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

In the matter of the amendment of ARM 36.12.101, 36.12.102, 36.12.103, 36.12.115 and the adoption of New Rules I and II regarding water right combined appropriation	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION

To: All Concerned Persons

1. On January 23, 2014, at 10:00 a.m., the Department of Natural Resources and Conservation will hold a public hearing in the Fred Buck Conference Room (bottom floor), Water Resources Building, 1424 Ninth Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than January 13, 2014, to advise us of the nature of the accommodation that you need. Please contact Millie Heffner, Montana Department of Natural Resources and Conservation, P.O. Box 201601, 1424 Ninth Avenue, Helena, MT 59620-1601; telephone (406) 444-0581; fax (406) 444-0533; e-mail mheffner@mt.gov.

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

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

(1) through (12) remain the same.

(13) "Combined appropriation" means an appropriation of water as used under 85-2-306(3)(a), MCA, from the same source aquifer (as defined in (58) below) by two or more groundwater developments ~~, that are physically manifold into the same system~~ for 40 acres or less for or within:

(a) a subdivision as defined in 76-3-103, MCA, where the subdivision application is deemed to contain sufficient information for review by the governing body under 76-3-604(2), MCA, after [the effective date of these rules];

(b) land that is divided under 76-3-201(1)(a) and 76-3-207(1)(b) and (c), MCA, after [the effective date of these rules]; or

(c) a tract of record, as defined in 76-3-103, MCA, in existence on or before [the effective date of these rules]. A tract of record in existence on or before [the effective date of these rules] with 40 acres or less may have a combined appropriation up to 10 acre-feet per year under 85-2-306(3)(a)(iii), MCA; and

(d) if a subdivision under (a), land divided under (b), or a tract of record under (c) is in excess of 40 acres then the water user may have an additional combined

appropriation for every 40 acres not to exceed a volume that is proportional to 40 acres or 0.25 acre feet per year for each acre under 85-2-306(3)(a)(iii), MCA.

(14) through (57) remain the same.

(58) "Same source aquifer" solely as related to "combined appropriation" as defined in (13) means:

(a) unconsolidated sediments throughout the state and underlying basin-fill sediments and/or sedimentary rocks in intermontane valleys, unless the applicant demonstrates that the aquifers are separate and not connected; or

(b) bedrock consisting of all consolidated geologic units not identified in (a) unless the applicant demonstrates that the individual geologic units are separate and not connected; and

(c) aquifers under (a) and (b) are not presumed to be connected into the same source aquifer.

(58) through (79) remain the same but are renumbered (59) through (80).

AUTH: 85-2-113, 85-2-306, MCA
IMP: 85-2-306, MCA

36.12.102 FORMS (1) The following necessary forms for implementation of the act and these rules are available from the Department of Natural Resources and Conservation, P.O. Box 201601, Helena, Montana 59620-1601 and its Water Resources regional offices, or on the World Wide Web at http://dnrc.mt.gov/wrd/default.asp. The department may revise as necessary the following forms to improve the administration of these rules and the applicable water laws:

(a) through (ah) remain the same.

(ai) Form No. 651, "Petition to Modify a Permit or Change Authorization"; ~~and~~

(aj) Form No. 652, "Petition for Stream Depletion Zone~~.~~"; and

(ak) Form No. 653, "Pre-Approval for Notice of Completion."

AUTH: 85-2-113, 85-2-306, MCA
IMP: 85-2-306

36.12.103 FORM AND SPECIAL FEES

(1) remains the same.

(2) The department will assess the following filing fees:

(a) through (z) remain the same.

(aa) $400 for Form No. 651, Petition to Modify a Permit or Change Authorization; ~~and~~

(ab) $750 for Form No. 652, Petition for Stream Depletion Zone~~.~~; and

(ac) $50 for Form No. 653, Pre-Approval for Notice of Completion.

(3) through (4) remain the same

AUTH: 85-2-113, 85-2-306, MCA
IMP: 85-2-306, MCA

36.12.115 WATER USE STANDARDS

(1) remains the same.

(2) The department will use the following standards when reviewing notices or applications for new uses of water:

(a) for domestic use, for one household, 250 gallons per day up to 1.0 acre-foot per year of water for year-round use;

(b) through (6) remain the same.

AUTH: 85-2-113, MCA
IMP: 85-2-302, 85-2-306, MCA

4. The rules as proposed to be adopted provide as follows:

NEW RULE I NOTICE OF COMPLETION (1) A notice of completion is correct and complete pursuant to 85-2-306(3)(b) and (c), MCA, if:

(a) it limits the total combined appropriation to the requirements under ARM 36.12.101(13) and is consistent with a pre-approval, if applicable; and

(b) it contains all the information on Form No. 602.

AUTH: 85-2-306, MCA
IMP: 85-2-306, MCA

NEW RULE II PRE-APPROVAL OF EXEMPT WELLS (1) An applicant may seek pre-approval from the department to determine if a combined appropriation is within the requirements of ARM 36.12.101(13).

(2) When making a determination on a pre-approval the department will use the following standards:

(a) ARM 36.12.115;

(b) Form No. 615; and

(c) for types of water use that are not referenced in (a) and (b), the applicant must provide information to support the amount needed.

(3) The department shall make a determination on a pre-approval that a proposed plan for development is within the requirements of ARM 36.12.101(13) within 20 working days of submission of a correct and complete pre-approval application.

AUTH: 85-2-306, MCA
IMP: 85-2-306, MCA

REASONABLE NECESSITY: By order of the Montana First Judicial District Court, Lewis and Clark County, in CFC et al. v. DNRC, Cause No. BDV-2010-874, DNRC is required to define the term "combined appropriation" in 85-2-306, MCA, because no legislation was passed during the 2013 legislative session that defined the term. The amendments to ARM 36.12.101 and the adoption of New Rules I and II are reasonably necessary because the order requires that the definition be broader than, and not solely limited to: wells or developed springs that are physically manifold or connected together; and, that DNRC consider cumulative or collective impacts as a result of multiple, unconnected wells or developed springs that appropriate water

from a single source aquifer and for a single project. DNRC had also previously found in its public declaratory ruling proceeding conducted pursuant to the Montana Administrative Procedure Act (2-4-308 and 2-4-501, MCA) *Declaratory Ruling*, Petition for Declaratory Ruling and Request to Amend Rule 36.12.101(13), DNRC (2010), that the definition of "combined appropriation" needed to be amended for the reasons set forth in its ruling.

The amendments to ARM 36.12.101 are based on the 40-acre standard under 85-2-306, MCA, for exempt stock pits in order to create a consistent standard for future combined appropriations of exempt wells or developed springs for subdivisions, divisions of land, or wells that are located on the same tract of land. Additionally, DNRC believes the amended ARM 36.12.101(13) embodies and clarifies the single "project or development" concept of the "combined appropriation" definition promulgated by DNRC in 1987, contemporaneous to the addition of the term to statute in 85-2-306, MCA.

The amendments to ARM 36.12.101(58) are reasonably necessary to clarify the definition of "same source aquifer" and to identify which aquifers will be considered connected for the sole purpose of combined appropriations. This amendment is necessary because exempt wells do not go through the same site-specific analysis that other appropriations of water must go through before they are permitted to determine: what sources of water will be depleted; if water is legally available; and, if the new appropriation will have an adverse effect on other appropriators.
The amendments to ARM 36.12.115 are based on the standards for water use provided by the Department of Environmental Quality (DEQ) for an average household in order to create a consistent standard for use between the two departments.

Pursuant to 85-2-113, MCA, DNRC may prescribe fees for public service provided under the Montana Water Use Act. DNRC evaluated processing costs for the new form to determine the fee amount for Form No. 653. The proposed fee is expected to generate $25,000 per year and affect approximately 500 people.

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 in writing to Millie Heffner, Department of Natural Resources and Conservation, P.O. Box 201601, 1424 Ninth Avenue, Helena, MT 59620; fax (406) 444-0533; or e-mail mheffner@mt.gov, and must be received no later than 5:00 p.m. on January 23, 2014.

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

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding conservation districts and resource

development, forestry, oil and gas conservation, trust land management, water resources, or a combination thereof. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Lucy Richards, P.O. Box 201601, 1625 Eleventh Avenue, Helena, MT 59620; fax (406) 444-2684; e-mail lrichards@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

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

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

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment and adoption of the above-referenced rules will significantly and directly impact small businesses.

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

/s/ Candace F. West
Candace F. West
Rule Reviewer

Certified to the Secretary of State December 16, 2013.