that inaccuracies in water rights decreed in Montana's adjudication process would, over time because of the change process, be caught. So it is that the Department in change proceedings will ask change applicants for evidence of their historic water use if they have never had their water right adjudicated, whether it was adjudicated 100 years ago, or whether it was adjudicated 10 years ago by the Water Court. If someone cannot prove they are entitled to a change, the Department has not readjudicated their water right and they are free to use it as they always have without any kind of interference from the Department.

The rules simply state what information an applicant must have in the application to be correct and complete so the analysis of the application can proceed. The Department is trying to balance the needs of change applicants with the water rights, both junior and senior, that already exist on a stream and cannot be adversely affected by a change of a water right.

COMMENT 59: The DNRC will argue that it is protecting existing water rights. I would argue that addressing the twenty-year back log of unverified permits and removing their paper water rights would be more helpful in the protection of existing water rights.

RESPONSE 59: The water rights issued by the department since 1973 make up about 5% of the water rights in the State. The flow rate and volume of those rights were usually granted with reasonable amounts, but even if a right was granted for an excessive amount, one could hardly be concerned about the impact. Permits are subject to call and if an applicant applies to change a post-June 30, 1973 water right, the applicant is subject to the same requirements of any other change applicant.

COMMENT 60: I, for one, do not take kindly to our recognized, and confirmed water rights by the Montana Constitution being taken by the unilateral process proposed by the draft rules.

RESPONSE 60: It is the department's view that recognized and confirmed means that the benefit of the doubt be given to historic existing water rights, and the work done by the Montana Water Court, until the adjudication process is complete.

COMMENT 61: Though the new proposed permit requirements are understandably an attempt to ensure water availability and adverse impact, they may go too far in requiring an applicant to measure, monitor and provide very scientific hydrologic data. Many private or public entities that may wish or require a new water right may be unable to provide or obtain the proposed

necessary data, or it would be at such an excessive expense small water users or local governments would not be able to comply. For instance a small community may wish to put in a community well to serve its citizens, but would be unable to afford the costs of both the well, the monitoring well and data compilation that can only be compiled by professionals and could take a long periods of time to gather the necessary data.

RESPONSE 61: The department agrees and has amended the aquifer testing rule ARM 36.12.121 to incorporate additional flexibility for ground water applicants. As amended, the rules reflect that the requirements are preferred by the department, but are not required. The department recognizes that projects vary in size and complexity and that flexibility is a necessity. The department also recognizes that many professionals in the private sector have the knowledge and ability to design adequate aquifer tests. The department also encourages ground water applicants to seek department staff advice on testing requirements.

COMMENT 62: The main concerns I have with the New Proposed Rules are those for the Change Application process. The legislature created the Change Authorization statutes because they obviously recognized the necessity and inevitability of changes in water use over time. The statutes allow a water right owner to make changes to their rights without creating adverse impact upon other water right owners. The new proposed rules are extremely excessive and in some instances the criteria are unattainable. Some historic water rights date back over 100 years and the data for which you are asking often does not exist. Historic flow measurements, consumptive volumes used and especially return flows are 99% of the time non-existent.

RESPONSE 62: See response to comment number 58.

COMMENT 63: Overall, there remains high potential that these rules will result in a greater proliferation of certificate wells. The rules will also result in unnecessarily high costs for obtaining water right permits for wells in many cases. I strongly recommend that DNRC consider each rule element in the context of water right administration. The rules as written appear to apply primarily to incidents where adverse effects are likely, however, in reality there are many well permits submitted where adverse effects are remote. In these latter cases, a simpler and less costly aquifer testing protocol is warranted.

RESPONSE 63: See response to comment number 61.

COMMENT 64: There are some proposed changes that fly in the face of current hydrological science in the proposed rules. Simply put, the river in a basin with an unconfined aquifer is simply a surface expression of the aquifer. This is true in the gross sense even if the portions of the river are confined or

partially confined. The water use in the basin must consider the hydrology of the whole basin. All of the water is directly or immediately and directly connected. I think these proposed rules have several fatal flaws because they are not based on modern hydrologic science. They would simply allow further "water mining" of our ground water aquifers and subsequent streambed flow depletion.

RESPONSE 64: Many of the concerns expressed by this commenter relate to the rules regarding compliance with basin closure statutes. These rules relate to procedures for evaluating whether ground water is "immediately or directly connected to surface water" and thereby subject to restrictions of the closed basin statutes. The first consideration to keep in mind is that the terms "immediately or directly connected to surface water" are not defined in modern hydrologic science. As a result, the Department has made an administrative interpretation of the legislative intent. Further, the evaluation for basin closure compliance is required prior to the correct or complete stage of application processing to determine if an application can be processed further, not to make decisions regarding the potential for adverse effects such as "water mining" and stream flow depletion.

COMMENT 65: A conservation organization offers the following comments. We have been involved in the administrative processes described in these rules both as an applicant at various times and also as an objector. We appreciate the amount of work the department has gone to, to put these rules together. We recognize that they are proposing to codify a lot of what the department’s existing practice is now. We think that’s a good thing and in fact our experience with the department's process in both new permit hearings and change processes has largely been a good one. We also appreciate that when taking on a task this large, you're going to no doubt have a number of people, no matter what you do, who don’t like what you come up with. We appreciate the seriousness with which you approach this task.

RESPONSE 65: The department acknowledges the time and effort put forth by the commenter and appreciates their interest.

COMMENT 66: An irrigator in southwest Montana offered the following comments. We have been informed due to our need, our perceived need, to continually object to the process of water right applications within our basin. We feel that the burden of proof needs to be raised considerably by the DNRC and certainly to use comments about the historic use and the importance of that. We are familiar with an application to change to point of diversion, the means of conveyance, the place of use and the purpose of use. I think that fails to meet any kind of historic standard, except that they would like to keep their priority date. My association feels that what they are really proposing is an entirely new use and that the application should have been

rejected without any necessity to come in and file an objection and go through the expense, which of course our Ag community really does not need any increase in.

My particular concern is about the rules relating to immediate or direct in the closed basin. We really feel that the rules are just not even helpful within the context of a basin closure. They really don't make much sense.

We had assumed the prior existing standard, which I was intimately involved with in the Day Ranch Fish Creek hearing, in which case, the cone of depression reaching the river was considered to be enough to be a violation of the immediate or direct standard or the basin closure. We don't like your standard. We don't think it's broad enough. We don't think groundwater infiltration measures the real concept of a basin closure. If the cone of depression reaches a surface flow, it is interfering with the water that we have a property right to. Certainly, during irrigation season, we have a property right to it. So, we would like you to broaden that definition.

We feel we have had to battle, in the Gallatin Valley both immediate and direct effects that should not have been processed. This direct connection needs to be broadened in your rules. I hope the DNRC will take my comments and the fact that the irrigators have had to go to all the trouble of forming a 501C5 to battle the DNRC because they aren't fulfilling our understanding of a basin closure.

RESPONSE 66: It is incumbent on all water users to get involved with proceedings that involve either new uses that come into a basin via new water use permit applications or via change applications. Montana long ago decided on an administrative process set out in the Montana Administrative Procedure Act, 2-4-601, MCA, et seq., whereby a fair process is set up for a person to apply for water right that also provides for notice to others potentially affected so they can object. A hearing process is provided for, and the applicant bears the burden of proof. Although water users feel some basin closures are set up so they never have to get involved again in protecting their water rights, that is an unrealistic reading of those closure statutes. For one thing, no basin closure statutes result in absolutely closed basins. There are exceptions to the closure, and to that extent all other water users are obligated to review applications and decide whether to object. The ability to have notice of new applications or changes is an opportunity to participate and object.

Before the Water Use Act, new uses and changes of uses could take place with no notice and no opportunity beforehand to participate to stop a new or changed use. Before 1973 existing water users had to go directly to district court for injunctive and other relief, and the burden of proof was on them to stop new or changed uses of water. Now that has been reversed, and the burden is on new users and change applicants. That is a huge change in favor of existing water users. The forum is also an administrative one, which is also easier for existing users as far as their participation. Given all those positive changes

for existing water right holders, it must be pointed out though that there is nothing in Montana water law that has been changed to mean that they no longer have the responsibility to act to protect their water rights. No water right users in Montana are insulated from having to act to protect their water rights where new water right applications or changes are allowed.

The legislature has the ability to close a basin down completely, but that has not yet happened, and even if that ever does occur as to new uses, there will always be the right for water users to change their water rights. The use of water in Montana is dynamic, and the best thing there can be is a fair forum for water use decisions to be made and where the rules are known, and that is what these rules are attempting to do.

COMMENT 67: An individual who had an interest in the Zoot properties permit application testified at the rules hearing about information related to that application.

RESPONSE 67: The comments were not related to the proposed rules and therefore no further response is offered.

COMMENT 68: An individual interested in the Zoot application offered the following testimony related to the proposed rules. I believe the rules should even be tighter or some type of an allowance should be in them also for the monitoring, the collection of data. I know your rules are trying to tighten up the direct or indirect in a basin closure, but there again, you still have engineers or hydrologists with the models, doing the models, which do not necessarily tell you every month whether the river is gaining or losing, does not tell you the drought conditions, does not tell you a lot of conditions have changed.

My feeling is that if there is a situation where monitoring can be as part of the rules or the condition, then I would like to see a monitor plan for the collection of actual data, rather than strictly models and theory or theoretical groundwater and surface water interconnection. Especially in the case where the cone of depression or zone of influence shows that it will intercept the river and that there is some question whether it is a gaining or losing, that is a valid point, the time of year the tests were taken.

RESPONSE 68: The Department is implementing the basin closure statute in a way it believes complies with the intent of the statute and provides for an exception. Getting an application accepted by the Department is only part of the process. Impacts to surface water will still need to be addressed by the applicant and lack of adverse effect has to be proven by a preponderance of the evidence before the department could grant an application. The department has made clear since 1993 that the legislature can be asked to change the law and test if everyone is dissatisfied with the department's interpretation and implementation. The legislature is free to

completely close the basin or to make clearer how and when applications can be processed.

The applicant must provide sufficient information on which to base a determination that the proposed ground water use is not hydraulically connected or if hydraulically connected, will not induce surface water infiltration during the period of diversion. The department has amended ARM 36.12.120(13)(e) to clarify the evaluation of induced infiltration from surface water under losing and gaining conditions. The site-specific spatial and temporal complexity of exchange between ground water and surface water are not addressed in the rules. An applicant will be requested to provide additional proof if the information submitted is not sufficient on which to base a determination.

COMMENT 69: Applicants need to understand that if DNRC receives an objection to their application, they may need to provide further analysis and information, and, that their application may still be denied.

A correct and complete application can advance to the next step in the decision process. A determination that an application is correct and complete does not mean a permit will be issued or a change authorized.

RESPONSE 69: The department agrees with the comment and has added information explaining that an application deemed correct and complete application does not ensure the application will be granted. See ARM 36.12.1601(1) - (3).

New Rule I (36.12.1601) - Correct and Complete Requirement Rule Comments

COMMENT 70: Sections (1) and (2) should read the same because the law requires the filing of a correct and complete application for both permit and change applications. The implication left by the proposed rule is that a change application does not have to conform to the standard of substantial credible information and all the necessary parts of the application form requiring the information do not need to be filled in with the required information.

RESPONSE 70: The department agrees with the comment and has modified the rule accordingly.

COMMENT 71: Suggest I(2) say, require an applicant to conform with "all applicable" new rules.

RESPONSE 71: The department thinks that by specifying each rule that is applicable to developing a correct and complete application controversy over which rules apply will be limited. Therefore, this rule has not been amended.

New Rule X (36.12.1401) - Application Modification Rule Comments

COMMENT 72: Our only comment is that (4) states that "depending on the circumstances" the applicant may be responsible for cost of republication. We feel that these circumstances should be defined, or examples provided for guidance.

RESPONSE 72: The department agrees with this comment and has modified ARM 36.13.1401(5).

COMMENT 73: (5) A new analysis of the application criteria must be submitted when an application modification requires republication and the department will make a new correct and complete determination on the modifications. New analysis should be limited to modified criteria. The analysis doesn't change for unmodified criteria.

RESPONSE 73: The department agrees with this comment to the extent that the modifications do not impact other criteria. The department must review all of the elements of an application, not just those that have been modified, and must analyze and document the complete effect of a modification.

COMMENT 74: (5) A new analysis of the application criteria must be submitted when an application modification requires republication and the department will make a new correct and complete determination on the modifications prior to republication.

RESPONSE 74: The department agrees with this comment and has modified ARM 36.12.1401(6).

COMMENT 75: (6) Applicant name changes prior to public notice can be made by letter to the department. Name changes after public notice may be made by letter to the department and copies to all parties if objections have been received.

RESPONSE 75: The department agrees with this comment and has modified ARM 36.12.1401(2).

COMMENT 76: Appears republication could affect date of the water use permit in time. Too vague to understand increased or decreased. Propose increased pumping rates or volumes by more than 10% would need republication. Less may not need republication. In (3)(j) "a different impact" should be better defined.

RESPONSE 76: If an application is modified to the extent that republication is required, the priority date will be altered to the date the last modification was made. These rules will help to ensure that the public knows what is required prior to filing an application and that modifications will not be required. The water needs requested by an applicant are key to others deciding whether or not the proposed use will impact their water right. Therefore, the department would be remiss if

it did not require republication of a modification that increased the amount of water needed. The department agrees that "a different impact" should be better defined and modified the rule. The department must always reserve the right to evaluate modifications on a case-by-case basis to ensure that all individuals who may be impacted by a modification have been allowed due process.

COMMENT 77: Too broad. A modification may reduce source impact or burden and should not require republication.

RESPONSE 77: The department agrees there are times that a modification may reduce the impact of a proposed project, however, the department will have to evaluate such modifications on a case-by-case basis. The department must ensure that all individuals who may be impacted by a modification have been allowed due process.

COMMENT 78: If the application is for a new permit and they decide to change an existing water right instead, it should be republished.

RESPONSE 78: The department agrees with this comment and has added ARM 36.12.1401(7).

New Rule XI (36.12.1501) - Deficiencies and Termination Rule Comments

COMMENT 79: Under the statute, 85-2-302(6), MCA, the department has discretion to allow a further time for correction and completion of an application. The rule takes the discretion away from the agency. Such an action is not a lawful exercise of agency rulemaking authority. The rule should be amended to retain the agency discretion and still conform to the intent of the law. Section (2) could be amended to add the clause "or an extension of time of no more than 15 days." Section (3) would then be amended to provide after "deficiency letter" the phrase "unless extended under Section (2)".

RESPONSE 79: The department agrees with this comment and has amended the rule accordingly.

COMMENT 80: (5) If a second or follow-up deficiency letter is required, the 90-day period does not start over. The applicant should get additional adequate time to respond to DNRC after subsequent correspondences. If a second DNRC deficiency letter is delivered to the applicant at or very near the end of a 30- or 90-day time limit, there is no time to respond. This is NOT due process. Because of the complexity of the new rules, there is likely to be much back-and-forth correspondence between DNRC and applicants. I find it disconcerting that the DNRC takes up to a year or more to process a claim and then the applicant must respond in 30 days and gets only one shot to meet

and/or explain how the application meets these complex DNRC criteria.

RESPONSE 80: These rules were drafted so that an applicant knew the requirements for filing a correct and complete application. By knowing the requirements prior to filing an application it is thought by the department that deficiencies in application will be reduced significantly. Most of the requirements set forth in these rules are policies and procedures that have been in place for many years. ARM 36.12.1501(5) which discussed a second or follow-up letter has been eliminated. The department will send one deficiency letter and will identify the rule that has not been met. By receiving applications that meet the correct and complete requirements and writing one deficiency letter, the department will be able to timely process water right applications.

COMMENT 81: 30 days may not be adequate to obtain information. Seems it would be fair if the DNRC is contacted within 30 days and a letter explaining how the deficiencies would be addressed is sufficient to allow time to complete the work without having the date of the permit adjusted. 90 days should be sufficient time to address deficiencies.

RESPONSE 81: These rules were drafted so that an applicant knew the requirements for filing a correct and complete application. By knowing the requirements prior to filing an application it is thought by the department that deficiencies in application will be reduced significantly. The department agrees that more time may be needed in some instances and has revised the rule to allow an 15 additional days to respond to deficiencies.

COMMENT 82: A state agency generally supports that rule as written. However on (4) we suggest a note that the application fee will not be refunded if an applicant does not supply requested information and the application terminates.

RESPONSE 82: The department has rules in place related to refunds. See ARM 36.12.107.

COMMENT 83: (4) If all of the requested information in the deficiency letter is not submitted within 90 days of the date of the deficiency letter, the permit or change application will be terminated. At this point will a filing fee be refunded? I can see a problem with the DNRC sending out a deficiency letter in November asking for information that would not be attainable due to seasonal (weather) constraints.

RESPONSE 83: The department has rules in place related to refunds. See ARM 36.12.107.

COMMENT 84: Is a letter postmarked within the time frames timely?

RESPONSE 84: Yes, the postmarked date is used to determine a timely response. The department has amended the rule to reflect that information.

COMMENT 85: Rule should provide process to challenge DNRC correct and complete determination. Maybe some type of show cause hearing is an option. That would keep correct and complete process from being implemented arbitrarily.

RESPONSE 85: The statutes already provide that the department can return an application that is not correct and complete, and these rules set out what it is required by an applicant. There is communication and dialogue between an applicant and the department about what is expected, and these rules apply across the state to all Regional Offices to make those expectations clear. The statutes do not provide for a show cause hearing as is being requested, and the legislature would have to so provide for one.

COMMENT 86: The irrigator in southwest Montana also felt the same as the conservation organization that groundwater in the process of arriving at a surface flow belongs to the surface flow. When you capture groundwater that is on its way to the surface within the timeframe that would prevent it from reaching the river, during the beginning of the irrigation season and throughout the irrigation season, you have removed our property. So, we would very much like to see a more meaningful and broader hydrological connection to the surface water; that it is immediate or direct.

RESPONSE 86: See response to comment #87.

New Rule XII (36.12.120) - Basin Closure Compliance Rule Comments

COMMENT 87: The following comment applies to several sections of this rule: Basin closures that do not allow for new appropriations of ground water that is immediately or directly connected to surface water result from a lack of surface water legally available for appropriation. The closures are intended to prevent the further diminishment in surface water flows. The interpretation of "immediately or directly connected" to mean only those hydrologic connections that induce infiltration of surface water ignores, by our interpretation, the impetus of the basin closures. The interpretation of the ground water definition for these closures should be based on the presence or absence of impact to surface water and not the mechanism of impact. Whether the impact is due to induced infiltration of surface water or due to the capture of ground water tributary to surface water is unrelated to the presence or absence of an immediate or direct connection.

RESPONSE 87: The Department is implementing the basin closure statute in a way it believes complies with the intent of the statute and provides for an exception. Getting an application accepted by the Department is only part of the process. Impacts to surface water will still need to be addressed by the applicant and lack of adverse effect has to be proven by a preponderance of the evidence before the department could grant an application. The department has made clear since 1993 that the legislature can be asked to change the law and test if everyone is dissatisfied with the department's interpretation and implementation. The legislature is free to completely close the basin or to make clearer how and when applications can be processed.

COMMENT 88: (4) This section is confusing. Does it mean ponds are consumptive, therefore won't qualify under a non-consumptive exception or, can their evaporation be mitigated?

RESPONSE 88: The rule has been amended to remove the inference that ponds are consumptive. The rule now states that evaporation losses must be mitigated regardless of how evaporation losses occur.

COMMENT 89: (5) Of the statutes identified as being implemented only 85-2-337, MCA, provides for Augmentation plans. Section (5) refers to basin closures that allow for augmentation plans but makes no mention of whether or not augmentation plans would be accepted in basin closure areas that do not expressly allow for augmentation. The DNRC has indicated that they would accept augmentation plans in such basin closure areas, but this rule seems to fail to clarify this point. The rule should clarify DNRC's position on whether augmentation plans will be allowed in closed basins where the statute is silent as to augmentation plans. A state agency does not oppose the use of augmentation plans, however, we feel that having some criteria for approval of augmentation plans is important.

RESPONSE 89: The department agrees with the comment and has amended the rule accordingly.

COMMENT 90: (5) A wildlife agency expressed its strong support for the proposition that for augmentation plans that require more than one application, and one application is terminated or denied, then all applications must be terminated or denied. The agency has experienced this situation as a water rights objector. We have been presented with a scenario in which an applicant proposed a mitigation plan, but does not submit the change application necessary to implement that plan. The new rule would eliminate that situation.

RESPONSE 90: The department acknowledges the time and effort put forth by the commenter and appreciates their interest and support.

COMMENT 91: (6)(b) - DNRC staff shall make a written determination that the evidence submitted is sufficient on which to base a determination ... DNRC should make clear that its determination is rebuttable by an objector.

RESPONSE 91: The department agrees with the comment and has amended the rule accordingly.

COMMENT 92: (6)(c)(i) states that an applicant must determine if the source aquifer is hydraulically connected to the surface water source when the estimated radius of influence lies near a surface water source. "Near" should be defined.

RESPONSE 92: All references to "near a surface water source" have been removed. The applicant must determine if the source aquifer is hydraulically connected to surface water within the delineated zone of influence.

COMMENT 93: (6)(d) This rule states that if an applicant submits a technical explanation concluding induced surface water infiltration will not occur when static ground water level is greater than 10 feet below the bed of a surface water source, the source aquifer will not be considered hydraulically connected to the surface water and no further testing will be required. Again, it should be emphasized that this evidence goes toward the determination of whether an application will be deemed correct and complete, but may not be sufficient to prove the criteria necessary for DNRC to issue a permit.

RESPONSE 93: The department agrees with the comment and has amended the rule accordingly.

COMMENT 94: (8) - ground water pit evaporation - In section (8) the DNRC seems to be making a factual determination without knowing any of the facts. Ground water pits adjacent to surface water can induce infiltration of surface water through evaporative losses depending on the slope of the ground water gradient and the nature of the hydrologic connection. Additionally, evaporative loss of ground water tributary to surface water causes a depletion of surface water. In both cases, the impacts to surface water due to evaporation of ground water may be relatively small, but that is not always the case and cannot be arbitrarily ignored by rule. The means by which losses occur should not dictate how they are interpreted as the means has no bearing on the impact. Whether it is a pumping well or the evaporation of a pit, the impact to the stream still occurs.

RESPONSE 94: The section regarding evaporation from ground water pits has been clarified. The department assumes evaporation from pits will not induce surface water infiltration for the purpose of evaluating whether a source is immediately or directly connected to surface water. This decision was made because of the relatively small amount of water involved in most

cases and the difficulty of measuring small effects. The department does not assume that evaporation losses from a ground water pit cannot affect stream flow. An applicant must conduct a hydraulic analysis to evaluate the potential for adverse effects.

COMMENT 95: (6) should be consistent with expert disclosures in judicial and administrative proceedings. (6) could be viewed as inconsistent with (7).

RESPONSE 95: The department is unsure of the inconsistency that is suggested by the commenter. Therefore, no response has been provided.

COMMENT 96: In proposed ARM 36.12.120, "Basin Closure Area Exceptions and Compliance," the applicant is asked to conduct a series of evaluations to determine whether the source aquifer is hydraulically connected to surface water. The problem with ARM 36.12.120 is that it makes an unrealistically narrow assumption of hydraulically connected to surface water. As a result, we strongly recommend revising ARM 36.12.120. ARM 36.12.120(6)(a) and (b) should be changed to be consistent with our recommended change to the definition of "immediately or directly connected to surface water," discussed above. ARM 36.12.120(6)(a), should be amended to read: " . . . the cone of depression or radius of influence of a pumping well will not intercept surface water by inducing infiltration during the proposed period of diversion, or, will not capture ground water tributary to surface water." ARM 36.12.120(6)(b) should be amended to read: " . . . or if hydraulically connected, will not deplete stream flows." Likewise, ARM 36.12.120(7)(d) sets out a scientifically accurate way to determine potential for induced surface water infiltration, but does not ask for information about the potential for stream flow depletion.

With regard to ARM 36.12.120(6)(c), a conservation organization recommends making the assumption that the source aquifer is hydraulically connected to surface water, but allowing an applicant the opportunity to demonstrate that the source aquifer is not hydraulically connected. This change to ARM 36.12.120(6)(c) would be a truer implementation of the statutory requirements of a basin closure. In Montana's inter-mountain basins, all ground water is ultimately connected to surface water and, in fact, any ground water that is not consumed within the basin ultimately discharges to surface water regardless of whether a well is located near a hydraulically disconnected stretch of river or stream. If ground water beneath a perched (i.e., disconnected) reach of stream is not withdrawn, then it will continue to flow downgradient until it discharges to surface water. Therefore, whether or not a cone of depression intercepts a disconnected stream, the ground water pumping ultimately will deplete stream flow.

To truly protect stream flows in a closed basin, the test for new ground water pumping should be a comparison between proposed and historical water consumption, i.e., a water balance

analysis. However, this would go beyond the statutory basin closure that does allow ground water pumping except for ground water that is "directly or immediately connected to surface water." In order to at least implement the basin closure statute, ARM 36.12.120 must include the capture of tributary ground water. The complex analysis required in ARM 36.12.120 to determine whether surface water infiltration will be induced ignores capture of tributary ground water. The changes recommended above would correct that deficiency in the proposed rules.

RESPONSE 96: The Department is implementing the basin closure statute in a way it believes complies with the intent of the statute and provides for an exception. Getting an application accepted by the Department is only part of the process. Impacts to surface water will still need to be addressed by the applicant and lack of adverse effect has to be proven by a preponderance of the evidence before the department could grant an application. The department has made clear since 1993 that the legislature can be asked to change the law and test if everyone is dissatisfied with the department's interpretation and implementation. The legislature is free to completely close the basin or to make clearer how and when applications can be processed.

COMMENT 97: The complex analysis required in Rule XII opens the door to increased controversy and contested applications for new ground water pumping. ARM 36.12.120(7)(f), for example, which asks that the hydraulic gradient be compared with the slope of the cone of depression in order to determine surface water infiltration, applies only to a gaining stream. For a losing stream, the cone of depression need only intersect the stream regardless of gradient. In addition, any given hydraulic gradient (both in terms of direction and magnitude), can change both seasonally and from year to year. With its reliance solely on induced surface water infiltration, ARM 36.12.120 opens the door to increased confusion and contested case hearings.

RESPONSE 97: The applicant must provide sufficient information on which to base a determination that the proposed ground water use is not hydraulically connected or if hydraulically connected, will not induce surface water infiltration during the period of diversion. The department has amended ARM 36.12.120(13)(e) to clarify the evaluation of induced infiltration from surface water under losing and gaining conditions. The site-specific spatial and temporal complexity of exchange between ground water and surface water are not addressed in the rules. An applicant will be requested to provide additional proof if the information submitted is not sufficient on which to base a determination.

COMMENT 98: In ARM 36.12.120(5), the language is good as far as it goes. But we suggest adding the additional language:

"An augmentation plan must mitigate the potential adverse effects to the specific reach or part of the source that would otherwise suffer flow depletions because of other permit or change authorizations. Augmentation must occur in the depleted reach and during the season of the depletion. Augmentation plans must include a measuring plan." This is to assure that the areas that actually suffer depletion receive the benefits of augmentation. For example a permit authorization should not be given based on an augmentation plan that retires a senior right that is two miles downstream from the new point of diversion because the flow in the intermediate two miles (though the same source) is decreased potentially to the detriment of other water right holders or instream flow. Only augmentation plans, which do not spatially disrupt instream flow, should be allowed and that should be made clear in the definition.

RESPONSE 98: The department agrees with the comment and has amended the rule accordingly.

COMMENT 99: There is no statutory basis for stating a pond is considered consumptive.

RESPONSE 99: The department agrees with the comment and has amended the rule accordingly.

COMMENT 100: (4) To be consistent with the definition this section should say, "A pit, pit dam or pond" is considered consumptive.

RESPONSE 100: The reference to pond in ARM 36.12.120(4) has been eliminated.

COMMENT 101: (4) Seepage losses return to the aquifer as recharge. Note that 85-2-101(3), MCA, states that "the state encourages the development of facilities that store and conserve waters for beneficial use,...and for ground water recharge." Thus the state encourages development of ponds and pond seepage provides ground water recharge.

RESPONSE 101: The reference to pond in ARM 36.12.120(4) has been eliminated. The department agrees that the statute can be interpreted to mean that the state encourages development of ponds. However, it is also worth noting that statute requires that any new water use or change of a water right is subject, to in addition to other criteria, that an applicant show others will not be adversely affected by the application before the department can grant an application.

COMMENT 102: (6)(a) The department will not determine an application to be for a permit to appropriate ground water unless the department can determine from the information provided that the cone of depression or radius of influence of a pumping well will not ~~intercept~~ induce surface water ~~by inducing~~ infiltration during the proposed period of diversion. Surface

water may infiltrate through the vadose (dry) zone between the surface and the aquifer. Intercepting this water once it reaches the aquifer does not meet the immediate and direct language of the Smith River decision. I believe inducing surface water infiltration better meets that definition.

RESPONSE 102: The department agrees with the comment and has amended the rule accordingly.

COMMENT 103: (6)(b) The department staff shall make a written determination that the evidence submitted by an applicant is sufficient on which to base a determination that the proposed ground water ~~use~~ source aquifer is not hydraulically connected or if hydraulically connected, will not induce surface water infiltration.

RESPONSE 103: The department agrees with the comment and has amended the rule accordingly.

COMMENT 104: High and low transmissivity and storativity values can be evaluated and used to estimate a radius of influence. If the estimated radius of influence lies near (AMBIGUOUS & VAGUE; what constitutes near??) a surface water source, then the applicant must determine if the source aquifer is hydraulically connected to the surface water source.

RESPONSE 104: All references to "near a surface water source" have been removed. The applicant must determine if the source aquifer is hydraulically connected to surface water within the delineated zone of influence.

COMMENT 105: (6)(c)(iii) Water level data may be obtained from existing wells located near (again, what constitutes near?) or at the surface water source.

RESPONSE 105: All references to "near a surface water source" have been removed. The applicant must determine if the source aquifer is hydraulically connected to surface water within the delineated zone of influence.

COMMENT 106: (6)(c)(iv) If existing wells are not available, the installation of small diameter wells, wellpoints, or piezometers, including those adjacent to or in the surface water source, can be used to ~~obtain these data~~ determine the existence of a hydraulic connection.

RESPONSE 106: The department agrees with the comment and has amended the rule accordingly.

COMMENT 107: What is the scientific basis for 10 feet?

RESPONSE 107: While it may not be a scientifically based figure, 10 feet was used because the public can dig or drill a monitoring well without being subject to the Board of Water Well

Contractor rules. An applicant can provide additional information to show the absence of hydraulic connection if the depth to ground water below the bed of a surface water body is less than 10 feet.

COMMENT 108: (6)(d) If an applicant demonstrates ~~and provides a technical explanation concluding induced surface water infiltration will not occur when~~ that static ground water level is greater than 10 feet below the bed of a surface water source, the source aquifer will not be considered hydraulically connected to surface water at that location. Further testing for induced surface water infiltration at the tested location is not required.

RESPONSE 108: The department agrees with the comment and has amended the rule accordingly.

COMMENT 109: Why does an applicant have to provide a technical explanation if static ground water level is greater than 10 feet? That alone should demonstrate non-connection; and why 10 feet? If there is 5 feet of separation, there also can be no hydraulic connection. See definition of "hydraulically connected" - saturated zone in DIRECT CONTACT with surface water. Therefore ANY unsaturated zone between surface water and ground water means that the two are NOT hydraulically connected and therefore pumping cannot induce surface water infiltration. Also troubling, is the part "at that location". How many locations does an applicant have to prove this? Private property issues with neighbors (and potential objectors) and the sheer size of a cone of depression will limit an applicant's ability to demonstrate no connection at all points where a cone of depression MAY underlie surface water. Therefore, if an applicant does not have access to the stream through an objector, he has no chance to prove no immediate or direct connection.

RESPONSE 109: Subsections ARM 36.12.120(6)(b) and (c) have been modified to clarify the requested evaluation of hydraulic connection between ground water and surface water. It is true ground water may not be hydraulically connected to surface water if the separation between the water table and the bed of a stream is less than 10 feet. A capillary rise from the water table and elevated saturation beneath the bed of a surface water body can result in hydraulic connection and free-exchange of water where the static water level is beneath the bed of a surface water body. In addition, the 10-foot cutoff provides a factor-of-safety in instances where seasonal water level fluctuations are significant. Subsection (6)(c) has been modified to provide an applicant the opportunity to evaluate capillary pressure, saturation, and unsaturated flow between the bed of a surface water body and ground water as well as diurnal and seasonal water levels fluctuations.

COMMENT 110: (6)(e) If an applicant demonstrates ~~and provides a written technical explanation concluding~~ that the static ground water level is above or less than 10 feet below the bed of a surface water source, the source aquifer is considered to be hydraulically connected to surface water at the tested location and further testing must be conducted to determine whether pumping the proposed well will induce surface water infiltration during the proposed period of diversion.

RESPONSE 110: The department agrees with the comment and has amended the rule accordingly.

COMMENT 111: (6)(f) Induced surface water infiltration can be best evaluated (does this imply that the department will accept "other" methods of evaluating induced surface-water infiltration??) by conducting an aquifer test. The following rules address the evaluation of whether the proposed well will induce surface water infiltration.

RESPONSE 111: The department has eliminated (6)(f).

COMMENT 112: (7) Aquifer tests (more than one test is now needed??) must be conducted using methods described in ARM 36.12.121 that will determine the aquifer properties needed to determine the zone of influence for the period of diversion and the potential for drawdown to induce the infiltration of surface water within the zone of influence.

RESPONSE 112: The department agrees with the comment and has amended the rule accordingly.

COMMENT 113: (7)(b) Staff gages must be installed in surface water sources adjacent to the observation wells to monitor stages during the aquifer test for comparison with ground water levels.

RESPONSE 113: The department agrees with the comment and has amended the rule accordingly.

COMMENT 114: (7)(b) Staff gages must be installed in surface water sources adjacent to the observation wells to monitor stages during the aquifer test for comparison ~~to~~ with ground water levels. Vague; gages is plural, so at least 2 gages? What if there is only 1 monitoring well adjacent to surface water? DNRC expert staff has told me in writing that "staff-gage monitoring to evaluate for reduction of surface-water flow is not an appropriate procedure to address the issue of induced streambed infiltration". So why require it of an applicant during a pumping test? What if the test is adjacent to the Missouri River? A staff gage will not detect changes in stage of large-volume rivers. Furthermore, upstream diversions during testing can affect monitoring, as can typical daily diurnal changes in stream stage. The use of staff gages should be optional.

RESPONSE 114: Staff gages are most useful for evaluating hydraulic connection between ground water and surface water, and to evaluate the hydraulic gradient. Staff gage measurements also are needed to evaluate the effects of changing surface water stage on ground water levels observed during an aquifer test. Use of staff gages during an aquifer test is optional.

COMMENT 115: (7)(d) Relative or absolute elevations of ground water levels and surface water stages must be compared to determine whether the hydraulic gradient between the source aquifer and gaining surface water sources is reversed or whether the hydraulic gradient between losing surface water sources and the source aquifer is steepened. The occurrence of either during the aquifer test constitutes induced surface water infiltration. There is NO consideration for natural ground water fluctuation. Weight and Sonderegger (pp. 396-397).

RESPONSE 115: Natural fluctuations of ground water levels as well as surface water stage are preexisting conditions that affect exchange of water between ground water and surface water. Pumping is a new stress on a ground water system in dynamic balance and drawdown resulting from pumping will be superimposed on fluctuating natural ground water levels. In addition, diurnal or seasonal fluctuations in surface water stage can cause fluctuations in hydraulic connection to a surface water body and hydraulic gradient in the immediate vicinity of a surface water body. These natural fluctuations need to be considered to interpret ground water level and surface water stage data and to evaluate whether a proposed well will induce infiltration from surface water. At the correct or complete stage of application processing, the Department is asking the applicant to provide a reasonable argument regarding the potential that pumping a proposed well will induce infiltration from surface water during the period of diversion. An applicant will be requested to consider natural fluctuations of ground water levels and surface water stage if Department staff believe their argument is not adequate.

COMMENT 116: (5) In basin closure areas that allow augmentation plans and applications for nonconsumptive uses, the department must approve the augmentation plan prior to processing the application. If an augmentation plan requires more than one application, all applications will be processed simultaneously. If any of the augmentation applications is terminated or denied, all related applications will be terminated or denied. What if you plan on augmenting from a well (less than 35 gpm + less than 10 acre-feet) and form 602 is not to be filed until the water is put to beneficial use?

RESPONSE 116: The commenter raises a good point. An augmentation plan could include the filing of a Notice of Completion of Groundwater Development as long as the ground water is nontributary water and the extent of the use does not

exceed 35 gpm or less and 10 acre-feet. The department has amended the rule to include this comment.

COMMENT 117: The definition of tributary below reads as follows: (74) "Tributary" means the following: (a) a surface water source feeding another surface water source; (b) ground water discharge to a surface water source; (c) surface water recharge to an aquifer; (d) an overlying aquifer recharging an underlying aquifer or vice versa; and (e) ground water hydraulically connected to a surface water source. The definition of tributary precludes any augmentation from groundwater in that all groundwater is defined as tributary! An exception for 602's should be made.

RESPONSE 117: The department agrees with the comment and has amended the definition of tributary. This change in definition would allow evaporation losses from a pond surface to be made up from ground water that is not hydraulically connected to surface water. A Notice of Completion of Groundwater Development could be filed if the amount to be augmented falls within the statutory limits of up to 35 gpm and not to exceed 10 acre-feet.

COMMENT 118: (6)(b) The department staff shall make a written determination that the evidence submitted by an applicant is sufficient on which to base a determination that the proposed ground water use is not hydraulically connected or if hydraulically connected, will not induce surface water infiltration. What happens if there is a dispute between the applicant's expert(s) and DNRC staff? How will a dispute between experts be settled? The rules should specify a process to resolve technical issues.

RESPONSE 118: The department is obligated to process applications in basin closure areas as agreed to in a court approved stipulation. The commenters can explore legal remedies that the commenter may have available.

COMMENT 119: (6)(b) The department staff will determine the adequacy of the test design or test conducted. No process to resolve disputes between experts with regard to the development or pumping tests.

RESPONSE 119: This subsection has been eliminated.

COMMENT 120: ARM 36.12.120 would allow an applicant to demonstrate that the surface water and ground water are not connected based on a short 72 hour pump test. If the hydrograph in the well proposed for use, or adjacent wells, shows a seasonal water level fluctuation similar to the nearby stream or river, then the aquifer is immediately and directly connected. This should be the basis for the department's decision, not the pump test.

<u>RESPONSE 120:</u> Hydrographs of wells near surface water bodies commonly show a seasonal water level fluctuation similar to the nearby surface water body; this is an indication of hydraulic connection between ground water and the surface water body. The difference between ground water levels and surface water stage need to be evaluated in order to determine whether pumping the well will induce infiltration from the surface water body.

<u>COMMENT 121:</u> ARM 36.12.120(6)(d) and (e) do not allow for the fact that in certain selected reaches, surface waters may be perched, while the ground water intercepts and recharges the surface water downstream or loses more upstream if the ground water level declines. Any analysis must include basin-wide evaluation of surface water and ground water interaction and evaluations must be open to public evaluation and comment prior to the issuance of any water right in a closed basin.

<u>RESPONSE 121:</u> Basin-wide analysis may be appropriate for the purpose of evaluating the potential for adverse affects to prior water users but is not considered when evaluating immediate or direct connection.

<u>COMMENT 122:</u> ARM 36.12.120(8) is poorly written. It states that a pond next to a stream cannot induce infiltration due to evaporation alone. The department apparently has not considered rapid snowmelt events or storms, both of which could cause infiltration to the stream in excess of evaporation. If the surface area of the pond is in excess of the surface are of the adjacent stream, the net evaporation losses would further dewater the stream. In all cases a hydraulic analysis must be performed.

<u>RESPONSE 122:</u> The section regarding evaporation from ground water pits has been clarified. The Department assumes evaporation from pits will not induce surface water infiltration for the purpose of evaluating whether a source is immediately or directly connected to surface water. This decision was made because of the relatively small amount of water involved in most cases and the difficulty of measuring small effects. The Department does not assume that evaporation losses from a ground water pit cannot affect stream flow. An applicant must conduct a hydraulic analysis to evaluate the potential for adverse effects.

<u>COMMENT 123:</u> (1) should not explicitly state that these tests may be used to satisfy the requirements on ARM 36.12.120.

<u>RESPONSE 123:</u> The Department is implementing the basin closure statute in a way it believes complies with the intent of the statute and provides for an exception. Getting an application accepted by the Department is only part of the process. Impacts to surface water will still need to be addressed by the applicant and lack of adverse effect has to be

proven by a preponderance of the evidence before the department could grant an application. The department has made clear since 1993 that the legislature can be asked to change the law and test if everyone is dissatisfied with the department's interpretation and implementation. The legislature is free to completely close the basin or to make clearer how and when applications can be processed.

COMMENT 124: (3) The department will determine whether an application in a basin closure area can be processed based upon the information received from the applicant and will document its findings before it will review the application to determine whether it is correct and complete.

RESPONSE 124: The department agrees with the comment and has amended the rule accordingly.

COMMENT 125: (5) In basin closure areas that allow augmentation plans and applications for nonconsumptive uses, the department must approve (85-2-337, MCA, states the application is defective if no plan us received. I don't think approval of the plan is proper until all the facts are in the record, like immediate or direct can be contested at a hearing after the department makes the determination.) the augmentation plan prior to processing the application. If an augmentation plan requires more than one application, all applications will be processed simultaneously. If any of the augmentation applications are terminated or denied, all related applications will be terminated or denied.

RESPONSE 125: The department agrees with the comment and has amended the rule accordingly.

COMMENT 126: (6)(c) An applicant must address whether the source aquifer is hydraulically connected to any surface water sources that lie within an estimated or actual delineated zone of influence. An applicant may use the results of an appropriate nearby aquifer test to approximate the zone of influence. Depending on circumstances, such as proposed flow rate and volume, cyclic pumping, well depth, or distance to surface water, an applicant may be able to demonstrate that there is not nor will there be a hydraulic connection to surface water under the proposed pumping schedule or scheme.

RESPONSE 126: The department agrees with the comment and has amended the rule accordingly.

COMMENT 127: Have you considered how the determination is affected if the hydraulic connection occurs in a reach of a stream that changes from gaining to losing over the course of a year or different climatic cycle?

RESPONSE 127: The applicant must provide sufficient information on which to base a determination that the proposed

ground water use is not hydraulically connected or if hydraulically connected, will not induce surface water infiltration during the period of diversion. The department has amended ARM 36.12.120(7)(f) [now (15)(e)] to clarify the evaluation of induced infiltration from surface water under losing and gaining conditions. The site-specific spatial and temporal complexity of exchange between ground water and surface water are not addressed in the rules. An applicant will be requested to provide additional proof if the information submitted is not sufficient on which to base a determination.

COMMENT 128: (7)(c) repeats (7)(d).

RESPONSE 128: The department agrees with the comment and has removed (7)(c).

COMMENT 129: (6)(b) The department staff shall make a written determination that the evidence submitted by an applicant is sufficient on which to base a determination that the source aquifer ~~proposed ground water use~~ (the "use" is not evaluated for hydraulic connection, it's the source aquifer) is not hydraulically connected or, if hydraulically connected, will not induce surface water infiltration.

RESPONSE 129: The department agrees with the comment and has amended the rule accordingly.

New Rule XIII (36.12.121) - Aquifer Testing Rule Comments

COMMENT 130: (3)(a)-(h) standard aquifer testing procedures should not be mandatory. Circumstances vary and some applicants may not be able to afford what is proposed. Should say, "preferred aquifer testing protocols." Technical community should provide input. Consider negotiated rulemaking for this section.

(4)(a)-(h) Adequate monitoring - Standard aquifer monitoring procedures should not be mandatory. Circumstances vary and some applicants may not be able to afford what is proposed. Should say, "preferred aquifer testing protocols." Technical community should provide input. Consider negotiated rulemaking for this section.

(5)(a)-(j) Adequate Reporting - Standard reporting procedures should not be mandatory. Circumstances vary and some applicants may not be able to afford what is proposed. Should say, "preferred aquifer testing protocols." Technical community should provide input. Consider negotiated rulemaking for this section.

RESPONSE 130: The department agrees that the aquifer procedures should be described as "preferred" procedures and has amended the rules to reflect that change. Because of the amended language, the department does not think that negotiated rulemaking is needed.

COMMENT 131: A state agency questions whether one observation well is adequate for aquifer testing.

RESPONSE 131: The department has amended the aquifer testing rule ARM 36.12.121 to incorporate additional flexibility for ground water applicants. As amended, the rules reflect that the requirements are preferred by the department, but are not required. The department recognizes that projects vary in size and complexity and that flexibility is a necessity. The department also recognizes that many professionals in the private sector have the knowledge and ability to design adequate aquifer tests.

COMMENT 132: ARM 36.12.121 shares the problems of ARM 36.12.120 with regard to focus on induced surface water infiltration and determination of hydraulic gradient. In proposed ARM 36.12.121(4)(f), only two days of monitoring are required before a pump-test in order to evaluate the prepumping hydraulic gradient. Two days, however, are insufficient to reveal seasonal and annual fluctuations. Seasonally, a given stream reach can go from a gaining stream to a losing stream. Such large variations are not captured at all in ARM 36.12.121.

(3)(c) Pumping discharge rate - This subsection appears to suggest a constant discharge rate is not particularly important. If the reduced 75% discharge rate can be justified, the rule should written that way.

RESPONSE 132: The applicant must provide sufficient information on which to base a determination that the proposed ground water use is not hydraulically connected or if hydraulically connected, will not induce surface water infiltration during the period of diversion. The department has amended ARM 36.12.120(7)(f) [now (15)(e)] to clarify the evaluation of induced infiltration from surface water under losing and gaining conditions. The site-specific spatial and temporal complexity of exchange between ground water and surface water are not addressed in the rules. An applicant will be requested to provide additional proof if the information submitted is not sufficient on which to base a determination.

COMMENT 133: ARM 36.12.121(3)(c) only requires test pumping at 75% of the proposed discharge rate. Accepting test data at only 75% of the proposed pumping rate does not adequately demonstrate physical availability, without adverse impact to other water users. Like other aspects of proposed ARM 36.12.120 and ARM 36.12.121, accepting less than the proposed pumping rate opens the door to increased confusion and controversy over permit applications.

RESPONSE 133: The department agrees with the comment and has amended the rule accordingly.

COMMENT 134: (3)(c) Pumping must be maintained at a constant discharge rate equal to or greater than the ~~requested~~

(proposed) pumping rate for the entire duration of the test. If the discharge rate varies, the applicant must note the clock time and discharge rate. If unforeseeable circumstances prevent the applicant from pumping at or above the proposed discharge rate, a discharge rate of not less than 75% of the proposed discharge rate can be accepted.

RESPONSE 134: The department agrees with the comment and has amended the rule accordingly.

COMMENT 135: ARM 36.12.121 pertains to aquifer testing requirements. (2)(b) of the rule states "the department staff will determine the adequacy of the test design or test conducted." This rule gives the Department unlimited veto power over a test design proposed by an applicant's expert hydrologist. Moreover, it shifts decision making from the hearings examiner to department staff, which is inappropriate.

As an example, department staff could conclude that a test design or test was inadequate even though it complied with generally recognized scientific or hydrologic principles. Department staff should not have final decision-making authority over test design. Whether or not the remaining criteria set forth in this rule make sense for every well application is debatable. Again, qualified hydrologists should be entitled to determine what criteria are necessary to provide adequate data without being hamstrung by imposition of a general standard which does not fit all proposed well applications.

RESPONSE 135: The department has eliminated ARM 36.12.121(2)(b).

COMMENT 136: (3)(f) A barrel is not an adequately accurate measuring device for modern aquifer tests at the volumes proposed for testing. Might be okay for 20 gpm or less.

RESPONSE 136: The department agrees that using a barrel to measure high flows may not be adequate. The rules also state (ARM 36.12.121(3)(a)) that experts or people familiar with aquifer testing procedures must supervise testing. The department leaves it up to those individuals to determine whether a barrel will accurately measure discharge.

COMMENT 137: (2) Flexibility should not be dependent on being outside of a basin closure area. There should be provisions for flexibility inside basin closure areas as well. "Depending on other circumstances" is very vague. What other circumstances?

RESPONSE 137: The department agrees with the comment and has amended the rule accordingly.

COMMENT 138: (2)(a) Department experts will provide written guidance on testing procedures, monitoring, and reporting, but will not provide technical support or assistance.

Guidance should be in writing so there are no arguments about what was discussed and agreed upon after the test.

RESPONSE 138: The department regularly answers numerous questions prior to, during, and after aquifer testing. To require department staff to write down all of the guidance would be burdensome and would reduce the time available to provide guidance. Therefore, the department did not amend this subsection.

COMMENT 139: (3)(d) Minimum duration of pumping during an aquifer test must be 24 hours for a proposed ~~use or~~ discharge of 150 gpm or less and a proposed volume of 50 acre-feet or less.

RESPONSE 139: The department wants to ensure that an aquifer test should be for the proposed amount of water that an applicant will need for the beneficial use. Therefore the suggested amendment has not been made.

COMMENT 140: (3)(e) Minimum duration of pumping during an aquifer test must be 72 hours for a proposed ~~use or~~ discharge of greater than 150 gpm and proposed volume greater than 50 acre-feet.

RESPONSE 140: The department wants to ensure that an aquifer test should be for the proposed amount of water that an applicant will need for the beneficial use. Therefore the suggested amendment has not been made.

COMMENT 141: (2)(b) should say staff experts. (2)(a) says staff experts.

RESPONSE 141: The department only has two hydrogeologists (experts), but has other staff that can provide guidance on ground water testing. The department needs the ability to use any of its staff familiar with various areas of water related tasks to provide guidance the public. Subsection (2)(a) has been eliminated.

COMMENT 142: (3)(a) A hydrogeologist, hydrologist, or engineer familiar (you can be "familiar" with aquifer tests without having any formal training or competence) with aquifer testing procedures must supervise the aquifer test, analyze data, and report results and conclusions.

RESPONSE 142: The department agrees that a person can be familiar with aquifer tests without having formal training. The department itself has staff who are familiar and capable of providing guidance but do not have formal training.

COMMENT 143: (3)(d) Minimum duration of pumping during an aquifer test must be 24 hours for a proposed ~~use or~~ discharge of 150 gpm or less and a proposed volume of 50 acre-feet or less.

RESPONSE 143: The department wants to ensure that an aquifer test should be for the proposed amount of water that an applicant will need for the beneficial use. Therefore the suggested amendment has not been made.

COMMENT 144: (3)(e) Minimum duration of pumping during an aquifer test must be 72 hours for a proposed ~~use or~~ discharge of greater than 150 gpm and proposed volume greater than 50 acre-feet.

RESPONSE 144: The department wants to ensure that an aquifer test should be for the proposed amount of water that an applicant will need for the beneficial use. Therefore the suggested amendment has not been made.

COMMENT 145: (3)(g) Discharge rate must be monitored and recorded with clock time and adjusted if necessary at 15-minute intervals during the first three hours of the aquifer test and at frequent intervals until the end of the test to maintain a constant discharge. 15-minute intervals are too restrictive; maybe 3 times an hour for the first 3 hours.

RESPONSE 145: The department has amended the aquifer testing rule ARM 36.12.121 to incorporate additional flexibility for ground water applicants. As amended, the rules reflect that the requirements are preferred by the department, but are not required. The department recognizes that projects vary in size and complexity and that flexibility is a necessity. The department also recognizes that many professionals in the private sector have the knowledge and ability to design adequate aquifer tests.

New Rule XVI (36.12.1702) - Permit Surface Water Availability Rule Comments

COMMENT 146: This rule calls for an applicant to either submit flow records or estimate flows for a median year. This is important because physical water availability must then be compared to existing legal demands to determine whether water is legally available. At first blush, using flow rates from an average year makes sense. However, few water users would be satisfied with only receiving water in an average year. To truly ascertain whether water is available for appropriation, legal demands should be compared to physical availability in the majority of years. We feel that requiring an applicant to submit eightieth percentile exceeded flow levels would be a more accurate representation of physical water availability.

RESPONSE 146: These correct and complete rules are written to show what information is required to make an application correct and complete. The department will be drafting future rules that will need to address the information provided in this comment.

COMMENT 147: The rule is concerned with physical surface water availability and storage of surface water. Surface water is not defined. Ground water is defined as water beneath the ground surface. A water user is allowed under Montana law to develop ground water in its production of coal bed methane gas without the need for a beneficial water use permit. The water user stores this developed water in a pipeline system. The water has lost its character as ground water. As developed water it takes on the character of surface water, i.e., it is not beneath the ground surface when application is made to the department to put it to a beneficial use. Because of the unique nature of the developed water some of the information required in the rule may not be applicable to an applicant. The rule should be amended to provide a section that allows an applicant to explain why the requirement for the production of any otherwise required information is not applicable to a particular application.

RESPONSE 147: The department agrees with this comment and has amended ARM 36.12.1701 and ARM 36.12.1901 to allow an applicant to explain why required information is not applicable to the applicant's proposed project.

COMMENT 148: (3)(a)(ii) if no or insufficient information is available on flow rates into the proposed facility, the applicant must use the methods in (3). (3) references methods in (5) and vice-versa. Very confusing!! The applicant must also conduct a drainage basin analysis that includes the average monthly flow rate and volume produced by the basin from which water will be collected and describe all conclusions, data, measurement techniques, calculations and assumptions used in determining available storage volumes and flow rates.

RESPONSE 148: The department agrees with the comment and has amended the rule to clarify the confusion.

COMMENT 149: (3)(a)(iii) the dates measurements were taken, with a description of current weather conditions. Why is this necessary, required by statute?

(iii) the dates measurements were taken, with a description of current weather conditions; Vague. You mean like sunny and cold, or what? Is the applicant supposed to carry a weather station? Be specific!

RESPONSE 149: Stream flow measurements can be affected by weather conditions. The department needs to know if the weather conditions occurring at the time, for instance a heavy rain, render the measurements unrepresentative of typical conditions. It is useful to know approximate temperature, sky conditions, noting any rain and snow, and approximate wind conditions. The department amended the rule to include examples of how an applicant might describe weather conditions.

COMMENT 150: (4)(c) projected evaporation and seepage losses. The DNRC fails to recommend a methodology that is useable to meet this standard.

RESPONSE 150: The department does not have a preferred methodology, however, ARM 36.12.109 provides several acceptable reports that can be used to determine evaporation losses. Various professionals in the public sector can determine seepage losses.

COMMENT 151: (1) Substantial credible information must be provided showing there is surface water physically available at the flow rate and volume that the applicant seeks to appropriate for the proposed period of use.

RESPONSE 151: The department agrees with the comment and has amended the rule accordingly.

COMMENT 152: (3) If there are not adequate flow data and volume measurements to estimate the median monthly flows in a median year, then the applicant will need to use the most appropriate method listed in (5) and follow the appropriate steps in this rule. This information must then be correlated with known data from another similar or comparable surface water source. (a) Stream flow measurements in cfs or gpm must be collected at least once every month during the entire proposed period of diversion at the most suitable location on the source of supply, and at or directly upstream of the proposed point of diversion. Measurements taken and submitted under this method must include...How is the applicant supposed to provide reliable stream flow measurements for months that the source is ice bound?

RESPONSE 152: Flow and volume data should be collected during the same time period that an applicant is proposing to divert water. Will the source that is ice bound be used in winter? If not, then measurements for that month are not required.

New Rule XVIII (36.12.1704) - Permit Existing Legal Demands Rule comments

COMMENT 153: (7) Does reference to "instream water uses" include exempt water rights for domestic or stock?

RESPONSE 153: This section of the rule has been eliminated.

COMMENT 154: (8) Identification of existing rights by DNRC should be sufficient for (1) through (7).

RESPONSE 154: The department will identify the individuals who will receive public notice of the application. An applicant must identify existing legal demands that the

applicant determines may be affected by the proposed application.

COMMENT 155: Existing Legal Demands and ARM 36.12.1901 Change Application - Adverse Effect both contain a table outlining the extent of the notice area or area of potential impact. The statute identified as being implemented is 85-2-302, MCA that requires the DNRC to develop rules to determine whether or not an application is correct and complete. The titles of these sections allude to 85-2-311(1)(a)(i)(B) and 85-2-402(2)(a), MCA, respectively when in reality the notice area or area of potential impact is governed by 85-2-307, MCA. It must be made absolutely clear to the applicant that providing a correct and complete application is not the same as proving the statutory criteria and that the DNRC, even without objection by other interests, is obligated to deny all applications failing to prove the statutory criteria with or without objection. The rules should clearly identify these as minimums, and state that extended areas and corresponding water rights may need to be evaluated in order to prove the statutory criteria in 85-2-311 or 85-2-402(2), MCA.

RESPONSE 155: The department agrees with the comment and has amended various sections of the rules in response to the commenter's concerns.

COMMENT 156: Section (7) requires an applicant to include an index or general abstract of water rights located within the identified notice area, and specifies what must be included in each abstract. To be fair, the rules should not require an applicant to provide any more than what is listed in the abstracts that are available.

RESPONSE 156: This department has eliminated the rule related to this comment.

New Rule XIX (36.12.1705) - Permit – Comparison of Water Availability and Existing Legal Demands Rule comments

COMMENT 157: Rules XIX and XX should refer an applicant to statutory definitions and case law and common law.

RESPONSE 157: ARM 36.12.1705 is drafted to define the requirements to deem an application correct and complete. What is being written in the rules is based on the statutes themselves, 85-2-311, 85-2-402, MCA, and the Water Use Act and its definitions. The PC Development case, proposal and final order, and also the Montana Golf proposal for decision discuss case law and common law involved in change cases. The rules are not meant to be the place where case law is found for all water use situations. Applicants have to look for those in other places, such as law libraries and water law treatises, and in the end may have to consider obtaining legal assistance.

COMMENT 158: ARM 36.12.1705 addresses comparison of physical water availability and existing legal demands. Section (2) requires an applicant to analyze all of the senior water rights on a source of supply's downstream tributaries. It would make more sense to require an applicant to analyze senior water users' rights on the source of supply and those waters to which it is tributary.

RESPONSE 158: The department agrees with the comment and has amended the rule accordingly.

COMMENT 159: The term "area of potential impact" is used in (1) and (2) but not defined. Is it related to the zone of influence? What information would an applicant be required to supply to determine the area of potential impact. Also, the phrase is vague. Is there a time component; that is, will potential impact include everything that happens in the next month or the next year? The area of potential impact is sufficiently vague that the whole of ARM 36.12.1705 becomes meaningless; however, it is critically important to determine whether water is physically available to meet existing and proposed demands.

RESPONSE 159: The term "area of potential impact" is commonly used to denote the portion of a surface water source that may be impacted by a new application. The "zone of influence" is the vertical projection of the cone of depression. If the zone of influence intersects with a surface water source, then applicants must address impacts to ground and surface water rights. The time component of impact is the period of diversion requested. So, for example if an applicant wanted to irrigate new ground, the applicant would need to address other water rights that are dependent on water from the source described in the application and its downstream tributaries during the usual irrigation season. It is very difficult to define the area of impact because determination of the area is very specific to the application. For example, if an application is for 20 gpm from Flathead Lake to irrigate 1 acre, an area of impact may be non-existent. However, if the diversion is for 1000 gpm to be diverted from a moderate size, perennial stream that has 10 other water users within a mile of the proposed point of diversion, then the area of impact may include users on the source for several miles downstream. Regardless of the how the area of impact is determined, an applicant for a new permit cannot adversely affect senior water users. Those senior users may be 15' or 100 miles from the proposed point of diversion.

COMMENT 160: Editorial comment: In Section (1), sentence 2, the term "One" should read "The applicant".

RESPONSE 160: The department agrees with the comment and has amended the rule accordingly.

New Rule II (36.12.109) - Evaporation Standards Rule Comments

COMMENT 161: I presume using a USGS evaporation pan is acceptable? The standard pan is 4 feet in diameter and 10 inches deep and measured daily.

RESPONSE 161: The department agrees that using a USGS evaporation pan is acceptable and has amended the rule to include this information.

New Rule XX (36.12.1706) - Permit Adverse Effect Rule Comments

COMMENT 162: Rule XX should cite 85-2-401(1), MCA.

RESPONSE 162: Certainly 85-2-401, MCA, pertains to this issue and parties are free to argue its applicability in all proceedings.

COMMENT 163: Under section (1), a state agency agrees the that adverse effect for permit application should be based on the applicant's plan showing the diversions and use of water and showing that operation of the proposed project can be properly regulated during times of water shortage so that water rights of prior appropriators will be satisfied. However, we believe the requirement should be expanded so that applicant would need to show that plan would be implemented.

RESPONSE 163: The rules listed describe the requirements to make an application correct and complete. The suggestion made by the commenter would be required to grant an application.

COMMENT 164: Additional language suggested: "Wells that are considered public water supply wells pursuant to ARM Title 17, chapter 38, subchapter 1 shall also meet the applicable requirements in that rule."

RESPONSE 164: The department agrees that public water supply wells should also meet the applicable requirements of the rule cited. However, these rules contain required information to make an application correct and complete. The cite to the requested rule would be appropriate in the rules that will be drafted with the information that is required to grant an application.

New Rule XXI (36.12.1707) - Permit Adequate Diversion Rule Comments

COMMENT 165: ARM 36.12.1707 requires an applicant to expend substantial sums of money on engineering and design work prior to filing of an application that may, or may not be, deemed correct and complete by the Department. This places the cart squarely in front of the horse. The Department has an obligation to design a permitting process which does not compel an applicant to expend large sums of money or effort at the onset of the process.

RESPONSE 165: The department agrees with the comment and has amended the rule to include the term "preliminary".

COMMENT 166: Section (2) requires the applicant to show any condition required to protect prior water appropriators can and will be implemented. An applicant does not know at the time of the filing of an application what conditions may be imposed in order for a permit to be granted. Conditions are not determined until objections have been filed and the matter is resolved through agreement or hearing. This section of the rule should be deleted.

RESPONSE 166: The department agrees with the comment and has amended the rule accordingly.

COMMENT 167: As is the case with many of the proposed rules, the rules reflect the more usual kinds of beneficial use, such as irrigation. The marketing or sale of water, especially from developed or imported water is not necessarily contemplated by the drafters of the rules. Section (6) concerning design plans and specifications may be one such rule. It is recommended that the department qualify such rules by using the phrase "if applicable" and then requiring the applicant to explain the reason why the request information is not applicable. Another alternative would be to have a generic rule that would allow an applicant to explain why requested information is not applicable rather than placing the qualification in each separate rule.

RESPONSE 167: The department agrees with the comment and has amended the rule accordingly.

New Rule XXII (36.12.1801) - Permit and Change Beneficial Use Rule Comments

COMMENT 168: (2)(a)-(c) Why is it stated that water right must be beneficial; why the annual flow and volume must be reasonable; and who can appropriate?

RESPONSE 168: The department has removed the statements related to beneficial use. Who can appropriate water is not defined by statute and these rules are to provide that information. The flow rate and volume must be reasonable because the amounts requested cannot constitute waste. What is reasonable without waste is dependent on the type of purpose for which the water will be used. In some cases, (see Water Use Standards rules), the department has been able to set typical "standards" that would be considered reasonable. The standards were typically obtained from literature describing water use. For example, the NRCS irrigation guide is recognized as a reasonable standard for new irrigation uses. If a standard has not been developed, an applicant must provide information that

shows the requested amount of water is reasonable for the purpose.

COMMENT 169: (2)(c) which clarifies that water may be appropriated by a person for the person's own use, unless provided otherwise by statute may be problematic for private users on federal lands which are valid under Montana law.

RESPONSE 169: The part of the rule that says, "by a person for the person's own use", adequately addresses the commenter's concern. The department has also amended the rule to allow for "another's use" as provided in law.

COMMENT 170: Editorial comment: Section (1)(b) states "¼ waste as defined in 85-2-102, MCA." It is not necessary to state where a term is defined unless the term is defined in a section of the law other than Title 85.

RESPONSE 170: The department agrees with the comment and has amended the rule accordingly.

New Rule III (36.12.110) - Land Description Standards Rule Comments

COMMENT 171: Clarify that secondary points of diversion (PODs) are only needed if from water source or using natural conveyance. Should not be construed for PODs on ditch or pipeline.

RESPONSE 171: The department defines secondary diversion as those that are not from the same source as the primary diversion. A secondary diversion might typically be a pump in a ditch or a pipeline from a reservoir. The department included the secondary diversion rule in response to the public who has asked for the ability to describe the secondary diversion and see it printed on their water right. Identification of a secondary diversion is not required.

COMMENT 172: Seems appropriate to be able to use a hand held GPS unit to locate POD. Typically units read in latitude and longitude, but could be converted to UTM coordinates. GPS coordinates might be more useful to the public than the township, range, and section.

RESPONSE 172: The department agrees that GPS units could be used to locate a point of diversion, however, since the general public is unfamiliar with UTM coordinates, the quarter section, township, range, and section must be identified.

COMMENT 173: (1)(b) Add the word 'section' between ¼ section and township.

RESPONSE 173: The department agrees with the comment and has amended the rule accordingly.

COMMENT 174: (3) Add "and a measurement in stream miles downstream from the upstream point" to this sentence.

RESPONSE 174: The department agrees with the comment and has amended the rule accordingly and has added an example.

New Rule IV (36.12.111) - Map Standards Rule Comments

COMMENT 175: Water Resources Survey (WRS) maps should not be mandatory - may be useful, but not accurate.

RESPONSE 175: The department has determined the Water Resources Surveys are a good place to start regarding historic irrigated acres. The WRS are a proven and well-regarded piece of information on historic water use.

COMMENT 176: Section (5), as it relates to the Water Resources Survey, poses some problems. The problem with this requirement is that the Water Resource Survey map may not even be relevant to a given change, if the priority date of the original right post-dates the creation of the Water Resources Survey map. If the point is to require the applicant to locate the claimed historic use on a good map, the Department should expressly allow the use of other maps if the Water Resources map isn’t available. In addition, if the Department is going to require use of the Water Resources Survey map, it should look into getting reprints done of all the surveys, because they may not be readily available to everyone.

RESPONSE 176: The commenter has a good point. Some Water Resources Survey books were not printed for the county, however, the rule states, "if available for the land affected by the change". The department has determined the Water Resources Surveys are a good place to start regarding historic irrigated acres. The WRS are a proven and well-regarded piece of information on historic water use. That does not mean however, that an applicant cannot provide another type of map that may show the applicant's historic use if the WRS is not available or does not show the land to be irrigated.

COMMENT 177: (7) A digital copy of the maps could be sent to the department where the digital copies of the maps could be compiled and archived for future use.

RESPONSE 177: This a good suggestion. The department does not currently have the ability to compile such maps but it is pursuing that type of technology.

COMMENT 178: Map showing water rights that may be affected may not be known at initial application stage. Suggest map be developed prior to public notice. Furthermore, the rules provide that the Department will independently review the area of adverse impact regardless of the information supplied by the

applicant. (See, e.g., ARM 36.12.1903(17)). Presumably, the Department will also conduct an independent review to define the area where notice to other water users will be necessary. Requiring applicants to provide additional maps and information alleging no adverse impact results in unnecessary duplicative paper work that is likely to be disregarded by the Department during its independent review.

In addition to potentially invalid provisions regarding historic use, the rules contain several provisions that are unnecessary and will lead to duplicative work by applicants and the Department. For example, there are several requirements throughout the rules that the applicant for a permit or a change provide a map of the area of potential impacts on other water users and/or a map of the area where notice should be given based on potential adverse impact. This requirement is unnecessary and contradictory. Applicants for new permits or changes have the burden of demonstrating that their application will not impact other water users. It makes no sense to require the applicant in all cases to define the area of potential adverse impact when the criteria require the applicant to demonstrate that there is no adverse impact. Requiring applicants to define the area of potential adverse impact will likely result in applicants simply reasserting that their application will not impact other water rights.

RESPONSE 178: The department agrees with the comment and has eliminated ARM 36.12.111(4).

COMMENT 179: (5) For change applications to irrigation water rights, in addition to the map required in (1) and (2), a copy of the Water Resources Survey map, if available for the land affected by the change, shall be submitted with the historically irrigated acreage identified. The applicant has to supply the department a copy of their own map?

RESPONSE 179: An applicant must prepare a water right application and include the required information. The department is required to analyze the information in an application and determine if the application meets the necessary requirements. The department cannot be responsible to add information to the file for the applicant. The department has done that in the past and the time taken to do such functions is in part why the department cannot process applications timely.

New Rule V (36.12.112) - Period of Diversion and Period of Use Standards Rule Comments

COMMENT 180: New rule V imposes new period of diversion and period of use standards upon all water rights, including water rights involved in change applications. Imposition of any standard which has the effect of changing an existing water right is unlawful because it intrudes on Water Court jurisdiction and impairs existing rights. In addition, adoption of general standards inevitably leads to penalization of water

right owners whose water rights do not fit within the standard. Unfortunately, the new rules are full of attempts to "standardize" water rights. This effort at standardization misses a key point pertaining to water rights.

RESPONSE 180: The department recognizes that there are diversions or uses that may not fit the standards. The department allowed for those deviations by allowing an explanation for any deviations.

New Rule VI (36.12.113) - Reservoir Standards Rule Comments

COMMENT 181: Clarify that not all "senior" rights are entitled to be satisfied. Reservoir is usually developed water by definition and may not be used to satisfy a natural flow senior right.

RESPONSE 181: The department agrees with the comment and has amended the rule accordingly.

COMMENT 182: Do all reservoirs have a spillway?

RESPONSE 182: The department agrees with the comment and has amended the rule accordingly.

COMMENT 183: Municipalities should not be able to add a storage reservoir and avoid permitting.

RESPONSE 183: A permit is not required if a municipality adds a storage tank or reservoir if the municipality does not increase their flow rate or volume. If a municipality, or any other water user increases their flow rate or volume, a permit is required.

COMMENT 184: A wildlife agency agrees with and appreciates the requirement that applicants must include the annual volume of water that will evaporate from a reservoir.

RESPONSE 184: The department acknowledges the time and effort put forth by the commenter and appreciates their interest.

COMMENT 185: (5) needs clarification. It may be appropriate to specify when the situation warrants, e.g., during filling. Flow rate during filling impacts downstream water rights.

RESPONSE 185: As long as other water rights are satisfied, an applicant is entitled to whatever water is available. An applicant cannot fill the reservoir at a flow rate that exceeds the demand or prior water rights.

COMMENT 186: (6) the last two words are water system. To prevent confusion with all types of water systems that phrase should be change to public water supply system.

RESPONSE 186: The department removed the reference to public water supply systems. Only a municipality can add storage without a permit or change application as long as the municipality does not increase the historic flow rate and volume of water. If a municipality or anyone needs additional water, a permit application must be filed.

COMMENT 187: Although it is the exception, a potential applicant has a reservoir that is a pipeline system. As such, some of the reservoir standards in Rule VI do not apply to the applicant. New Rule VI should be amended to provide a new Section (7) which would provide that "[I]f the application is for a reservoir for which the above standards are not applicable, the applicant must explain the reason why the standard is not applicable."

RESPONSE 187: The department agrees with the comment and has amended the rule accordingly.

COMMENT 188: (3) Preliminary Design specifications for a reservoir's primary and emergency spillways must be included. Obviously, design specifications might change as the project develops.

RESPONSE 188: The department agrees with the comment and has amended the rule accordingly.

COMMENT 189: (4)(b) any losses that may occur with the means of conveyance must be calculated. How? The department should provide accepted methodologies. Unless the applicant knows the composition and hydraulic conductivity of the entire length of the conveyance means, they can't accurately calculate this.

RESPONSE 189: The department does not have a preferred methodology. Calculating the losses benefits the applicant in that they will want to have an adequate amount of water to fill the reservoir.

COMMENT 190: (3) states that design specifications for spillways must be included. The rule applies to projects involving both new and existing reservoirs but it is unlikely that design information will be available for existing reservoirs. If design information for the existing reservoir is not supplied, is the application deficient?

RESPONSE 190: If an applicant failed to file on a reservoir and must do so now to have a water right for the reservoir, the applicant will have to provide information relative to the design of the spillway.

New Rule VIII (36.12.115) - Water Use Standards Rule Comments

COMMENT 191: (2)(c) 15 gallons per day conflict with 30 gallons per day used in the past by DNRC and the Water Court. Why change?

RESPONSE 191: The new appropriations program has always used the standard of 15 gallons per day per animal unit. The Water Court set the standard for stock use at 30 gallons per day per animal unit. Since there are thousands of post-June 30, 1973, water rights that authorize 15 gallons per day per animal unit, the department is reluctant to change the standard at this time.

COMMENT 192: The proposed rule does not contain any standards for Fisheries or Fish and Wildlife use. As DNRC is well aware, many permit and change applicants are seeking water for development of private fishponds. A state agency now requires that applicants for fish stocking permits have a water right with a Fisheries or Fish and Wildlife purpose. Our impression, from review of public notices of water right applications and in-field observation, is that many applicants overstate the amount of water necessary for a fishpond. For example, we feel that the amount of water necessary to "flow through" a pond is often exaggerated. It is likely not practical to specify a particular standard of water appropriate for fishponds. Their design, location and the species the applicants wish to stock in the ponds vary too widely. However, most properly designed ponds do not require any continuous flow to maintain an adequate fishery. Wildlife uses definitely do not require a continuous flow. A suggested standard would be that fishery and fish and wildlife pond uses normally do not require water in addition to that needed to fill and maintain the level of the pond. This would alert applicants to the fact that having a flow through pond is the exception, not the standard.

RESPONSE 192: The department does not have any standards set at this time for fish and wildlife use. Fish and wildlife use is very site specific and is dependent on such things as location, type of fish, size of the water source, an area with many trees or not many trees, and typical water temperature of a source. The department has also found that fish biologists do not agree on what makes a good fishpond. A standard for fish and wildlife may be developed in the future when the department has adequate case law on which to base the standards. For now, an applicant must provide substantial credible information about the pond, but objectors can refute the information.

COMMENT 193: (5) As with the Water Resources Survey, the NRCS Irrigation Guide For Montana is not readily available. If the Department decides to keep this standard (which is a good one) it should commit to assuring availability of the relevant parts of the guide in each regional office, or at least

describing for applicants where they may find the NRCS Irrigation Guide For Montana.

RESPONSE 193: The department agrees with the comment and has amended the water use standards rule to include a table containing information from the NRCS guide.

COMMENT 194: Domestic includes up to 5 acres irrigation, but Rule VIII(2)(a) states domestic use does not include irrigation.

RESPONSE 194: The department agrees with the comment and has amended the rule accordingly.

COMMENT 195: (3) Fire protection vs. fire prevention? These two terms are both used in this rule but not really defined anywhere

RESPONSE 195: The department agrees with the comment and has amended the rule accordingly.

COMMENT 196: Why require permit for fire protection reservoirs? And why must evaporation losses be made up for an emergency use of water?

RESPONSE 196: For emergency fire protection use, water can be used from any source available. However, building a reservoir that will be used for fire protection is a planned development and not an emergency and a permit application is required. Therefore, evaporation losses from the reservoir must be accounted for in the application.

COMMENT 197: (4) Fire protection reservoirs in closed basins. Evaporation losses must be made up from nontributary water sources. Looking at definition of "Tributary" in rules appears to include all ground water and surface water. Appears this rule is designed to eliminate fire-protection ponds in closed basins. Because ALL ponds can be viewed as providing fire protection for its owner, this rule sounds like a way to eliminate all ponds!! 85-2-101(3), MCA "It is the policy of this state and purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide the wise utilization, development and conservation of the waters for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana, for the stabilization of stream flows, and for ground water recharge."

RESPONSE 197: The department certainly is not attempting to eliminate ponds. Ponds can provide a benefit to an applicant, however, the department must implement laws in ways

that it believes the legislature intended. Basins closed are created because there is not adequate water in the basin to supply all of the water rights. Therefore, if the department was to ignore the effects of evaporation losses from reservoirs it would be compounding the problem. The department agrees with the comment that the definition of tributary was confusing and the department has amended the definition of tributary. This amended definition allows evaporation losses from a pond surface to be made up from ground water that is not hydraulically connected to surface water. The department agrees that the statute can be interpreted to mean that the state encourages development of ponds. However, it is also worth noting that any water use is subject to certain criteria that must be met in order for the state to grant such an application.

New Rule X (36.12.1301) - Application Acceptance Rule Comments

COMMENT 198: Add a new Section (1). "Within one week of receipt of an application it will be reviewed for compliance under Section (2) or (3), whichever is applicable." Renumber the remaining sections. Provide in Sections (2) and (3) that the application will be "terminated and returned" for failure to comply with the provisions of the rule.

RESPONSE 198: The department believes that with the adoption of the correct and complete rules, the time taken to review an application will be reduced significantly. The department will therefore be able to make the determination of correct and complete timely and backlogs that have been experienced in recent years will not occur. Additionally, the department will only send one deficiency letter on an application and that will also save the department time, time that can be used to act on applications more quickly. If the department is incorrect in its belief that new applications will contain the required information, then the suggestion by the commenter may be an option.

New Rule XXV (36.12.1902) - Historic Use Rule Comments

COMMENT 199: (1) DNRC has no jurisdiction or authority to adjudicate or readjudicate existing water rights. (1) is also unconstitutional under Article IX, Section 3(1).

RESPONSE 199: See other comments on this same issue. The section addressed does not violate the constitutional provision as alleged as the Department's jurisdiction provides that it can grant changes of use where the applicant proves there will not be adverse effect. Montana has over 100 years of case law providing that changes cannot occur where they result in adverse effect to others. The Montana Supreme Court has already specifically ruled the change statute does not violate Article IX, Section 3(1). Castillo v. Kunnman, 197 Mont. 190, 199-200, 642 P.2d 1019, 1025-1026 (1982).

<u>COMMENT 200:</u> (2) states water being changed cannot increase historic amount diverted, consumptively used, or increase net depletion. Comment is rule mixes several concepts, is confusing, and net depletion is vague. If net depletion means a change in use could not affect return flows, the rule is overly broad and contrary to law.

<u>RESPONSE 200:</u> The department agrees that the term "net depletion" is vague. The department is intending to say that the historical flow rate diverted and historic amount consumptively used cannot be increased. The term "net depletion" has been removed from the definition rules and has been removed from the historic use rules. In response to the commenter's statement that a change in use could not affect return flows, that is correct. Other water users have a right to return flow.

<u>COMMENT 201:</u> (3) allows for a best available estimate for any element. Comment is "what does this mean?"

<u>RESPONSE 201:</u> The rule has been amended to include some examples of what a "best available estimate" can be based on. The list however is not inclusive and an applicant can provide a "best available estimate" based on other information. See ARM 36.12.1901(4).

<u>COMMENT 202:</u> (4)(a)-(d) requires narrative of historic use. Comment is that rule should be rejected. DNRC cannot be serious that (a)-(d) must be included based on actual physical measurements and commonly accepted engineering principles. For instance for (4)(a) [required flow rate] what happened in 1952, 1912, 1972? Same for (4)(b) [volume consumed]. What crops were used from each POD in 1983? (4)(c) description of how and when unconsumed water returns to a ground or surface water source is not possible and should not be required.

<u>RESPONSE 202:</u> The department is not asking for the exact historic use for each year it was exercised. The department is requiring an applicant to document the historic use over the years and the maximum extent of the historic use. That historic use is what an applicant is seeking to change and the effect of that change. A description of how and when unconsumed water returns to a source is nothing more than asking an applicant to discuss return flows. Return flows must be discussed if an applicant is to show lack of adverse effect.

<u>COMMENT 203:</u> (4), (5)(a)-(k), (6), and (7) Historic use narrative should be eliminated from any rule if DNRC expects any applicant to attempt compliance with the new rules or 85-2-402, MCA. Historic Use should be segregated from other rules if these are to proceed. Rule is practically defective, and legally deficient. Changes of use should not be discouraged because of a rule which has no basis in water use reality or the law. Rule violates basic principles of the prior appropriation

doctrine, common law, Water Use Act, and Article II, Section 3 and Article XI, Section 3 of Montana Constitution. Rule is so flawed it should not proceed forward in the rulemaking process.

RESPONSE 203: An applicant for change must address historic use if the applicant is to show how the contemplated change in historic use is consistent with historic use and will not adversely affect others. Commenters who believe historic use has no place in a change proceeding are overlooking the requirements of 85-2-402, MCA, and over 100 years of change law in Montana and the other western states.

COMMENT 204: A state agency agrees that an applicant should have to provide substantial credible information on historic use. We feel that documentation of unconsumed water's return to the source could be simplified. It would be acceptable in many circumstances to assume that all unconsumed water returns to the source of supply.

RESPONSE 204: The suggestion to "assume that all unconsumed water returns to the source of supply" would certainly be easier to work with, but each case is site specific and we are not aware of standards at this time that could be properly assumed for all cases.

COMMENT 205: Overall, the proposed rules are a timely and laudable effort that our conservation organization strongly supports. We offer these comments as its contribution to further this effort, with the goal of consistent and fair water rights administration firmly in mind. We believe that improved water rights administration will benefit water right holders, and ultimately, will benefit Montana's rivers and streams.

Proposed ARM 36.12.1901 ("Change Application-Historic Use") is an important contribution to the proposed rules. By requiring any applicant for a change to document historic use beyond a DNRC abstract or court decree in ARM 36.12.1901(1), DNRC follows well-established western water law. Setting the ceiling on changes as the amount historically consumed, and preventing any net depletion from the source or an increase in the flow rate historically diverted, through ARM 36.12.1901(2), is a key component of the proposed rules' strength.

RESPONSE 205: The department acknowledges the time and effort put forth by the commenter and appreciates their interest.

COMMENT 206: A conservation organization supports the language in ARM 36.12.1901(3) insofar as it recognizes that, in many cases the elements described in ARM 36.12.1901(4)-(7) may not be capable of proof in many, if not most, cases. Taken alone, the proposed requirements for providing evidence of historic use in ARM 36.12.1901(3)-(7) imposes a level of precision that most water users could not attain, especially as to pre-1973 use. This is because for many water right claims,

the information does not exist with the precision that DNRC requests it, especially as it applies to pre-1973 use. For example, (3)(a)'s requirement of "maximum flow rate diverted from each point of diversion listed on the water right in each month during the period of diversion" simply does not exist for many historic water rights. Section (3), by allowing the submission of "best available evidence" and requiring an explanation of that evidence, implicitly recognizes the dilemma posed by sections (4) through (7). But, given that many people who may seek a change may be doing so for the first time, it would be helpful for DNRC to include in the rules a list of the kinds of information that would be helpful to providing "best available evidence." Such a list might include, but not be limited to, such things as aerial photographs depicting irrigated land, diversion structure, and conveyance structures," "Water Resource Survey Maps," "Water Resource Survey field notes," field notes of waters commissioners describing allocation of water rights, affidavits of persons with first hand knowledge of historic use (especially if they have no vested interest in the water rights, calculation of historic ditch capacities based on a survey of ditch dimensions, and slope, log books or diaries of previous irrigators on the property, or other information that provides independent corroboration of the extent of historic use in a way that allows reasonable estimates of historic diversion and consumption.

RESPONSE 206: The department acknowledges the time and effort put forth by the commenter and appreciates their interest. Further, the department agrees with the comment to include the kinds of information that would be helpful. The department has amended the rule accordingly.

COMMENT 207: The multiplicity of these subsections is also problematic. For example, ARM 36.12.1901(4) appears to request analysis of waste, seepage, and return flow's recharge of ground and surface water, while (7) apparently requires a report of these same elements. Having both the requirements of sections (4) and (7) appears to be simply duplicative. A conservation organization is aware that there are those who believe the "historic use" criteria should be abandoned or weakened. Requiring multiple, duplicative reports, and requiring the documentation of historic use to the level of detail described in section (4)--which is profoundly difficult in most cases--only adds fuel to those who would argue for the abandonment of the historic use standard. Describing what constitutes acceptable "best available evidence" will go a long way toward making the historic use rule workable.

RESPONSE 207: The department agrees that (4) and (7) were duplicative and has removed section (7).

COMMENT 208: The Department's proposed rule concerning the determination of historic use in change application proceedings is inconsistent with Montana law. The Montana Supreme Court has

made it clear that the jurisdiction to interpret and determine existing water rights rests exclusively with the water courts. The Department does not have jurisdiction in a change proceeding to redetermine existing water rights previously determined by the Water Court. Furthermore, principles of issue and claim preclusion may prevent the Department, a party in the general adjudication pursuant to 85-2-233(1)(a)(i), MCA, from revisiting issues of historic use in a change proceeding. By statute, claims for existing water rights constitute prima facie proof of their content until the issuance of a final decree by the Water Court.

Only the Water Court can adjudicate the validity of a prima facie statement of claim for an existing water right. The Department does not have jurisdiction to determine the validity of the underlying water right in a change proceeding. An existing right is defined as a right to the use of water that would be protected by the law as it existed prior to July 1, 1973. The Water Court determines the elements of an existing right pursuant to pre-1973 law. By statute the appropriator has a right to apply for a change of certain elements of the existing water right. 85-2-402, MCA, specifically provides that the right to make a change in an existing water right is recognized and confirmed.

Moreover, the legislature has already provided a procedure for the DNRC to challenge or question the validity of claims or decrees of existing water rights in a change proceeding. 85-2-309(2), MCA, provides that prior to the conclusion of a hearing on a change application, the Department may in its discretion certify to the Water Court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification or relative priority date. The Department's proposed rule would implement a separate procedure where the Department makes historical use determinations without utilizing the certification process mandated by the legislature.

Because the proposed rules are contrary to Montana law, they may eventually be invalidated by a legal challenge. The Department should endeavor to promulgate rules that are not likely to lead to expensive litigation concerning their validity.

<u>RESPONSE 208:</u> The department notes that claims are only prima facies for 85-2-227, MCA, and that part does not pertain to change proceedings. The department is specifically not bound by prima facie statements of claim in change proceedings. It is discretionary for the department to certify to the Water Court issues of historical water rights, but it is not mandatory, and even if it was when the Water Court ceases to exist the department will still have to make decisions on change applications, and the same issues will exist - what was the historic use and will there be adverse effect. Given the 100 years of change case law that exist throughout the west, and the legislature's own Ross Report that recognizes the change process

will allow only changes based on historic use in spite of how they were adjudicated, it is surprising that the department's requirement of information on historic use should generate any controversy.

<u>COMMENT 209:</u> I suggest that the Department revise the proposed rules to provide criteria for when the Department will certify questions of historic use to the Water Court under 85-2-309(2), MCA, rather than to create a separate administrative process that is inconsistent with 85-2-309, MCA, and the Water Use Act.

<u>RESPONSE 209:</u> The two processes are not inconsistent. Only the Water Court adjudicates water rights. The DNRC can use the process of certifying the adjudication of water rights to the Water Court at the department's discretion. The department can decide to grant, modify, or deny a change application without certifying the water right to the Water Court. The DNRC grants or denies changes, but does not adjudicate water rights. Also, it is not necessary to adjudicate a water right before changing it.

<u>COMMENT 210:</u> Proposed ARM 36.12.1901 makes similar legal errors by insisting upon an historic use analysis regardless of the context of the underlying change. As you know, Wyoming has adopted this standard by statute. As a legislative enactment, this has led to the limitation of a change even in closed basins where there was no downstream user. See <u>Basin Electric Power Cooperative v. State Bd. Of Control</u> (Wyo. 1978), 578 P.2d 557. This result has been widely criticized in the literature as an example of a fundamental failure to apprehend that the historic consumptive use analysis is simply part of the wider question of injury to other water rights. Thus, where the change in historic use would not work injury to other water rights because of the character of the water right or the underlying facts, the historic use rule does not apply. As a result, it is difficult to see why the DNRC will voluntarily join a rule that has been comprehensively condemned in the literature.

Even if the historic use analysis applied as comprehensively as a factual matter as the Proposed Rule suggests, the Rule is nonetheless flawed because it fails to distinguish between the various types of water rights. For example, in Montana, water stored in priority is developed water, meaning that it can be used by the storage appropriator regardless of shortages to more senior users. The Proposed Rule implicitly seems to declare that any change in the use of such stored water can adversely affect other water users in the basin, notwithstanding the fact that these users cannot otherwise derive any benefit from the stored water. There simply is no Montana authority that makes such a sweeping conclusion. As a result, it follows that there must necessarily be a "reasonable legal theory" that a storage appropriator owes no such duty to other water users.

RESPONSE 210: This comment seems to argue an exception should become the rule. Change applicants are free to argue that their change will not adversely affect anyone such that it should go forward through the change process, but to argue that historic use has no place in change applications ignores the change law of all the western prior appropriation states. In the Wyoming case, the Wyoming Supreme Court rightly stated, "While this court has for many years recognized that one of the fundamental principles applicable to any transfer of water rights for change in use is the avoidance of injury (Johnston v. Little Horse Creek Irrigation Co., supra), equally fundamental is the principle which holds that an appropriator obtains a transferable water right only to the extent that he has put his appropriation to a beneficial use." That is what Montana is trying to do with its rules, to make sure that in change proceedings historic use is properly considered. Change applicants are being asked to give details on their historic use. They remain free to make whatever legal arguments they want in regard to their change application, once it is deemed correct and complete, and take that through hearing and thereafter on appeal to the district court and the Montana Supreme Court.

Change applicants are being asked to give details on their historic use. They remain free to make whatever legal arguments they want in regard to their change application, once it is deemed correct and complete, and take that through hearing and thereafter on appeal to the district court and the Montana Supreme Court.

COMMENT 211: The Proposed Rules create almost insuperable burdens for prospective changes purely as an evidentiary matter. The Proposed Rules require a prospective appropriator to document his "maximum" monthly flow rate, the volume of water consumed on a monthly basis, and a description of how and when unconsumed water returns to a ground or surface source. An applicant is then instructed to explain any changes in rate or timing of depletions and the effects of these changes on junior and senior users, including joint users of a ditch system, and otherwise compare his historic consumptive use with the consumptive use under his change. The Rules do not identify any authority for including such other users of a ditch system, notwithstanding authority from other states that declare that such effects do not raise any issues of water law, as opposed to any rights arising out of the joint use of an easement.

Maximum monthly flow rates are rarely relevant to a historic consumptive use test. Ordinarily, the historic consumptive use test focuses on average conditions, and is derived independently from measured diversions based on Blaney Criddle estimates of consumption associated with cropping patterns. Flow rates are derived from the consumptive volumetric measure over the typical period of use. The focus on consumption in this manner is driven by the difficulty and impracticability of deciphering "when unconsumed water returns to a ground or surface water source." Moreover, this focus

makes the consumption under the changed use immaterial, as by definition one is limited to the historic consumption in any event. Thus, adoption of the DNRC standards will virtually assure that changes in water rights in Montana will be too costly and complex for any but the most well-heeled users.

RESPONSE 211: The historic use rule has been amended to require the maximum flow rate and volume consumptively used for a year, rather than monthly figures. An applicant must have a good understanding of how the water right to be changed was historically used and how changing the water right may affect other water users, regardless of where they are located. At the correct and complete stage of application processing an applicant must provide information in the application addressing the effects the applicant's change may have. The DNRC is requesting information that would be required to satisfy the statutory criteria. Some of the comments reflect dissatisfaction with the change statute itself. The DNRC is not attempting to make the process prohibitively expensive; rather it is trying to request information for the findings required by statute.

COMMENT 212: The DNRC may profit from incorporating the experience of other states in supervising changes of water right under the prior appropriation system. Virtually all Western states require junior users to bear the burden of production on the question of injury in a change proceeding, at least where the applicant has already confined his change to the historic consumptive use under the changed water right. Montana has a like rule, requiring appropriators to file correct and complete objections. These states acknowledge that it is impossible as a practical matter for any appropriator to determine in advance all the myriad welter of ways that other users can be affected by a change. The DNRC Rules appear to require what other Western states perceive as impossible.

RESPONSE 212: The commenter seems to be asking the Department to ignore the statutory requirements of the Water Use Act in these rules because other states have found such an approach to not work, but the Department can only through these rules carry out the legislature directives; the Department cannot change the statutory scheme and burdens.

COMMENT 213: Every change will result in some deviation from historic diversions, simply because changing historic diversions is the reason for the change. Indeed, even the historic use test itself will result in patterns of diversions that affect some junior users more than others. After all, by focusing on average conditions, future diversions will not reflect the entire range of diversions that occurred historically, and inasmuch as the range of these diversions may impact users other than those affected by average conditions, the application of the historic use test will result in more depletions more often to this class of users. Western states

tolerate this result simply because the right to change a water right is a property right of equal significance to other users' vested rights to maintenance of the stream conditions as of the time of their appropriations. As a result, the perfect cannot become the enemy of the good by requiring evidence that is economically impossible to muster as a price of exercising one's right to change his water rights.

RESPONSE 213: The "no injury rule", on which Montana's statute is based, has existed in all of the western states in regard to changes for well over 100 years. The constitutionality of the change statute was upheld in 1982 in Castillo v. Kunneman. The legislature made the policy choice that instead of having water users as before 1973 simply changing their water rights anytime they wanted with the burden of proof being on objectors who took them to court, the Water Use Act would provide for permission first from the Department with the burden of proof on those seeking the change. The Department continues to implement that legislative policy choice in its rules.

COMMENT 214: (4) The applicant shall provide a narrative of the historic use of each water right being changed. The description must be based on actual physical measurements when available and use commonly accepted ~~engineering~~ hydraulic principles.

RESPONSE 214: The department agrees with the comment and has amended the rule accordingly.

COMMENT 215: This reason given for requiring historic use is misleading. The rules will not speed up processing times; the standard processing time will be 3 to 4 years. The unnecessary delays are of the DNRC's inability to move through work in a timely manner (180) days for initial review. When faced with the proposed rules two things will happen, the change will be made without authorization. The public will not apply to change water rights due to excessive costs. The rules are being used to shut down the whole process of making changes in valid existing water rights. The new rules as written will create economic harm to all applicants by placing the bar so high that only extensive and expensive studies can only be completed by the very well heeled. The small operator will be economically excluded from their right to change water use pattern.

RESPONSE 215: The department is confident that the rules provide clear and concise information so that an applicant can provide an application that contains the required information. In the past, the amount of time spent processing applications was significant because department time was used to write letters identifying and explaining numerous deficiencies. The correct and complete rules define what is needed and if an applicant provides the required information, no deficiencies will need to be addressed and processing time will be reduced

dramatically. This is a critical component of the rules because, as noted by the commenter, the department must make the a determination of correct and complete within 180 days of receipt of an application. The rules contain a significant amount of flexibility related to various required information. An applicant must be aware that the applicant cannot adversely affect other water users. If an individual uses water outside of existing law, when the court demands the source be enforced, which is already occurring, the illegal water user will no longer be able to use the water and may find that they cannot obtain a right to the source.

COMMENT 216: This entire section is requesting information and documentation that often does not exist. Historic flow rate measurement records are scare at best and volumes measurements and records are rare. The idea of the Department determining the historic water use sounds like an administrative adjudication with no guidelines, criteria, direction, or instructions. The Department could simply say "no".

RESPONSE 216: The rule has been amended to include some examples of what a "best available estimate" can be based on. The list however is not inclusive and an applicant can provide a "best available estimate" based on other information. See ARM 36.12.1901(4).

COMMENT 217: (2) should not allow change applicants to decrease ground water recharge. Historic recharge may not be appropriated as it is appropriated by other users. An increase in irrigation acreage should not be permitted in exchange for a decrease in ground water recharge.

RESPONSE 217: The Department is implementing the basin closure statute in a way it believes complies with the intent of the statute and provides for a ground water exception. Getting an application accepted by the Department is only part of the process. Impacts to ground and surface water will still need to be addressed by the applicant and lack of adverse effect has to be proven by a preponderance of the evidence before the department could grant an application.

COMMENT 218: (1) A change applicant shall bear the burden of proving their actual historic beneficial use of water no matter how that water right was described in previous claims, applications, district court decrees or Montana water court decrees. An abstract of a water right from the department or the Montana water court by itself is not sufficient to prove the existence or extent of the historical ~~right~~ use.

RESPONSE 218: The department agrees with the comment and has amended the rule accordingly.

COMMENT 219: The following information was received in testimony at the rules hearing. The first thing I want to talk

about is rule XXV, the Department's attempt to describe the historic use standard. I want to say that at the outset, we strongly support having that standard expressed in the rules. First of all, it's at the heart of the change process. Protecting existing water rights from adverse impacts is what this process is all about. When you talk about change processes, you cannot talk about adverse impacts without first trying to document and scrutinize the historical use of the water right to be changed. Usually that adverse impact involves either some issue of consumption or some timing of the use. Without looking at that issue, not simply as it's expressed in some abstract that has been issued as part of a water court proceeding, there's really no way to thoroughly assess what the impacts of a change process are going to be. The second thing I appreciate about these rules is that they properly place the burden of showing historic use and consumption squarely on the applicant. I should also qualify that by saying, I think they have to do that because, number one, the statute places the burden of proof upon the applicant and the fact that the supreme court has suggested that is where the burden rests and should rest. Nonetheless, as I understand it, there has at least been some discussion from some quarter suggesting that that burden not to shift to the objectors and we want to be on the record as suggesting as it is expressed in here is the proper way and we would urge the department to resist any attempt to either here or legislatively shift that.

One of the things I think is important about where this burden is, is that by having the burden on the applicant now, is my experience as an applicant has been that the department has been actually quite conscientious about holding our feet to the fire to do as much as we can to show the historic use of the water right we are seeking a change for and frankly that can be a pain in the neck for the applicant, but that's too bad. The focus of these change statutes that give rise to these rules is protecting the existing water rights holders. If we were to somehow shift the burden, what we would in effect do is probably take away some of the incentive and support for the department to be as conscientious as it is about establishing that historic use at the front end and in fact, would ill serve this process. So, I just want to underscore again that, that burden should remain where it is.

<u>RESPONSE 219:</u> The department acknowledges the time and effort put forth by the commenter and appreciates their interest.

<u>COMMENT 220:</u> I think one of the first things that might be appropriate would be to define in these rules, the term "historic use". Here's why: based on my experience, my understanding from the department has been, what they want to see from me in terms of documentation of historic use, primarily, not exclusively necessarily, primarily is pre-1973 historic use. I think the level of detail that's being required

exceeds what people can realistically present the Department with in most cases.

Frankly because, as we've learned, and I think many people have learned, is what is known very often about pre-1973 use doesn't rise to the level of detail of being able to say "how many cfs went down a specific ditch for a specific period of time each month" in a way that does that. Typically, the Department has required us to look very hard at the historic acres irrigated and the kind of crop used and to extrapolate backward from that and to look at what else is on the ground. I think that is an appropriate way to do it. The problem is that for an awful lot of what we call historic use, the level of detail of data that is required in sections (3), (4), and (5) simply doesn't exist. Frankly, I think because in the future, change processes are going to be the way that new uses of water come about as we reach the outer limits of our available supply, if we haven't already reached them. Then we need to be realistic about what we can expect people to document. I would suggest that the department take an additional step and I would encourage you to adopt, perhaps provide some detail there about what constitutes acceptable documentation of best available evidence, as that term is used. Is it aerial photos, is it water resource surveys, maps, journals, what are the levels of documentation that become acceptable if you cannot provide the level of precision described in sections (4), (5), and (6). So, I would urge that strongly, because I think it has to do with recognizing what the reality is going to be for a lot of people seeking changes. It is not to let the people off the hook, but to acknowledge the kind of documentation that would be available.

RESPONSE 220: The department agrees with the comment and has amended the rule accordingly.

COMMENT 221: If an applicant does not provide the historic use of their water right to be changed can the water rights to be changed be certified to the water court?

RESPONSE 221: Certification can be requested after an application is correct and complete, it has been noticed and the objection process is complete. The department on its own or on motion of a party may decide certification is an option.

New Rule XX (36.12.1903) - Change Adverse Effect Rule Comments

COMMENT 222: (1) users entitled to maintenance of stream. Comment that only a portion of an adequate statement of law. Other appropriators aren't entitled to stream or aquifer level, or pressure, if they can reasonably exercise their rights. See 85-2-401, MCA, and case law.

RESPONSE 222: The department agrees with the comment and has removed (1). The rule should be included in the issuance rules, but not in the correct and complete rules.

COMMENT 223: For section (3), the commenter referred to the comments provided for historic use.

RESPONSE 223: This section was related to the proposed use, however, the section has been removed because it duplicated the requirements in ARM 36.12.1901(7).

COMMENT 224: For section (4), the commenter referred to the comments provided for historic use.

RESPONSE 224: The comments related to historic use are not applicable to this section. The department is fairly certain that the commenter is not meaning to imply that an applicant is not required to provide information related to the effects of the applicant's proposed change.

COMMENT 225: For section (6) the commenter referred to the comments provided for historic use.

RESPONSE 225: The comments related to historic use are not applicable to this section. Nonetheless, the department eliminated the sections pertaining to providing a notice area map.

COMMENT 226: (7) and (8) Identify cone of depression vertically for notice area map. Comment is how do (7) and (8) apply to changes?

RESPONSE 226: The department eliminated the sections pertaining to the notice area map. However, the commenter asked how the sections would apply to a change. Those sections would have applied to a change in point of diversion of a well.

COMMENT 227: (10) Does reference to "instream water uses" include exempt water rights for domestic or stock?

RESPONSE 227: The department eliminated the sections pertaining to the index identifying junior and senior water users. However, to answer the question posed by the commenter, the instream water uses the department was referring to were stockwater instream use and instream use for fish and wildlife.

COMMENT 228: For section (11) the commenter referred to the comments provided for historic use.

RESPONSE 228: The comments related to historic use are not applicable to this section. The analysis of the potential effect of changing a water right on another water user is now ARM 36.12.1902(2). The department is fairly certain that the commenter is not meaning to imply that an applicant is not required to provide information related to the effects of the applicant's proposed change.

COMMENT 229: (13) requires explanation of proposed change on ground water and surface water rights. Comment is, "this could be construed as somehow related to basin closure statutes." Changes are not implicated by basin closure provisions.

RESPONSE 229: The department eliminated (13).

COMMENT 230: (10) requires an applicant to include an index or general abstract of water rights located within the identified notice area, and specifies what must be included in each abstract. To be fair, the rules should not require an applicant to provide any more than what is listed in the abstracts that are available.

RESPONSE 230: The department eliminated (10).

COMMENT 231: As in the case with ARM 36.12.1704, the use of the term "unperfected permit" is too limiting in that the term "permit" includes both perfected and unperfected permit. In addition, a water right evidenced by a certificate of water right is entitled to protection under the adverse effect rule. It is recommended that the department change "unperfected permits" to "permits and certificates" in Section (10) of the rule. In Section (4) concerning the identification of sources, the term "potentially" should be inserted before the term "affected." Although the miles rule in Table 2 is by necessity arbitrary, the POD requirement is much too arbitrary. It is recommended that the diversion requirement be limited by an additional fixed mileage of one-half of the mileage limitation, e.g., for less than 100 gpm, the next 3 diversion points not to exceed 3 miles downstream from the most upstream proposed point of diversion.

RESPONSE 231: The sections related to this comment have been eliminated.

COMMENT 232: The department does not have the authority to adopt Section (14). Effectively the department is deciding that every water right that has not been used for 10 successive years, when water is available, has been abandoned for purposes of a change. Essentially the department is saying that one part of a water right, i.e., the right to change, may be abandoned while the remainder to the water right is not. There is no statutory or case authority for such an administrative determination. The rule is unconstitutional, arbitrary and capricious.

ARM 36.12.1903(14) simply does not make any sense. The rule requires that where a water right has not been used for ten years or more, the applicant provide "information showing that beginning to exercise the water right again will not create an adverse effect to other water rights." Exercising a water right is never an adverse effect to any other water rights. If the DNRC instead is suggesting that such an applicant should provide

some evidence that his water right has not been abandoned, the rule should so state.

<u>RESPONSE 232:</u> The department agrees with the comment and has eliminated the rule.

<u>COMMENT 233:</u> The imprecise use of legal standards is also manifested in ARM 36.12.1903. The language in section (1) announces that both senior and junior users have vested rights to maintenance of the stream conditions as of the time of their appropriations, and follows that declaration in section (2) with the conclusion that therefore a prospective change of water right must address both seniors and juniors. The statement of the conclusion in section (2) does not follow from the principle set forth in section (1). A declaration that an appropriator has a vested right to maintenance of the stream conditions is a back-handed way of declaring that such an appropriator has the right to confine a senior user to his historic consumptive use from his historic point of diversion. A vested right to maintenance of the stream condition cannot include the acts of junior users, as of course that would mean that such a right would preclude all junior water rights. If the right does not preclude junior uses of water, it follows that the right does limit applications to change such junior water rights, as such stream conditions could not have existed as of the time of the senior's appropriation. This distinction is important in other Western states that implement the prior appropriation system to answer to the twin goals of protecting existing users and using the marketplace to change water rights to new and more productive uses. Historic consumptive use tests are often imperative mechanisms to protect the property rights of junior uses, even though the doctrine acknowledges that historic use tends to focus on average conditions in a way that makes an abstraction out of the actual historic use of the right. Because historic use tests are artifacts to avoid injury, the tests should not be adopted where they are not necessary to preserve an appropriator's supply.

Because a senior is entitled to his supply notwithstanding any diversion of a junior user, it follows that it is unnecessary to conduct an historic use analysis to preserve that senior's supply. Indeed, it is this very principle that has fostered subordinations as effective conditions on changes of water right to avoid injury. Where a change can be modified by subordinating the priority of the water right under the changed condition to specified junior users, these users cannot be adversely affected as a result of their "senior" status. In any event, it cannot be said that the distinction between junior and seniors in a change of water right context does not support a "reasonable legal position" as regards one's entitlements as against each such users, as Montana courts have not spoken to the issue.

<u>RESPONSE 233:</u> The department has removed (1). The rule sought merely to paraphrase for change applicants part of the

applicable case law from western states that both juniors and seniors can object to changes of water rights so that effects to both junior and senior water right were analyzed.

COMMENT 234: (1) Both junior and senior water appropriators are entitled to the maintenance of the stream conditions similar to those that existed when they began appropriating water. How would one know of historic stream conditions in say, 1865? Any changes in water use pre-1973 the burden was on the party affected to take action in court. How does one factor in changes in method of irrigation pre-1973? Legitimate periods of non-use (world war II) drought, when no records were kept.

This section goes way beyond what is reasonable "adverse impact". The first point (1) is a new concept that goes way outside the prior appropriation doctrine. There is nothing that defines "...maintenance of the stream conditions..." or how this is determined. The notice area is not realistic and each application is different and the notice should be based upon those rights that are realistically possibly affected. This whole section allows the Department to subjectively deny an application whether another water user objects or not.

RESPONSE 234: The department has removed (1). This section sought merely to reflect applicable law to change applicants so they were aware of why both juniors and seniors water rights must be taken into account in a change proceeding. The department notes to the commenter that an applicant must meet the criteria for issuance of an application whether or not there are objectors to the application.

New Rule XXVIII (36.12.2001) - Salvage Water Rule Comments

COMMENT 235: Under section (2), we support DNRC’s statement regarding the destruction of phreatophytes.

RESPONSE 235: The department acknowledges the time and effort put forth by the commenter and appreciates their interest.

COMMENT 236: This language requires the submission of a "professional report". What constitutes a "professional report?" Rather than simply forcing an application to hire a "professional" to do this, it would be better to describe the objective criteria that go into documentation of what water has been saved. The method of documentation, not the credential of the person making the report is what should control the Department’s decision. Or, in the alternative, simply delete the word professional.

RESPONSE 236: The department agrees with the comment and has amended the rule accordingly.

Comment 237: Under ARM 36.12.2001(1), the DNRC declares the water salvage cannot include water saved by "the destruction of phreatophytes." In the context of the statutory requirements for correct and complete applications, this statement means that the DNRC believes that there is no reasonable legal theory that supports using the water that was formerly consumed by such plants under a salvage application. It is difficult to see how the DNRC can make like declarations of public policy in order to deny or limit an application, where it is directed to merely determine whether the proposed use adversely affects the water rights of other persons. Finally, at the most basic level, this Proposed Rule violates the statutory requirements for a correct and complete application simply because it fails to acknowledge that no Montana court has taken any position on this issue. If an issue is reasonable enough to require the attention of the Colorado Supreme Court, how can it be that this same position does not qualify as a "reasonable legal theory" where Montana has not even spoken to the issue?

RESPONSE 237: The Department as a matter of rule can let applicants know it will not recognize cutting down trees as a water saving method. If the courts or the legislature thereafter want to endorse that as a water saving method that will be their call.

COMMENT 238: The following testimony was presented at the rules hearing. I guess I'd like to start by suggesting that implicit within the statute that allows water salvage 85-2-419, MCA, to the extent that it refers to allowing the salvage of water consistent with 85-2-402, MCA, which is the change statute, and also I think that implies at least that there is a limit as to what kind of water can be salvaged. Likewise, the historic use rule, section (2) to the extent that it doesn't allow for any net depletion of water, as it looks at historic consumption again places some limits on what salvage water might be, at least implicitly. That is that the limit there would be that for purposes of I think both of those imply that salvage water can only be water that was previously lost to the source, especially if the new use for that water would be consumptive use. Again, if we can't increase consumption, as we shouldn't be able to with a change, then salvage water of necessity needs to where it is going to be applied new consumptive use, be water that was previously lost to the source. Otherwise, you are going to be increasing consumption. I think that implicitly that's expressed within the statute. The problem is I think you have to move in the statute and the regulations and you have to move around a little bit through the sections to get that larger picture firmly in place.

I think it's compounded a little bit by the definition of water saving method here. In that definition, it lists a number of things that might be considered water saving, including leaky ditches. Basically if you're fixing a leaky ditch or replacing it with a pipe, in many cases, you're not capturing water that was previously lost to the source, you're simply capturing water

that is returning to the source. In using that same section as an example is the suggestion that you can change water management things to free up water that was previously consumed. I think the problem with the way that is characterized there is that if somebody who is not a lawyer or a water walk or geek who likes to read this stuff for entertainment, somebody who comes to this as a water user who is not familiar with wandering through these rules, I think one of the problems they're going to run into is they're going to read this and go "Hmm, I can increase my irrigated acreages with this salvaged water I'm going to get for fixing my leaky ditch."

Now, I understand that probably about the time they get to the regional office, somebody there is going to say, "No, you can't do that." And, I guess what I'm leading to here is to suggest that I think it might be appropriate in the regulations to make some fairly explicit statements about what the limitations of salvaged water are for a new consumptive use. And that is to make it clear that you can only use water that was previously lost to the source. And I think one way to get at that might be to look at that water saving method definition. I would like an explicit statement like that and in my written comments, I'll try to find where I think it fits in and suggest it.

But, I think you can also go a step further and perhaps help avoid some of that potential confusion by working with the definition of water saving method to perhaps more explicitly recognize the difference between freeing up water from a leaky ditch that might return to the source and be used in a nonconsumptive use, and frankly in our work for doing water leases, we have done a number of those where we have managed to put some water back in a short reach of stream that was otherwise lost to that reach, but not to the source, by fixing leaky ditches, but it was a nonconsumptive use. I think it would be valuable there to make that distinction between the kinds of water saving methods, if you're going to call them that that would apply to nonconsumptive uses and what the limits are on water that can be used for consumptive uses.

RESPONSE 238: The Department must implement the salvage statutes as enacted, and they provide for the right to obtain "salvaged water" under the "salvage" statute and definitions as enacted. The legislature has mandated that the change process and statutes be used when applying for "salvage water". To require new water use permits in such instances is beyond what the Department can do with these rules. What is requested would require a legislative change. Anyway, the Department disagrees that someone can increase their net consumptive use in a change proceeding whether it involves salvage or not, and the change process and the right to object remains for anyone as a means of stopping any increased consumptive uses that they allege may occur.

COMMENT 239: Salvage water must not be allowed in closed basins as the water is already over-appropriated.

RESPONSE 239: See above response to Comment 238.

6. These rule changes (adoption and amendments) will be effective January 1, 2005.

By:	/s/ ARTHUR R. CLINCH ARTHUR R. CLINCH Director	/s/ TIM D. HALL TIM D. HALL Rule Reviewer

Certified to the Secretary of State December 6, 2004.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I (42.15.107), II (42.15.108),III (42.15.109), IV (42.15.204), V (42.15.213), VI (42.15.310), VII (42.15.407), VIII (42.15.510); amendment of ARM 42.15.112, 42.15.301, 42.15.312, 42.15.314, 42.15.315, 42.15.316, 42.15.321, 42.15.325, 42.15.401, 42.15.402, and 42.15.403; amendment and transfer of ARM 42.15.111 (42.15.214), 42.15.113 (42.15.215), 42.15.114 (42.15.216), 42.15.115 (42.15.217), 42.15.116 (42.15.318), 42.15.117 (42.15.218), 42.15.118 (42.15.219), 42.15.121 (42.15.220), 42.15.308 (42.15.221), 42.15.309 (42.15.222), 42.15.324 (42.4.303), 42.15.421 (42.15.523), 42.15.423 (42.15.524), 42.15.426 (42.15.525); and repeal of ARM 42.15.102, 42.15.105, 42.15.201, 42.15.305, 42.15.313, 42.15.404, 42.15.405, 42.15.425, 42.15.429, 42.15.434, 42.15.435, and 42.15.436 relating to personal income taxes	NOTICE OF ADOPTION, AMENDMENT, AMENDMENT AND TRANSFER, AND REPEAL

TO: All Concerned Persons

1. On September 23, 2004, the department published MAR Notice No. 42-2-741 regarding the proposed adoption, amendment, amendment and transfer, and repeal of the above-stated rules relating to personal income taxes at page 2213 of the 2004 Montana Administrative Register, issue no. 18.

2. A public hearing was held on November 30, 2004, to consider the proposed adoption, amendment, amendment and transfer, and repeal of the above-stated rules. ARM 42.15.211 and 42.15.302 were also proposed to be amended and transferred and ARM 42.15.104, 42.15.106, 42.15.433 were proposed to be repealed. However, ARM 42.15.211 was previously transferred and ARM 42.15.104, 42.15.106, 42.15.302 and 42.15.433 were previously repealed by MAR Notice 42-2-731, published in 2004 Montana Administrative Register, issue no. 16, August 19, 2004. Therefore, no action will be taken for those rules with this adoption notice.

3. Oral testimony received at the hearing is summarized as follows along with the response of the department:

COMMENT NO. 1: Mr. Robert Turner stated that it appears that sections (5) and (6) in New Rule II identify the locations of rules for the additions and subtractions to federal adjusted gross income when arriving at Montana adjusted gross income. He asked if these are the only additions and subtractions allowed in the determination of Montana adjusted gross income.

Mr. Turner further stated that he thought subsection (8)(a) is unclear concerning whether the limitations of itemized deductions is a percentage of federal adjusted gross income, or Montana adjusted gross income. He recommended the department consider adding the word "Montana" before "adjusted gross income."

RESPONSE NO. 1: The answer to Mr. Turner's first question is "no." The additions and subtractions, which are found in New Rule II, are only those in which administrative rules of Montana exist, or are being proposed. When the department determines that administrative rules are required for other additions and subtractions found in 15-30-111, MCA, which are not currently addressed, the department will amend New Rule II to identify the location of such rules.

The department agrees with the suggestion of adding "Montana" before the words "adjusted gross income" and has amended the rule as shown below.

COMMENT NO. 2: Mr. Turner inquired about the reference in New Rule III concerning when a person becomes domiciled for Montana purposes. Do they have to have a permanent abode before they become domiciled?

RESPONSE NO. 2: The rule provides for an alternative: residency for Montana income tax purposes if they become domiciled or alternatively if they maintain a personal place of abode. Domicile is defined by statute and "place of abode" has been defined by the department in ARM Title 42, chapter 2.

COMMENT NO. 3: Mr. Turner stated that New Rule VI defines "injured spouse" which is more restrictive than the federal definition of "injured spouse." He suggested the department adopt the federal definition. Under federal law a spouse can be an "injured spouse" if only one spouse owes past-due federal tax, past-due child and/or child spousal support, a federal debt, or state income tax debt.

RESPONSE NO. 3: The department has historically used the term "injured spouse" to identify a spouse of a taxpayer who owes a past-due child support obligation subjecting a joint refund to offset. The term as used in federal law has a completely different meaning and is used when relieving a spouse of a joint tax liability. Legislative action would be required to adopt a system relieving a spouse of joint return liability as is done under federal law.

COMMENT NO. 4: Mr. Turner stated that New Rule VIII, subsection (1)(g) should include the phrase "if it is not a trade or business expense" at the end of the proposed language.

RESPONSE NO. 4: The department has amended New Rule VIII to include this phrase in subsection (1)(g).

COMMENT NO. 5: Mr. Turner asked about the language in ARM 42.15.112, Nonresident Military Personnel. Nonresident tax is prorated according to the Montana source income over the total income.

Under 15-30-101, MCA, Montana source income is defined as wage income from Montana sources. Statutes always override administrative rules but now we have a rule that is going to override a statute.

Mr. Turner stated that he thought this could be confusing for taxpayers. He suggested that the department adopt another rule that defines this better.

RESPONSE NO. 5: It is not correct that the rule is overriding a statute. Rather, it is reconciling two Montana statutes with federal law. Federal law prohibits states from taking military income into account to increase state income tax on a nonresident military person or their spouse. Section 15-30-101, MCA, contains a generally applicable definition of Montana source income, including wages. Section 15-30-111, MCA, exempts from Montana tax any amount the state is precluded from taxing by federal law. This rule describes how the department will administer these two separate statutes.

The department has defined the application of this tax requirement in ARM New Rule I (42.15.110) as shown in MAR Notice No. 42-2-742 published in this register.

COMMENT NO. 6: Mr. Turner stated that as he understands the process and according to the language found in ARM 42.15.321(2)(c), if a taxpayer files a joint return and they owe $1,000 on the original return and then they amend that return to where they now owe only $500, they would have had to pay the $1,000 first and then the department would refund them $500.

That really puts a burden on the department because for tax administrative purposes it asks for money from the taxpayer that they in essence don't owe. The question of whether it is delinquent or not could be questioned.

RESPONSE NO. 6: That is correct. They can't be delinquent and must be in compliance in order to obtain a refund.

COMMENT NO. 7: Mr. Turner mentioned that he thought the first sentence in ARM 42.15.325 was confusing and too long. He asked if it could be rewritten and shortened to better explain the request for information.

He further stated that it appears the department is proposing to eliminate the second request letter and apply the 30-day requirement after the first letter. He asked why the department was eliminating the second request letter.

RESPONSE NO. 7: The department agrees with Mr. Turner regarding the confusion and has amended section (1) to clarify the intent.

In regard to Mr. Turner's second issue with this rule, the department is establishing a consistent timeframe for all information requests for all tax types in anticipation of implementing a new tax system that will provide correspondence tracking for the department. In addition, the department feels that by adding the opportunity to extend this period by mutual consent, the rule will allow both the taxpayer and the department the opportunity to extend information requests under agreeable circumstances.

COMMENT NO. 8: Mr. Turner commented that ARM 42.15.114(1) allows obligations that are backed by the United States government excluding interest that comes from mutual funds and dividends. Obligations in (2) appear to be a change in practice for the department. It is his understanding that if they were issued by a governmental agency and backed by the United States government the interest was exempt.

RESPONSE NO. 8: The first part of Mr. Turner's statement is correct. However, the second part is not correct. There are some agencies that no longer fall into that category and the rule is being amended to comply with the current federal law.

COMMENT NO. 9: Mr. Turner stated that ARM 42.15.121 addresses only wages. The rule should be expanded to include other income such as business income. He stated that he felt that because business income is subject to self-employment taxes it should also be exempt.

REPONSE NO. 9: The exemption of income earned by an enrolled tribal member is complex and in many cases must be determined based on specific facts. The department has elected to only address wages of an enrolled tribal member at this time.

4. As a result of the comments received the department adopts New Rule II (ARM 42.15.108), New Rule VIII (42.15.510) and amends ARM 42.15.325 with the following changes:

NEW RULE II (42.15.108) DETERMINING TAX LIABILITY

(1) through (7) remain as proposed.

(8) Unless otherwise specified below, rules that address itemized deductions are found in ARM Title 42, chapter 15, subchapter 5. As provided in 15-30-123, MCA, deductions for expenses associated with the excluded income described in (6)

are not allowed. Additional rules related to itemized deductions include:

(a) a rule describing the calculation of itemized deductions that are limited to a percent of MONTANA adjusted gross income;

(b) through (11) remain as proposed.

AUTH: Sec. 15-30-305, MCA

IMP: Sec. 15-30-101, 15-30-102, 15-30-103, 15-30-105, 15-30-111, 15-30-112, 15-30-121, and 15-30-137, MCA

NEW RULE VIII (42.15.510) DEFINITIONS (1) through (1)(f) remain as proposed.

(g) the deduction for the patriotic license plate surcharge provided in 15-30-154, MCA, IF IT IS NOT A TRADE OR BUSINESS EXPENSE;

(h) through (2)(d) remain as proposed.

AUTH: Sec. 15-30-305, MCA

IMP: Sec. 15-30-101, 15-30-110 and 15-30-117, MCA

42.15.325 FAILURE TO FURNISH REQUESTED INFORMATION OR FILE A DELINQUENT RETURN (1) ~~If a~~ A taxpayer ~~does not~~ MUST provide information the department requests to ascertain the correctness of a return within 30 days after the date of the request or obtain the department's consent to provide the information at a later date~~,~~. IF THE TAXPAYER DOES NOT PROVIDE THIS INFORMATION WITHIN 30 DAYS, OR AS AGREED UPON, the department will adjust or disallow any amount or item that remains unverified. If the request is in writing, the 30 days are computed from the date of the written request.

(2) and (3) remain as proposed.

AUTH: Sec. 15-30-305, MCA

IMP: Sec. 15-1-216 and 15-30-145, MCA

5. Therefore, the department adopts New Rule II (ARM 42.15.108), New Rule VIII (42.15.510) and amends ARM 42.15.325 with the amendments listed above and adopts New Rule I (42.15.107), III (42.15.109), IV (42.15.204), V (42.15.213), VI (42.15.310), VII (42.15.407); amends ARM 42.15.112, 42.15.301, 42.15.312, 42.15.314, 42.15.315, 42.15.316, 42.15.321, 42.15.401, 42.15.402, and 42.15.403; amends and transfers ARM 42.15.111 (42.15.214), 42.15.113 (42.15.215), 42.15.114 (42.15.216), 42.15.115 (42.15.217), 42.15.116 (42.15.318), 42.15.117 (42.15.218), 42.15.118 (42.15.219), 42.15.121 (42.15.220), 42.15.308 (42.15.221), 42.15.309 (42.15.222), 42.15.324 (42.4.303), 42.15.421 (42.15.523), 42.15.423 (42.15.524), 42.15.426 (42.15.525); and repeals ARM 42.15.102, 42.15.105, 42.15.201, 42.15.305, 42.15.313, 42.15.404, 42.15.405, 42.15.425, 42.15.429, 42.15.434, 42.15.435, and 42.15.436 as proposed.

6. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.discoveringmontana.com/revenue, under "for your reference;" "DOR administrative rules;" and "upcoming events

and proposed rule changes." The Department strives to make the electronic copy of this Adoption 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. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson	/s/ Don Hoffman
CLEO ANDERSON	DON HOFFMAN
Rule Reviewer	Acting Director of Revenue

Certified to Secretary of State December 6, 2004

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I (42.15.110) and amendment and transfer of ARM 42.16.101 (42.15.319), 42.16.102 (42.15.320), 42.16.103 (42.2.503), 42.16.104 (42.2.505), 42.16.105 (42.2.504), 42.16.106 (42.2.520), 42.16.108 (42.15.326), 42.16.109 (42.15.327), 42.16.132 (42.15.328); transfer of ARM 42.16.1101 (42.15.119) and 42.16.1201 (42.15.120); and repeal of ARM 42.16.107, 42.16.133, 42.16.134, 42.16.1104, 42.16.1111, 42.16.1112, 42.16.1113, 42.16.1114, 42.16.1115, and 42.16.1117 relating to personal income taxes	NOTICE OF ADOPTION, AMENDMENT AND TRANSFER, TRANSFER, AND REPEAL

TO: All Concerned Persons

1. On September 23, 2004, the department published MAR Notice No. 42-2-742 regarding the proposed adoption, amendment and transfer, transfer, and repeal of the above-stated rules relating to personal income taxes at page 2251 of the 2004 Montana Administrative Register, issue no. 18.

2. A public hearing was held on November 30, 2004, to consider the proposed adoption, amendment and transfer, transfer and repeal of the above-stated rules. No one appeared at the hearing to testify. The department has determined for consistency purposes not to adopt New Rule II but to retitle New Rule I and blend the text from New Rule II into New Rule I. Additionally, this new rule will be placed in ARM Title 42, chapter 15 with other nonresident rules.

Also, in addition to amending ARM 42.16.101, 42.16.102, and 42.16.132 as shown in MAR 42-2-742, these rules should also be transferred as shown in this notice. Further, the department had proposed to transfer ARM 42.16.1101 to ARM Title 42, chapter 16 but upon closer review it would fit better in chapter 15.

3. Although Mr. Robert Turner did not appear at the rule hearing, he did provided an oral comment regarding these rules and it is summarized as follows along with the response of the department:

COMMENT NO. 1: Mr. Turner stated that he thought the department should consider adding 15-30-144, MCA, as an implementing cite to ARM 42.16.101 and 42.16.102.

RESPONSE NO. 1: The department agrees and has amended

the rules as shown below.

4. As a result of the comments received and further review by the department, the department adopts New Rule I (42.15.110) and amends ARM 42.16.101 (42.15.319), 42.16.102 (42.15.320), 42.16.108 (42.15.326) and 42.15.109 (42.15.327) with the following changes:

NEW RULE I (42.15.110) TAXATION OF NONRESIDENTS ~~AND PART-YEAR RESIDENTS~~ (1) Nonresidents and part-year residents are subject to the same filing requirements as residents unless OTHERWISE expressly exempted ~~otherwise~~ in statute.

(2) Part-year residents and nonresidents must include all Montana source income on Schedule III. Montana source income is defined in 15-30-101, MCA.

(3) Part-year residents and nonresidents must complete Schedule IV and compute their tax liability by the tax determined as if they were a resident by the ratio of their Montana source income to income from all sources.

(4) NONRESIDENT ESTATES AND TRUSTS ARE SUBJECT TO THE SAME FILING REQUIREMENTS SET FORTH IN (1) THROUGH (3) UNLESS OTHERWISE EXPRESSLY EXEMPTED IN STATUTE.

AUTH: Sec. 15-30-105, MCA

IMP: Sec. 15-30-101, 15-30-103, 15-30-105, 15-30-111, 15-30-112, 15-30-121, 15-30-122, 15-30-131, ~~and~~ 15-30-132, 15-30-135, 15-30-136, 15-30-137, and 15-30-138, MCA

42.16.101 (42.15.319) DATE AND PLACE OF FILING AND PAYMENT (1) through (3)(c) remain as proposed.

AUTH: Sec. 15-30-305, MCA

IMP: Sec. 15-30-142 AND 15-30-144, MCA

42.16.102 (42.15.320) DEFICIENCY NOTICES AND PAYMENTS (1) and (2) remain as proposed.

AUTH: Sec. 15-30-305, MCA

IMP: Sec. 15-30-142 AND 15-30-144, MCA

42.16.108 (42.15.326) REQUEST FOR ADJUSTMENT OF JOINT RETURN (1) through (3) remain as proposed.

AUTH: Sec. 15-1-201, 15-30-305 and 17-4-110, MCA

IMP: Sec. 15-1-211, 15-30-142 and 17-4-105, MCA

42.16.109 (42.15.327) STATEMENT REQUIRED FOR ADJUSTMENT OF JOINT RETURN (1) through (3) remain as proposed.

AUTH: Sec. 15-1-201, 15-30-305 and 17-4-110, MCA

IMP: Sec. 15-1-211, 15-30-142, 17-4-105 and 17-4-111, MCA

5. Therefore, the department adopts New Rule I (42.15.110), amends and transfers ARM 42.16.101 (42.15.319), 42.16.102 (42.15.320), 42.16.108 (42.15.326) and 42.16.109 (42.15.327), with the amendments listed above; amends and transfers ARM 42.16.103 (42.2.503), 42.16.104 (42.2.505), 42.16.105 (42.2.504), 42.16.106 (42.2.520), 42.16.132 (42.15.328); transfers ARM 42.16.1101 (42.15.119) and

42.16.1201 (42.15.120); and repeals ARM 42.16.107, 42.16.133, 42.16.134, 42.16.1104, 42.16.1111, 42.16.1112, 42.16.1113, 42.16.1114, 42.16.1115, and 42.16.1117 as proposed.

6. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.discoveringmontana.com/revenue, under "for your reference;" "DOR administrative rules;" and "upcoming events and proposed rule changes." The Department strives to make the electronic copy of this Adoption 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. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Don Hoffman
DON HOFFMAN
Acting Director of Revenue

Certified to Secretary of State December 6, 2004

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.18.106, 42.18.107, 42.18.109, 42.18.110, 42.18.112, 42.18.113, 42.18.115, 42.18.116, 42.18.118, 42.18.119, 42.18.121, 42.18.122, 42.18.124, and 42.19.501 relating to annual appraisal plan rules and the exemption for qualified disabled veterans for property taxes	)	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On September 23, 2004, the department published MAR Notice No. 42-2-743 regarding the proposed amendment of the above-stated rules relating to the annual appraisal plan and the exemption for qualified disabled veterans as they relate to property taxes at page 2264 of the 2004 Montana Administrative Register, issue no. 18.

2. A public hearing was held on November 29, 2004, to consider the proposed amendment. The department offered additional amendments at the hearing for ARM 42.19.501.

3. Oral testimony was received at the hearing and is summarized as follows along with the response of the department:

<u>COMMENT NO. 1</u>: Mary Whittinghill, Executive Director, Montana Taxpayers' Association, first commented to the appraisal plan rules in ARM Title 42, chapter 18, which reference the use of door hangers to collect specific construction detail and building material information regarding a property when the property owner is not present and an internal inspection is not possible. She inquired as to how successful the use of door hangers and self-reporting forms has been in the past.

<u>RESPONSE NO. 1</u>: The use of door hangers and self-reporting forms by the department has been successful. The department only proposes using door hangers in situations where a property owner is not home and an internal inspection of the property improvements is not possible. Any information the department obtains from the taxpayer through the use of a door hanger is either confirmation of or correction to the information the department would have otherwise estimated. The return of the door hangers by taxpayers is viewed as a successful process.

<u>COMMENT NO. 2</u>: Ms. Whittinghill expressed concern over confusion by the taxpayer as to what specific information the

department was requesting with the door hanger. She thought perhaps the department could leave a copy of the data collection sheet (ICS) or property record card (PRC) and ask the taxpayer to respond only if they disagreed with information on the ICS or PRC.

RESPONSE NO. 2: The information on the ICS or PRC is extensive. The department feels it would cause much greater confusion to the taxpayer by leaving either the ICS or PRC. The door hanger is typically used for gathering new construction information. Therefore, the ICS and PRC would not list any improvement characteristics.

The requested information on the door hanger is quite limited and the wording on the door hanger points the taxpayer to an individual appraiser in the county to call or contact if the taxpayer has questions as to what the department is looking for with respect to the door hanger.

COMMENT NO. 3: Ms. Whittinghill was concerned that the department wasn't requiring the taxpayer to return the door hanger forms, subject to a penalty for not returning the form.

RESPONSE NO. 3: There is no penalty associated with the taxpayer failing or refusing to return the door hanger form, it is strictly voluntary. The department will use the best information available to value the property, so it would be advantageous to the taxpayer to return the completed form. Without information obtained through an internal inspection of the property or by a returned door hanger, the department must estimate the value of the property based on the best information available to the department.

COMMENT NO. 4: Ms. Whittinghill was concerned as to why the department is proposing the use of door hangers for the 2003 cycle, since that cycle has already passed.

RESPONSE NO. 4: The department proposes the use of the door hanger for new construction, which is picked up annually, and until reappraisal values are applied in tax year 2009, the properties continue to be valued subject to the values set during the 2003 reappraisal cycle.

COMMENT NO. 5: Ms. Whittinghill was concerned that the department notify veterans groups regarding the changes proposed in ARM 42.19.501 and the additional amendments proposed by the department at the hearing (i.e., the application deadline change, the return of the form to the local department of revenue office, and the requirement for copies of the applicant's federal or state income tax return for the tax year immediately preceding the year of the application).

RESPONSE NO. 5: The department will make every effort to notify veterans groups and the Department of Military Affairs

of the changes brought about by the changes proposed in these rules. The annual notices published in local newspapers by the department statewide will also note the rule changes.

COMMENT NO. 6: Ms. Whittinghill recommended leaving the language in subsection (2)(b) as it was previously - "copy of the applicant's latest federal or state income tax return." She stated that some people don't have the current year's income tax return available or completed by the April 15th deadline, due to having obtained an extension on the filing of the return.

RESPONSE NO. 6: The department believes the proposed wording is necessary to ensure that proper and current proof of income is returned with the application to the department. The department will accept the application without the supporting income tax return on or before the April 15th deadline; with the caveat that the taxpayer will supply the income tax return at the time the extension for filing the return expires. The department will incorporate these instructions into a written procedure covering the handling and processing of disabled veteran applications by its employees.

4. The department amends ARM 42.19.501 further with the following changes:

42.19.501 PROPERTY TAX EXEMPTION FOR QUALIFIED DISABLED VETERANS (1) The property owner of record or the property owner's agent must make application ~~through~~ TO the LOCAL ~~Department of Revenue, P.O. Box 8018, Helena, Montana 59604-5805 8018~~ DEPARTMENT OFFICE, in order to obtain a property tax exemption. An application must be filed, on a form available from the local department office, before April 15 of the year for which the exemption is sought. Applications postmarked after April 15 will not be considered for that tax year unless the agent of the department determines the following conditions are met:

(a) the applicant successfully qualified during the preceding 12 months prior to ~~January 1~~ THE APPLICATION DATE of the current tax year; and

(b) remains as proposed.

(2) The following documents must accompany the application:

(a) letter from the veterans' administration which verifies that the applicant is currently rated 100% disabled or is paid at the 100% disabled rate; and

(b) ~~copy~~ COPIES of the applicant's ~~latest~~ federal or state income tax return FOR THE TAX YEAR IMMEDIATELY PRECEDING THE YEAR OF THE APPLICATION. FOR EXAMPLE, COMPLETE COPIES (INCLUDING ALL SCHEDULES) OF THE APPROPRIATE 2004 TAX YEAR RETURN MUST ACCOMPANY A 2005 APPLICATION FOR THE DISABLED AMERICAN VETERAN APPLICATION WHICH IS DUE BY APRIL 15, 2005.

(3) remains as proposed.

(4) The residence of the disabled veteran or the surviving spouse of a disabled veteran is defined as "that house or dwelling owned by the applicant on ~~January 1~~ THE DATE OF APPLICATION of the tax year for which exemption is sought, which is used by the applicant for more than ~~6~~ six months per year, and which may include a garage whether attached or detached." All other buildings, outbuildings or improvements shall not be exempt.

(5) through (7) remain as proposed.

AUTH: Sec. 15-1-201, MCA

IMP: Sec. 15-6-191 and 15-6-211, MCA

5. Therefore, the department amends ARM 42.19.501 with the amendments listed above and amends 42.18.106, 42.18.107, 42.18.109, 42.18.110, 42.18.112, 42.18.113, 42.18.115, 42.18.116, 42.18.118, 42.18.119, 42.18.121, 42.18.122, 42.18.124, as proposed.

6. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.discoveringmontana.com/revenue, under "for your reference;" "DOR administrative rules;" and "upcoming events and proposed rule changes." The Department strives to make the electronic copy of this Adoption 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. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Don Hoffman
DON HOFFMAN
Acting Director of Revenue

Certified to Secretary of State December 6, 2004

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.20.601, 42.20.620 and 42.20.625 relating to agricultural property taxes	)	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On November 4, 2004, the department published MAR Notice No. 42-2-745 regarding the proposed amendment of the above-stated rules relating to agricultural property taxes at page 2710 of the 2004 Montana Administrative Register, issue no. 21.

2. A public hearing was held on November 29, 2004, to consider the proposed amendment. Oral testimony received at the hearing is summarized as follows along with the response of the department:

<u>COMMENT NO. 1</u>: Senator Jerry Black, Senate District 14; Dwaine Iverson, CPA; and Jay Bodner, Montana Stockgrowers Association all stated that they were in favor of the proposed amendments.

<u>RESPONSE NO. 1</u>: The department appreciates the comments supporting these amendments.

3. After further review of these rules the department found two minor clerical errors that were not originally included in the proposal notice. Therefore, the department further amends ARM 42.20.625 as follows:

<u>42.20.625 CRITERIA FOR AGRICULTURAL LAND VALUATION FOR LAND TOTALING 20 TO 160 ACRES IN SIZE</u> (1) through (13) remain as proposed.

(14) For valuation as agricultural land, the owner of land used as a Christmas tree farm must provide proof that:

(a) all trees are cultivated or under accepted, proven husbandry practices;

(b) all trees are sheared on a regular basis; ~~and~~

(c) the property contains a minimum of 2,000 trees~~.~~<u>;</u> AND

(d) the Christmas tree operation continues to produce at least $1,500 in gross annual income once the initial crop of trees reaches salable maturity.

(15) through (19) remain as proposed.

<u>AUTH</u>: Sec. 15-1-201, MCA

<u>IMP</u>: Sec. 15-6-133, 15-6-134, 15-7-201, and 15-7-202, MCA

4. Therefore, the department amends ARM 42.20.625 with the amendments listed above and amends ARM 42.20.601 and 42.20.620 as proposed.

5. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.discoveringmontana.com/revenue, under "for your reference;" "DOR administrative rules;" and "upcoming events and proposed rule changes." The Department strives to make the electronic copy of this Adoption 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. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Don Hoffman
DON HOFFMAN
Acting Director of Revenue

Certified to Secretary of State December 6, 2004

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 44.6.105 Fees for Filing Documents -- Uniform Commercial Code, 44.5.114 Corporations - Profit and Nonprofit Fees, 44.5.115 Limited Liability Company Fees, and 44.5.121 Miscellaneous Fees, relating to On-line Filing Fees	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On November 4, 2004, the Secretary of State published MAR Notice No. 44-2-127 regarding a notice of public hearing on the above-stated rules at page 2715, 2004 Montana Administrative Register, issue No. 21.

2. The Secretary of State has amended the rules as proposed.

3. No comments or testimony were received.

/s/ Bob Brown
BOB BROWN
Secretary of State

/s/ Janice Doggett
JANICE DOGGETT
Rule Reviewer

Dated this 6th day of December 2004.

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee:

- Department of Agriculture;
- Department of Commerce;
- Department of Labor and Industry;
- Department of Livestock;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

Education and Local Government Interim Committee:

- State Board of Education;
- Board of Public Education;
- Board of Regents of Higher Education; and
- Office of Public Instruction.

Children, Families, Health, and Human Services Interim Committee:

- Department of Public Health and Human Services.

Law and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration, and Veterans' Affairs Interim Committee:

- Department of Administration;
- Department of Military Affairs; and
- Office of the Secretary of State.

Environmental Quality Council:

- Department of Environmental Quality;
- Department of Fish, Wildlife, and Parks; and
- Department of Natural Resources and Conservation.

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is PO Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject	1.	Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.
Statute Number and Department	2.	Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 2004. This table includes those rules adopted during the period September 1, 2004 through December 31, 2004 and any proposed rule action that was pending during the past six-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 2004, this table, and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule, and the page number at which the action is published in the 2003 and 2004 Montana Administrative Registers.

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BOARD APPOINTEES AND VACANCIES

Section 2-15-108, MCA, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of 2-15-108, MCA, is that the Secretary of State publish monthly in the ***Montana Administrative Register*** a list of appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments effective in November, 2004 appear. Vacancies scheduled to appear from January 1, 2005, through March 31, 2005, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of December 6, 2004.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2004

Appointee	Appointed by	Succeeds	Appointment/End Date

2-1-1 Community Coalition (Governor)

Ms. Margarett H. Campbell Poplar	Governor	not listed	11/30/2004 11/30/2006

Qualifications (if required): Montana Wyoming Tribal Leadership Council

Mr. Phil Cooke Helena	Governor	not listed	11/30/2004 11/30/2006

Qualifications (if required): Montana Public Service Commission

Ms. Jean Curtiss Missoula	Governor	not listed	11/30/2004 11/30/2006

Qualifications (if required): County Government

Ms. Sandi Filipowicz Great Falls	Governor	not listed	11/30/2004 11/30/2006

Qualifications (if required): call center

Mr. Wil Huett Great Falls	Governor	not listed	11/30/2004 11/30/2006

Qualifications (if required): Community organization that coordinates disaster relief delivery

Ms. Donetta Klein Helena	Governor	not listed	11/30/2004 11/30/2006

Qualifications (if required): Montana Coalition Against Domestic and Sexual Violence

Ms. Monique Lay Helena	Governor	not listed	11/30/2004 11/30/2006

Qualifications (if required): Montana Department of Military Affairs

Ms. Deb Mattuci Helena	Governor	not listed	11/30/2004 11/30/2006

Qualifications (if required): MHA Representative

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2004

Appointee	Appointed by	Succeeds	Appointment/End Date
2-1-1 Community Coalition (Governor) cont.			
Mr. Tim McCauley Helena	Governor	not listed	11/30/2004 11/30/2006
Qualifications (if required): United Way Organization			
Mr. Jim Morton Missoula	Governor	not listed	11/30/2004 11/30/2006
Qualifications (if required): call center			
Mr. Gary Owen Great Falls	Governor	not listed	11/30/2004 11/30/2006
Qualifications (if required): United Way Organization			
Ms. Deb Pate Conrad	Governor	not listed	11/30/2004 11/30/2006
Qualifications (if required): State or Local Area Agency on Aging			
Ms. Christina Powell Bozeman	Governor	not listed	11/30/2004 11/30/2006
Qualifications (if required): call center			
Mr. Charlie Rehbein Helena	Governor	not listed	11/30/2004 11/30/2006
Qualifications (if required): Department of Public Health and Human Services			
Rep. Trudi Schmidt Great Falls	Governor	not listed	11/30/2004 11/30/2006
Qualifications (if required): legislator			
Mr. Paul Spengler Helena	Governor	not listed	11/30/2004 11/30/2006
Qualifications (if required): local DES coordinator			

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2004

Appointee	Appointed by	Succeeds	Appointment/End Date
2-1-1 Community Coalition (Governor) cont.			
Mr. Tobias Stapleton Billings	Governor	not listed	11/30/2004 11/30/2006
Qualifications (if required): legislator			
Ms. Sherry Stevens Wulf Kalispell	Governor	not listed	11/30/2004 11/30/2006
Qualifications (if required): call center			
Ms. Margene Tower Billings	Governor	not listed	11/30/2004 11/30/2006
Qualifications (if required): Indian Health Service			
9-1-1 Advisory Council (Administration)			
Mr. Jim Anderson Helena	Director	not listed	11/3/2004 11/3/2006
Qualifications (if required): Department of Military Affairs			
Mr. Craig Bender Great Falls	Director	not listed	11/3/2004 11/3/2006
Qualifications (if required): Three Rivers Wireless			
Ms. Becky Berger Helena	Director	not listed	11/3/2004 11/3/2006
Qualifications (if required): Department of Administration			
Mr. Harold Blattie Helena	Director	not listed	11/3/2004 11/3/2006
Qualifications (if required): Montana Association of Counties			
Mr. Jeff Brandt Helena	Director	not listed	11/3/2004 11/3/2006
Qualifications (if required): Department of Administration			

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2004

Appointee	Appointed by	Succeeds	Appointment/End Date

9-1-1 Advisory Council (Administration) cont.

Mr. Richard Brumley Lewistown	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Montana Emergency Medical Services Association

Ms. Kim Burdick Fort Benton	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Association of Public Safety Communications Officials

Mr. Joe Calnan Montana City	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Montana State Volunteer Fire Fighters Association

Mr. Chris Christensen not listed	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Montana Board of Crime Control

Mr. Phil Cooke Helena	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Public Service Commission

Mr. Thom Danenhower Helena	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Department of Public Health and Human Services

Mr. Mike Doto not listed	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Montana State Volunteer Fire Fighters Association

Mr. Leo Dutton not listed	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Montana Sheriff's and Peace Officers Association

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2004

Appointee	Appointed by	Succeeds	Appointment/End Date

9-1-1 Advisory Council (Administration) cont.

Appointee	Appointed by	Succeeds	Appointment/End Date
Mr. Geoff Feiss Helena	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Montana Telecommunications Association

Appointee	Appointed by	Succeeds	Appointment/End Date
Mr. Terry Ferestad Billings	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Western Wireless

Appointee	Appointed by	Succeeds	Appointment/End Date
Ms. Aimee Grmoljez Helena	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Verizon Wireless

Appointee	Appointed by	Succeeds	Appointment/End Date
Ms. Jenny Hansen Helena	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Department of Administration

Appointee	Appointed by	Succeeds	Appointment/End Date
Mr. Don Hollister Kalispell	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Century Tel

Appointee	Appointed by	Succeeds	Appointment/End Date
Mr. Bob Jones Great Falls	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Montana Association of Chiefs of Police

Appointee	Appointed by	Succeeds	Appointment/End Date
Mr. Doug Kaercher Havre	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Montana Association of Counties

Appointee	Appointed by	Succeeds	Appointment/End Date
Mr. Stanley Kaleczyc not listed	Director	not listed	11/3/2004 11/3/2006

Qualifications (if required): Verizon Wireless

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2004

Appointee	Appointed by	Succeeds	Appointment/End Date
9-1-1 Advisory Council (Administration) cont.			
Ms. Lisa Kelly	Director	not listed	11/3/2004
Kalispell			11/3/2006
Qualifications (if required): Century Tel			
Ms. Anne Kindness	Director	not listed	11/3/2004
not listed			11/3/2006
Qualifications (if required): Helena Police Department			
Mr. Vince Kolar	Director	not listed	11/3/2004
not listed			11/3/2006
Qualifications (if required): Association of DES Coordinators			
Mr. Steve Larson	Director	not listed	11/3/2004
Helena			11/3/2006
Qualifications (if required): Montana State Fire Chiefs Association			
Mr. Fred Leistiko	Director	not listed	11/3/2004
Kalispell			11/3/2006
Qualifications (if required): Montana League of Cities and Towns			
Mr. Mark Lerum	Director	not listed	11/3/2004
Helena			11/3/2006
Qualifications (if required): Helena Police Department			
Sheriff Cheryl Liedle	Director	not listed	11/3/2004
Helena			11/3/2006
Qualifications (if required): Montana Sheriff's and Peace Officers Association			
Ms. Bonnie Lorang	Director	not listed	11/3/2004
Helena			11/3/2006
Qualifications (if required): Montana Independent Telecommunications Systems			

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2004

Appointee	Appointed by	Succeeds	Appointment/End Date
9-1-1 Advisory Council (Administration) cont.			
Mr. Dennis Luttrell	Director	not listed	11/3/2004
not listed			11/3/2006
Qualifications (if required): Qwest Communications			
Mr. Phil Maxwell	Director	not listed	11/3/2004
not listed			11/3/2006
Qualifications (if required): Montana Telecommunications Association			
Ms. Anita Moon	Director	not listed	11/3/2004
Helena			11/3/2006
Qualifications (if required): Department of Administration			
Ms. Margaret Morgan	Director	not listed	11/3/2004
Helena			11/3/2006
Qualifications (if required): Western Wireless			
Mr. Kevin Myhre	Director	not listed	11/3/2004
Lewistown			11/3/2006
Qualifications (if required): Montana Association of Chiefs of Police			
Mr. Ernie Peterson	Director	not listed	11/3/2004
not listed			11/3/2006
Qualifications (if required): Three Rivers Wireless			
Ms. Wilma Puich	Director	not listed	11/3/2004
Butte			11/3/2006
Qualifications (if required): Association of DES Coordinators			
Mr. Larry Sheldon	Director	not listed	11/3/2004
Helena			11/3/2006
Qualifications (if required): Qwest Communications			

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2004

Appointee	Appointed by	Succeeds	Appointment/End Date
9-1-1 Advisory Council (Administration) cont.			
Mr. John Spencer	Director	not listed	11/3/2004
not listed			11/3/2006
Qualifications (if required): Montana Highway Patrol			
Mr. Mike Strand	Director	not listed	11/3/2004
Helena			11/3/2006
Qualifications (if required): Montana Independent Telecommunications Systems			
Mr. Tim Thennis	Director	not listed	11/3/2004
not listed			11/3/2006
Qualifications (if required): Department of Military Affairs			
Mr. Chuck Winn	Director	not listed	11/3/2004
Bozeman			11/3/2006
Qualifications (if required): Montana State Fire Chiefs Association			
Board of Outfitters (Labor and Industry)			
Mr. Kelly Flynn	Governor	Billingsley	11/10/2004
Townsend			10/1/2007
Qualifications (if required): hunting and fishing outfitter			
Flathead Basin Commission (Governor)			
Mr. Remington Kohrt	Governor	Tutvedt	11/18/2004
Darby			10/1/2005
Qualifications (if required): public member			
Governor's Advisory Council on Disability (Governor)			
Mr. Robert Bushing	Governor	not listed	11/24/2004
Billings			11/24/2006
Qualifications (if required): public member			

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2004

Appointee	Appointed by	Succeeds	Appointment/End Date
Governor's Advisory Council on Disability (Governor) cont.			
Ms. Anna Creed Great Falls Qualifications (if required): public member	Governor	not listed	11/24/2004 11/24/2006
Ms. Jill Davis Great Falls Qualifications (if required): public member	Governor	not listed	11/24/2004 11/24/2006
Ms. Bernadine Gantert Missoula Qualifications (if required): public member	Governor	not listed	11/24/2004 11/24/2006
Mr. Gene Haire Helena Qualifications (if required): public member	Governor	not listed	11/24/2004 11/24/2006
Ms. Katherine Kountz Helena Qualifications (if required): ex-officio member	Governor	not listed	11/24/2004 11/24/2006
Dr. Margaret J. Osika Warm Springs Qualifications (if required): public member	Governor	not listed	11/24/2004 11/24/2006
Mr. Joseph Todisco Big Timber Qualifications (if required): public member	Governor	not listed	11/24/2004 11/24/2006
Montana Arts Council (Education)			
Ms. Cynthia Andrus Bozeman Qualifications (if required): public member	Governor	Tyers	11/15/2004 2/1/2007

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Aeronautics Board (Transportation)		
Mr. Ken D. Tolliver, Billings	Governor	1/1/2005
Qualifications (if required): representative of the Montana Chamber and an attorney		
Ms. Debra Metz, Big Arm	Governor	1/1/2005
Qualifications (if required): representative of the Association of Montana Aerial Applicators		
Mayor George Warner, Dillon	Governor	1/1/2005
Qualifications (if required): representative of the Montana League of Cities and Towns		
Mr. Lanny Hanson, Glasgow	Governor	1/1/2005
Qualifications (if required): representative of the Montana Airport Management Association		
Mr. Frank Bass, Moore	Governor	1/1/2005
Qualifications (if required): representative of the Montana Pilots Association		
Alternative Livestock Advisory Council (Livestock and Fish, Wildlife, and Parks)		
Ms. Meg Smith, Divide	Governor	1/1/2005
Qualifications (if required): representative of the Board of Livestock		
Mr. John Lane, Cascade	Governor	1/1/2005
Qualifications (if required): representative of the Fish, Wildlife, and Parks Commission		
Appellate Defender Commission (Administration)		
Ms. Randi Hood, Helena	Governor	1/1/2005
Qualifications (if required): attorney/public defender		
Mr. Todd Hillier, Bozeman	Governor	1/1/2005
Qualifications (if required): attorney/public defender		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Board of Architects (Labor and Industry)		
Mr. Eugene Vogl, Billings	Governor	3/27/2005
Qualifications (if required): licensed architect		
Board of Chiropractors (Labor and Industry)		
Dr. Daniel Prideaux, Missoula	Governor	1/1/2005
Qualifications (if required): licensed chiropractor		
Board of Crime Control (Justice)		
Mr. John Flynn, Townsend	Governor	1/1/2005
Qualifications (if required): county attorney		
Attorney Mike McGrath, Helena	Governor	1/1/2005
Qualifications (if required): Attorney General		
Ms. Janet Stevens, Missoula	Governor	1/1/2005
Qualifications (if required): public member		
Ms. Elaine Allestad, Big Timber	Governor	1/1/2005
Qualifications (if required): county commissioner		
Chief Robert Jones, Great Falls	Governor	1/1/2005
Qualifications (if required): representative of police chiefs		
Mr. Jim Oppedahl, Helena	Governor	1/1/2005
Qualifications (if required): public member		
Mr. Bill Slaughter, Helena	Governor	1/1/2005
Qualifications (if required): Director of the Department of Corrections		
Sheriff Clifford Brophy, Columbus	Governor	1/1/2005
Qualifications (if required): Sheriff		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Board of Crime Control (Justice) cont.		
Sen. Mack Cole, Forsyth	Governor	1/1/2005
Qualifications (if required): public member		
Sen. Bob Keenan, Bigfork	Governor	1/1/2005
Qualifications (if required): state senator		
Mr. Robert Brooks, Butte	Governor	1/1/2005
Qualifications (if required): public member		
Mr. William Mercer, Billings	Governor	1/1/2005
Qualifications (if required): ex-officio member		
Mr. Godfrey Saunders, Bozeman	Governor	1/1/2005
Qualifications (if required): educator		
Ms. Margaret (Peg) Shea, Missoula	Governor	1/1/2005
Qualifications (if required): public member		
Board of Dentistry (Commerce)		
Dr. Paul Sims, Butte	Governor	3/29/2005
Qualifications (if required): dentist		
Board of Environmental Review (Environmental Quality)		
Mr. Ward Shanahan, Helena	Governor	1/1/2005
Qualifications (if required): having expertise in local government planning and an attorney		
Mr. Russell Hudson, Libby	Governor	1/1/2005
Qualifications (if required): public member		
Dr. Garon Smith, Missoula	Governor	1/1/2005
Qualifications (if required): scientist		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Board of Environmental Review (Environmental Quality) cont.		
Mr. David Fishbaugh, Billings	Governor	1/1/2005
Qualifications (if required): having expertise in hydrology		
Board of Horse Racing (Livestock)		
Mr. T.J. Graveley, Townsend	Governor	1/20/2005
Qualifications (if required): public member representing District 4		
Board of Housing (Commerce)		
Mr. William H. Oser, Billings	Governor	1/1/2005
Qualifications (if required): public member		
Mr. Robert J. Savage, Sidney	Governor	1/1/2005
Qualifications (if required): public member		
Mr. Thomas Welch, Dillon	Governor	1/1/2005
Qualifications (if required): public member		
Mr. Stephen Redinger, Billings	Governor	1/1/2005
Qualifications (if required): public member		
Board of Investments (Commerce)		
Mr. Dick Anderson, Helena	Governor	1/1/2005
Qualifications (if required): public representative		
Mr. Joel T. Long, Billings	Governor	1/1/2005
Qualifications (if required): public member		
Mr. Tim Ryan, Great Falls	Governor	1/1/2005
Qualifications (if required): representative of the Public Teachers' Retirement Board		
Mr. Jay Klawon, Hamilton	Governor	1/1/2005
Qualifications (if required): representative of the Public Employees' Retirement Board		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Board of Investments (Commerce) cont.		
Mr. Dennis Beams, Kalispell	Governor	1/1/2005
Qualifications (if required): representative of the financial industry		
Board of Labor Appeals (Labor)		
Mr. Joseph E. Thares, Helena	Governor	1/1/2005
Qualifications (if required): public member		
Ms. Carol L. Vega, Butte	Governor	1/1/2005
Qualifications (if required): public member		
Board of Livestock (Livestock)		
Mr. Jerry E. Leep, Amsterdam	Governor	3/1/2005
Qualifications (if required): dairy producer		
Mr. Bob Lee, Judith Gap	Governor	3/1/2005
Qualifications (if required): cattle producer		
Mr. Jeremy Kinross-Wright, Big Timber	Governor	3/1/2005
Qualifications (if required): swine producer		
Board of Milk Control (Livestock)		
Ms. Dixie S. Hertel, Moore	Governor	1/1/2005
Qualifications (if required): public member and a Republican		
Mr. Milton "Swede" Olson, Whitewater	Governor	1/1/2005
Qualifications (if required): public member and a Republican		
Mr. Jesse Russell Gleason, Fairfield	Governor	1/1/2005
Qualifications (if required): public member and a Republican		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Board of Oil and Gas Conservation (Natural Resources and Conservation)		
Mr. Allen C. Kolstad, Chester	Governor	1/1/2005
Qualifications (if required): landowner with mineral rights		
Mr. David Ballard, Billings	Governor	1/1/2005
Qualifications (if required): representative of the oil and gas industry		
Mr. Gary Willis, Helena	Governor	1/1/2005
Qualifications (if required): public member		
Mr. Jerry Kennedy, Shelby	Governor	1/1/2005
Qualifications (if required): representative of the oil and gas industry		
Board of Pardons and Parole (Corrections)		
Ms. Sheryl Hoffarth, Billings	Governor	1/1/2005
Qualifications (if required): auxiliary member with knowledge of Indian culture		
Rep. Matt McCann, Harlem	Governor	1/1/2005
Qualifications (if required): auxiliary member with knowledge of American Indian culture and problems		
Mr. Mark Fournier, Hamilton	Governor	1/1/2005
Qualifications (if required): public member		
Board of Personnel Appeals (Labor and Industry)		
Mr. James P. Reardon, East Helena	Governor	1/1/2005
Qualifications (if required): labor union representative		
Mr. Thomas Schneider, Helena	Governor	1/1/2005
Qualifications (if required): labor union representative		
Mr. Michael O'Neill, Butte	Governor	1/1/2005
Qualifications (if required): management representative		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Board of Public Assistance (Public Health and Human Services)		
Ms. Mary Belcher, Clancy	Governor	1/1/2005
Qualifications (if required): attorney		
Ms. Julie Ann Millam, Helena	Governor	1/1/2005
Qualifications (if required): public member		
Board of Public Education (Education)		
Ms. Diane Fladmo, Glendive	Governor	2/1/2005
Qualifications (if required): Independent residing in District 4		
Board of Regents of Higher Education (Education)		
Mr. Richard Roehm, Bozeman	Governor	2/1/2005
Qualifications (if required): representative of District 2 and an Independent		
Board of Respiratory Care Practitioners (Commerce)		
Ms. Linda Davis, Townsend	Governor	1/1/2005
Qualifications (if required): public member		
Dr. Gregory Paulauskis, Great Falls	Governor	1/1/2005
Qualifications (if required): respiratory care practitioner		
Ms. Shirley Pollard, Stevensville	Governor	1/1/2005
Qualifications (if required): respiratory care practitioner		
Board of Social Work Examiners and Professional Counselors (Commerce)		
Ms. Mary Meis, Conrad	Governor	1/1/2005
Qualifications (if required): social worker		
Mr. Ervin Booth, Roundup	Governor	1/1/2005
Qualifications (if required): professional counselor		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Board of Social Work Examiners and Professional Counselors (Commerce) cont.		
Mr. Patrick Wolberd, Livingston	Governor	1/1/2005
Qualifications (if required): social worker		
Ms. Rashel Jeffrey, Missoula	Governor	1/1/2005
Qualifications (if required): professional counselor		
Coal Board (Commerce)		
Mr. Alan Evans, Roundup	Governor	1/1/2005
Qualifications (if required): representative of District 4 and an impact area		
Mr. Gerald Feda, Glasgow	Governor	1/1/2005
Qualifications (if required): representative of District 3		
Mr. Roger Knapp, Hysham	Governor	1/1/2005
Qualifications (if required): representative of District 4 and an impact area		
Mr. James W. Royan, Missoula	Governor	1/1/2005
Qualifications (if required): representative of District 1		
Commissioner of Political Practices (Political Practices)		
Ms. Linda Vaughey, Helena	Governor	1/1/2005
Qualifications (if required): not listed		
Developmental Disabilities Planning and Advisory Council (Public Health and Human Services)		
Mr. Wallace Melcher, Helena	Governor	1/1/2005
Qualifications (if required): secondary consumer		
Ms. Othelia Schulz, Anaconda	Governor	1/1/2005
Qualifications (if required): representing Region IV		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Developmental Disabilities Planning and Advisory Council (Public Health and Human Services) cont.		
Ms. Paula Holdeman, Plentywood	Governor	1/1/2005
Qualifications (if required): secondary consumer		
Ms. Sonya Standing Rock, Box Elder	Governor	1/1/2005
Qualifications (if required): consumer		
Mr. Edward James Brown, Jr., Harlem	Governor	1/1/2005
Qualifications (if required): consumer		
Ms. Diana Tavary, Helena	Governor	1/1/2005
Qualifications (if required): parent of a consumer		
Ms. P.J. Rismon-Beckley, Kalispell	Governor	1/1/2005
Qualifications (if required): family member of a consumer		
Mr. Len Nopen, Great Falls	Governor	1/1/2005
Qualifications (if required): primary consumer		
Ms. Barbara Olind, Baker	Governor	1/1/2005
Qualifications (if required): parent of a developmentally disabled adult and a secondary consumer		
Ms. Melissa Clark, Great Falls	Governor	1/1/2005
Qualifications (if required): primary consumer		
Fish, Wildlife, and Parks Commission (Fish, Wildlife, and Parks)		
Mr. Dan Walker, Billings	Governor	1/1/2005
Qualifications (if required): representative of District 5		
Mr. Michael E. Murphy, Helena	Governor	1/1/2005
Qualifications (if required): representative of District 1		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Fish, Wildlife, and Parks Commission (Fish, Wildlife, and Parks) cont.		
Mr. John Lane, Cascade	Governor	1/1/2005
Qualifications (if required): representative of District 3		
Mr. Rich Lane, Missoula	Governor	1/1/2005
Qualifications (if required): representative of District 1		
Governor's Wolf Management Advisory Council (Fish, Wildlife, and Parks)		
Dr. Charles E. Buehler, Butte	Governor	2/26/2005
Qualifications (if required): public member		
Mr. Hank Fischer, Missoula	Governor	2/26/2005
Qualifications (if required): public member		
Rep. Chase Hibbard, Helena	Governor	2/26/2005
Qualifications (if required): public member		
Mr. Bruce Tutvedt, Kalispell	Governor	2/26/2005
Qualifications (if required): public member		
Ms. Darlyne Dascher, Fort Peck	Governor	2/26/2005
Qualifications (if required): public member		
Mr. Bruce Malcolm, Emigrant	Governor	2/26/2005
Qualifications (if required): public member		
Dr. Nelson Wert, Townsend	Governor	2/26/2005
Qualifications (if required): public member		
Ms. Robin Hompesch, Bozeman	Governor	2/26/2005
Qualifications (if required): public member		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Governor's Wolf Management Advisory Council (Fish, Wildlife, and Parks) cont.		
Mr. James Cross, Kalispell	Governor	2/26/2005
Qualifications (if required): public member		
Mr. Terry Beaver, Helena	Governor	2/26/2005
Qualifications (if required): public member		
Mr. Jay Kirkpatrick, Billings	Governor	2/26/2005
Qualifications (if required): public member		
Mr. Dan Carney, Browning	Governor	2/26/2005
Qualifications (if required): public member		
Hail Insurance Board (Agriculture)		
Mr. W. Ralph Peck, Helena	Governor	1/1/2005
Qualifications (if required): Director of the Department of Agriculture		
Mr. John Morrison, Helena	Governor	1/1/2005
Qualifications (if required): State Auditor		
Hard Rock Mining Impact Board (Commerce)		
Ms. Betty Aye, Broadus	Governor	1/1/2005
Qualifications (if required): county commissioner from District 4		
Ms. Tammy Johnson, Whitehall	Governor	1/1/2005
Qualifications (if required): industry representative from District 2		
Mr. Craig Rehm, Fort Benton	Governor	1/1/2005
Qualifications (if required): representative of a financial institution and District 3		
Human Rights Commission (Labor & Industry)		
Ms. Evelyn Stevenson, Pablo	Governor	1/1/2005
Qualifications (if required): public member and an attorney		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Human Rights Commission (Labor & Industry) cont.		
Mr. Gary Hindoien, Clancy	Governor	1/1/2005
Qualifications (if required): public member		
Ms. Arleah Shechtman, Kalispell	Governor	1/1/2005
Qualifications (if required): public member		
Judicial Nomination Commission (Justice)		
Rep. Rick Hill, Helena	Governor	1/1/2005
Qualifications (if required): public member		
Martin Luther King, Jr. Commemorative Commission (Office of Community Service)		
Rev. Phillip Caldwell, Great Falls	Governor	1/20/2005
Qualifications (if required): public member		
Mr. Robert Fourstar, Wolf Point	Governor	1/20/2005
Qualifications (if required): public member		
Ms. Cristina Medina, Helena	Governor	1/20/2005
Qualifications (if required): public member		
Ms. Carol Murray, Browning	Governor	1/20/2005
Qualifications (if required): public member		
Mr. Alan Thompson, Helena	Governor	1/20/2005
Qualifications (if required): public member		
Ms. Kathy Day, Great Falls	Governor	1/20/2005
Qualifications (if required): public member		
Ms. Lindley Dupree, Kalispell	Governor	1/20/2005
Qualifications (if required): public member		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Martin Luther King, Jr. Commemorative Commission (Office of Community Service) cont.		
Ms. Gwendolyn Kircher, Billings	Governor	1/20/2005
Qualifications (if required): public member		
Ms. Nancy Knauff, Great Falls	Governor	1/20/2005
Qualifications (if required): public member		
Rev. Marcus Collins, Great Falls	Governor	1/20/2005
Qualifications (if required): public member		
Mr. Benjamin Pease, Lodge Grass	Governor	1/20/2005
Qualifications (if required): public member		
Missouri River Basin Advisory Council (Natural Resources and Conservation)		
Ms. Diane Brandt, Glasgow	Governor	3/4/2005
Qualifications (if required): public member		
Mr. Don Pfau, Lewistown	Governor	3/4/2005
Qualifications (if required): public member		
Mr. Bud Clinch, Helena	Governor	3/4/2005
Qualifications (if required): DNRC Director		
Mr. Jim Rector, Glasgow	Governor	3/4/2005
Qualifications (if required): public member		
Mr. Ron Miller, Glasgow	Governor	3/4/2005
Qualifications (if required): public member		
Mr. Steve Page, Glasgow	Governor	3/4/2005
Qualifications (if required): public member		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Missouri River Basin Advisory Council (Natural Resources and Conservation) cont.		
Mr. John Foster, Lewistown	Governor	3/4/2005
Qualifications (if required): public member		
Mr. Boone A. Whitmer, Wolf Point	Governor	3/4/2005
Qualifications (if required): public member		
Mr. Buzz Mattelin, Brockton	Governor	3/4/2005
Qualifications (if required): public member		
Montana Arts Council (Education)		
Mr. Bill Frazier, Big Timber	Governor	2/1/2005
Qualifications (if required): public member		
Mr. Monte Dolack, Missoula	Governor	2/1/2005
Qualifications (if required): public member		
Ms. Marilyn Olson, Sidney	Governor	2/1/2005
Qualifications (if required): public member		
Ms. Jennifer Earle Seifert, Troy	Governor	2/1/2005
Qualifications (if required): public member		
Ms. Linda Reed, Helena	Governor	2/1/2005
Qualifications (if required): public member		
Ms. Kari Knierim, Glasgow	Governor	2/1/2005
Qualifications (if required): public member		
Montana Committee for the Humanities		
Rep. Arla Jeanne Murray, Miles City	Governor	1/2/2005
Qualifications (if required): public member		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Montana Committee for the Humanities cont.		
Mr. Stuart Knapp, Bozeman	Governor	1/2/2005
Qualifications (if required): public member		
Ms. Julie Cajune, Ronan	Governor	1/2/2005
Qualifications (if required): public member		
Mr. James Driscoll, Butte	Governor	1/2/2005
Qualifications (if required): public member		
Montana Grass Conservation Commission (Natural Resources and Conservation)		
Mr. Bill Loehding, Ekalaka	Governor	1/1/2005
Qualifications (if required): holder of active preference rights within the state grazing district		
Mr. Phil Hill, Mosby	Governor	1/1/2005
Qualifications (if required): holder of active preference rights within the state grazing district		
Montana Health Facility Authority (Commerce)		
Ms. Gayle Carpenter, Helena	Governor	1/1/2005
Qualifications (if required): public member		
Ms. Joyce Asay, Forsyth	Governor	1/1/2005
Qualifications (if required): public member		
Mr. Lee Jockers, Billings	Governor	1/1/2005
Qualifications (if required): public member		
Ms. Kelley Evans, Red Lodge	Governor	1/1/2005
Qualifications (if required): public member		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Montana Vocational Rehabilitation Council (Public Health and Human Services)		
Mr. Don Jones, Helena	Director	1/17/2005
Qualifications (if required): federally mandated Client Assistance Program position		
Mr. Dennis Moore, Billings	Director	3/3/2005
Qualifications (if required): federally mandated parent organization position		
Montana Voluntary Employee Beneficiary Association Advisory Council (Administration)		
Mr. Thomas Schneider, Helena	Director	3/1/2005
Qualifications (if required): none specified		
Ms. Beth McLaughlin, Helena	Director	3/1/2005
Qualifications (if required): none specified		
Mr. Tom Bilodeau, Helena	Director	3/1/2005
Qualifications (if required): none specified		
Ms. Coleen Balzarini, Great Falls	Director	3/1/2005
Qualifications (if required): none specified		
Ms. Sheila Cozzie, Helena	Director	3/1/2005
Qualifications (if required): none specified		
Mr. Glen Leavitt, Helena	Director	3/1/2005
Qualifications (if required): none specified		
Mr. Todd Watkins, Kalispell	Director	3/1/2005
Qualifications (if required): none specified		
Mr. Don Kinman, Helena	Director	3/1/2005
Qualifications (if required): none specified		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
State Compensation Insurance Fund Study Committee (State Compensation Insurance Fund)		
Mr. George Wood, Missoula	Governor	1/1/2005
Qualifications (if required): representative of a plan #1 insurer		
Sen. Thomas Beck, Helena	Governor	1/1/2005
Qualifications (if required): representative of the Governor's Office		
Mr. Jack Morgenstern, Lewistown	Governor	1/1/2005
Qualifications (if required): representative of the State Fund Board and an insured employer of state fund		
Ms. Jacqueline Lenmark, Helena	Governor	1/1/2005
Qualifications (if required): representative of a plan #2 insurer		
State Employee Group Benefits Advisory Council (Administration)		
Sen. Mike Cooney, Helena	Director	1/1/2005
Qualifications (if required): none specified		
Mr. Thomas Schneider, Helena	Director	1/1/2005
Qualifications (if required): none specified		
Mr. Dale Taliaferro, Helena	Director	1/1/2005
Qualifications (if required): none specified		
Ms. Mary Dalton, Helena	Director	1/1/2005
Qualifications (if required): none specified		
Mr. Steve Barry, Helena	Director	1/1/2005
Qualifications (if required): none specified		
Mr. John W. Northey, Helena	Director	1/1/2005
Qualifications (if required): none specified		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
State Employee Group Benefits Advisory Council (Administration) cont.		
Mr. Todd Lovshin, Helena	Director	1/1/2005
Qualifications (if required): none specified		
Mr. Richard Cooley, Helena	Director	1/1/2005
Qualifications (if required): none specified		
Ms. Barbara Smith, Helena	Director	1/1/2005
Qualifications (if required): none specified		
Mr. Monte Brown, Helena	Director	1/1/2005
Qualifications (if required): none specified		
Ms. Amy Carlson, Helena	Director	1/1/2005
Qualifications (if required): none specified		
State Lottery Commission (Commerce)		
Sheriff Clifford Brophy, Columbus	Governor	1/1/2005
Qualifications (if required): law enforcement officer		
State Lottery Commission (Administration)		
Mr. Donald Sterhan, Billings	Governor	1/1/2005
Qualifications (if required): public member		
State Tax Appeal Board (Administration)		
Ms. JereAnn Nelson, Helena	Governor	1/1/2005
Qualifications (if required): public member		
Transportation Commission (Transportation)		
Rep. Shiell W. Anderson, Livingston	Governor	1/1/2005
Qualifications (if required): representative of District 2 and a Republican		

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2005 through MARCH 31, 2005

Board/current position holder	Appointed by	Term end
Transportation Commission (Transportation) cont.		
Mr. Daniel Rice, Great Falls	Governor	1/1/2005
Qualifications (if required): representative of District 3 and an Independent		
Mr. Meredith Reiter, Billings	Governor	1/1/2005
Qualifications (if required): representative of District 5 and a Republican		
Traumatic Brain Injury Advisory Council (Public Health and Human Services)		
Ms. Ruby Clark, Poplar	Governor	1/1/2005
Qualifications (if required): family member of a survivor		
Mr. Reg Gibbs, Billings	Governor	1/1/2005
Qualifications (if required): representative of injury control or prevention programs		