

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

In the matter of the amendment of ARM)
36.12.1901, Filing a Change Application) NOTICE OF PUBLIC HEARING
and 36.12.1902, Change Application -) ON PROPOSED AMENDMENT
Historic Use)

To: All Concerned Persons

1. On June 29, 2009, at 1:00 p.m., the Department of Natural Resources and Conservation will hold a public hearing in the Fred Buck Conference Room (first floor), at the Department of Natural Resources and Conservation, Water Resources Division, 1424 Ninth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

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 agency no later than 5:00 p.m. June 8, 2009, to advise the agency of the nature of the accommodation that you need. Please contact Kim Overcast, Department of Natural Resources and Conservation, 1424 Ninth Avenue, Helena, MT 59620, telephone (406) 444-6614; fax (406) 444-0533; e-mail kovercast@mt.gov.

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

36.12.1901 FILING A CHANGE APPLICATION (1) An applicant who desires to change the point of diversion, place of use, purpose of use, or place of storage of a water right must file an application to change a water right (Form No. 606) and applicable addendum; all materials must include, but are not limited to the information required by Title 36, Chapter 12. ~~must be filed when an applicant desires to change the point of diversion, place of use, purpose of use, or place of storage of a water right.~~

(2) An application for a temporary change must meet the same rule requirements as those for a permanent change application.

(3) In addition to the change application rules, a temporary change application for instream flow must submit the information required under 85-2-407, 85-2-408, and 85-2-436, MCA.

~~(2) and (3) remain the same but are renumbered (4) and (5).~~

~~(4) Form no. 606 and applicable addendum must be filled in with the required information.~~

~~(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.~~

~~(6) and (7) remain the same.~~

~~(8) Multiple water rights may be changed on one application if, upon completion of a project, all of the water rights being changed accomplish a single~~

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MAR Notice No. 36-22-134

WATER POLICY INTERIM
COMMITTEE
SEPTEMBER 21, 2009
EXHIBIT 16

~~proposed project; the diversion, place of use, purpose, or storage information will be exactly the same for each changed water right. If not, separate applications must be filed. The applicant shall provide a chart or table of the combined water rights demonstrating how each water right both individually and cumulatively contributes to the project.~~

(9) remains the same.

~~(10) Calculations showing how the historic and proposed flow rate, volume, and capacity were determined must be included in the application materials and the methodology employed must be described.~~

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

(11) The application must contain a narrative explaining the specific details of the requested water right change and why it is being requested.

~~(12) The proposed diverted flow rate and consumed diverted 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.~~~~

(13) through (14)(a) remain the same.

(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; ;

(c) remains the same.

(d) the applicant must provide information to show that the historic flow rate diverted will be adequate, even though the additional stock tanks may be farther farther away from the source of supply.

(15) remains the same.

AUTH: 85-2-112, MCA

IMP: 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-436, MCA

36.12.1902 CHANGE APPLICATION - HISTORIC USE (1) The description of the historic information is related to a date that is dependent on the type of water right being changed. The following dates are applicable for each type of water right:

(a) historic information for a statement of claim must be described as it was used prior to July 1, 1973;

(b) historic information for a provisional permit must be described as it was used at the filing date of the completion notice;

(c) historic information for a certificate of water right must be described as it was used at the filing date of the completion notice; and

(d) historic information for an exempt or nonfiled water right must be described as it was completed prior to July 1, 1973.

~~(2) (4) Final water court 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 an abstract of a water right from the department or the Montana ~~water court~~ Water Court by itself is not sufficient to prove the existence or extent of the historical use.~~

(2) remains the same, but is renumbered (3).

(4) (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.

(5) For an application to change multiple irrigation water rights, the total number of acres for each water right located within the place of use must be identified.

(6) For an application to change water rights that overlap the place of use, an applicant shall include those water rights in the change application or shall explain how each of the water rights has been historically used and how the unchanged water rights will be used if the change authorization were granted. If water will continue to be used at the historic place of use, the applicant shall explain how the continued use will not increase the combined maximum diverted flow rate, the diverted volume, and the historic consumptive volume.

(4) (7) If an An applicant shall provide substantial credible information to corroborate the historic use, including the following of each water right being changed: provides a "best available estimate" to any element or requirement in (5) through (7), 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.

- (a) water right number and the priority date;
- (b) most recent year the water right was used;
- (c) historic point of diversion;
- (d) historic period of diversion;
- (e) historic means of diversion;
- (f) historic diversion schedule and operation pattern;
- (g) means of conveyance;
- (h) historic ditch capacity;
- (i) maximum historic flow rate diverted from each point of diversion and how the amount was determined;

- (j) historic place of use for each purpose;
- (k) maximum number of acres historically irrigated;
- (l) historic period of use for each purpose;
- (m) annual or monthly historic diverted volume and how this amount was determined;

- (n) the annual or monthly historic consumptive volume for each purpose;
- (i) for irrigation, an applicant may choose to use the methodology described in (15); and
- (ii) for irrigation, an applicant who chooses not to use the methodology described in (15), shall provide the factual basis for the historic consumptive volume calculation and why the historic consumptive use is less than or greater than the methodology described in (15);
- (o) the historic efficiency including the diversion, conveyance, and overall system;
- (p) the legal land description of a reservoir;
- (q) the maximum volume in acre-feet of stored water;
- (r) evaporation loss of stored water (evaporation standards can be found in ARM 36.12.116);
- (s) maximum number of times a reservoir was filled during a year; and
- (t) maximum period of time when water was legally collected for storage.
- (8) A narrative must be included in the application materials explaining why the historic operation of the right can be considered reasonable and typical of the purpose for which the historic right was used.
- (9) The following information may help an applicant establish the requirements under (7):
 - (a) aerial photographs depicting irrigated land:
 - (i) 1979, 1997, and 2005 photos showing the irrigated land would be beneficial;
 - (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 (NRCS) information, such as field specific soils information;
 - (g) affidavits from persons with first-hand knowledge of historic use;
 - (h) calculation of historic ditch capacities;
 - (i) description of irrigation equipment, field treatments, means of conveyance, control structures, and other onsite features related to water use;
 - (j) description of water supply availability;
 - (k) log books or diaries of previous irrigators or farm operations, crop yield records, or diversion records; or
 - (l) an evaluation of the seniority of the water right in relation to other users.
- ~~(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 principles. The narrative must contain the following:~~
 - ~~(a) the maximum flow rate diverted from each point of diversion listed on the water right during the period of diversion;~~
 - ~~(b) total volume of water consumed for each water right 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) documentation of the basis of all data used in the analysis, methods of analysis and calculations.~~

~~(6) The applicant shall provide written documentation explaining the historic use and how the information was acquired to substantiate the following elements of each water right proposed to be changed:~~

- ~~(a) point of diversion;~~
- ~~(b) period of diversion;~~
- ~~(c) volume used for each purpose;~~
- ~~(d) period of use for each purpose;~~
- ~~(e) place of use for each purpose;~~
- ~~(f) maximum number of acres historically irrigated;~~
- ~~(g) means of conveyance;~~
- ~~(h) location of reservoir;~~
- ~~(i) maximum volume in acre-feet of water stored;~~
- ~~(j) maximum number of times a reservoir was filled during a year; and~~
- ~~(k) maximum period of time when water was collected for storage.~~

~~(7) A narrative must be included in the application materials explaining the historic operation of the right, including flow rate, volume, period of diversion, period of use, and period of storage are reasonable and typical of the purpose for which the historic right was used.~~

(10) Calculations for each water right showing how the historic flow rate, consumed and diverted volume for each water right, and capacity were determined must be included in the application materials, and the methodology employed must be described.

(11) The annual or monthly historic diverted volume must be based on the appropriator's historic operation of their diversion, irrigation, and harvest schedule throughout the period of diversion and the period of use. If applicable, the historic operation information must include a discussion of the primary diversion from the source and secondary diversion from a ditch or reservoir.

(12) Historic consumptive volume must be based on the acre-feet of water used for the beneficial purpose, such as water transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products that do not return to ground or surface water.

(13) The methodology in (15) may be used to determine the historic consumptive volume for irrigation. The methodology is based on data from the United States Department of Agriculture (USDA) National Agricultural Statistics Service (NASS), and generated using the USDA NRCS Irrigation Water Requirements (IWR) program. If the applicant chooses not to use the methodology, they shall provide evidence showing how the historical consumptive use was calculated and why that amount is less than or greater than the methodology described in (15).

(14) IWR Data for Seasonal Alfalfa Evapotranspiration County Management Factor are shown in Table 1 and may be used to identify the historic consumptive volume. If this table is used to establish the historic consumptive volume, the department will recognize that volume, unless a valid objection is received.

(15) To determine the historic consumptive volume using the table, complete the following steps:

(a) determine which weather station (column B) is the most representative for the place of use (column C). The most representative weather station may not be in the county of the place of use, but must be nearby and about the same elevation and climatic conditions as the irrigated acres. A map showing the weather stations is located on the Internet at: http://dnrc.mt.gov/wrd/water_rts/default.asp;

(b) find the evapotranspiration inches based on whether the historic irrigation is flood, wheeline, handline, or center pivot, to estimate the historic IWR (columns D or E);

(c) identify the county in which the irrigated acres are located to determine the county management factor percentage (column F);

(d) multiply the IWR estimate found in column D or E by the management factor percentage in column F. The result is the number of inches used per irrigated acre;

(e) multiply the number of total acres within the historic place of use by the county adjusted inches used per irrigated acre calculated in (d) above to determine the historic consumptive inches for those acres; and

(f) divide the cumulative historic consumptive inches from (e) by 12 to determine the cumulative historic consumptive acre-feet for the total acres.

Table 1 - Montana County Weather Station IWR Data for Seasonal Alfalfa Evapotranspiration and Montana County Management Factor.

Column A	Column B	Column C	Column D	Column E	Column F
County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 - 1973
Beaverhead	Dillon	5239	17.05	19.78	63.7 %
	Wisdom	6060	6.72	8.82	
	Jackson	6480	7.73	9.83	
	Lakeview	6710	7.52	10.02	
	Lima	6583	12.72	15.23	
Big Horn	Busby	3430	18.96	21.87	55.4 %
	Hardin	2905	26.01	28.88	
	Hysham 25	3100	18.84	21.80	
	Wyola	3750	17.79	20.84	
	Yellowtail Dam	3305	26.12	29.83	
Blaine	Chinook	2420	19.12	22.32	58.7 %
	Harlem	2362	19.99	23.05	
Broadwater	Townsend	3840	17.93	20.77	69.2 %
	Trident	4040	19.07	22.14	
Carbon	Joliet	3776	20.94	24.03	58.3 %
	Red Lodge	5500	14.28	17.44	

Column A	Column B	Column C	Column D	Column E	Column F
County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 - 1973
Carter	Ekalaka	3425	18.38	21.83	38.4 %
	Ridgeway	3320	18.70	21.83	
Cascade	Cascade 20	4600	12.83	15.67	57.3 %
	Cascade 5	3360	16.31	19.56	
	Great Falls	3675	18.21	21.37	
	Neihart	4945	10.73	14.01	
Chouteau	Sun River	3340	16.68	19.59	
	Big Sandy	2700	19.76	23.06	52.5 %
	Fort Benton	2640	20.32	23.51	
	Geraldine	3130	18.55	21.95	
	Iliad	2950	19.89	23.03	
	Loma	2700	21.00	24.14	
Custer	Shonkin	4300	11.64	15.44	
	Miles City	2628	24.89	28.21	54.5 %
	Mizpah	2480	22.14	25.32	
Dawson	Powderville	2800	23.09	26.38	
	Glendive	2076	24.08	27.54	56.8 %
Deer Lodge	No weather station				See appropriate adjacent county
Fallon	Plevna	2780	20.79	24.07	47.6 %
Fergus	Denton	3620	13.87	16.97	48.8 %
	Grass Range	3490	17.16	20.60	
	Lewistown	4167	13.96	17.25	
	Roy	3450	18.23	21.50	
	Winifred	3240	16.18	19.50	
Flathead	Creston	2949	13.49	16.70	87.6 %
	Hungry Horse Dam	3160	13.18	16.95	
	Kalispell	2972	15.21	18.10	
	Olney	3165	11.37	14.31	
	Polebridge	3600	9.36	11.87	
	West Glacier	3154	12.48	15.83	
	Whitefish	3100	14.32	17.55	
	Gallatin	Bozeman Exp Farm	4775	15.41	18.48
Bozeman MT		4913	16.78	20.16	

Column A	Column B	Column C	Column D	Column E	Column F
County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 - 1973
	State				
	Hebgen Dam	6667	9.13	12.05	
Garfield	Cohagen	2710	20.81	23.83	43.4 %
	Jordan	2661	21.91	25.07	
	Mosby	2750	22.76	26.03	
Glacier	Babb	4300	10.70	13.80	59.7 %
	Cut Bank	3855	14.54	17.50	
	Del Bonita	4340	13.10	16.17	
	East Glacier	4810	9.61	12.53	
	St Mary	4560	12.37	15.64	
Golden Valley	Ryegate	4440	16.16	19.09	62.6 %
Granite	Philipsburg Ranger Station	5270	11.83	14.46	86.5 %
Hill	Fort Assinniboine	2613	20.72	23.93	54.1 %
	Guilford	2820	18.00	20.91	
	Havre	2585	19.46	22.35	
	Simpson	2815	18.15	21.00	
Jefferson	Boulder	4904	15.78	18.50	61.0 %
Judith Basin	Moccasin Exp Station	4243	14.51	17.83	49.3 %
	Raynesford	4220	14.54	17.86	
	Stanford	4860	15.06	18.43	
Lake	Bigfork	2910	15.67	19.33	55.0 %
	Polson	2949	18.95	22.10	
	Polson Kerr Dam	2730	19.85	22.95	
	St Ignatius	2940	18.01	21.18	
Lewis & Clark	Augusta	4070	16.06	19.04	60.1 %
	Austin	4790	14.19	17.04	
	Helena	3828	18.82	21.63	
	Holter Dam	3490	22.18	25.34	
	Lincoln Ranger Station	4575	11.93	14.51	
Liberty	Chester	3132	17.79	20.62	54.8 %
	Joplin	3300	17.53	20.29	
	Tiber Dam	2850	21.41	24.29	
Lincoln	Eureka Ranger	2532	19.21	22.20	47.1 %

Column A	Column B	Column C	Column D	Column E	Column F
County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 - 1973
	Station				
	Fortine	3000	14.77	17.70	
	Libby Ranger Station	2096	20.06	22.86	
	Libby	3600	10.29	12.79	
	Troy	1950	18.70	21.78	
Madison	Alder	5800	13.13	15.85	65.2 %
	Ennis	4953	15.86	18.71	
	Glen	5050	16.57	19.09	
	Norris	4750	19.06	22.61	
	Twin Bridges	4777	15.75	18.30	
	Virginia City	5770	14.30	17.17	
McCone	Brockway	2630	19.12	22.14	43.7 %
	Circle	2480	20.55	23.75	
	Fort Peck Power Plant	2070	23.54	26.79	
	Vida	2400	19.93	23.30	
Meagher	Lennepe	5880	10.82	13.55	57.3 %
	Martinsdale	4800	13.83	16.71	
	White Sulphur Spr	5060	15.12	17.92	
Mineral	St Regis Ranger Stn	2680	16.54	19.26	56.1 %
	Superior	2710	20.64	23.57	
Missoula	Lindbergh Lake	4320	13.65	16.48	69.5 %
	Missoula	3420	17.52	20.50	
	Missoula WSO AP	3199	18.23	20.98	
	Potomac	3620	13.18	15.60	
	Seeley Lake Ranger Station	4100	13.85	16.55	
Musselshell	Melstone	2920	22.42	25.83	50.0 %
	Roundup	3386	22.26	25.50	
Park	Cooke City	7460	7.36	10.64	56.9 %
	Gardiner	5275	21.22	23.77	
	Livingston	4870	15.05	18.25	
	Livingston FAA AP	4656	17.11	20.25	
	Wilsall	5840	11.84	14.98	
Petroleum	Flatwillow	3133	20.63	23.78	44.0 %

Column A	Column B	Column C	Column D	Column E	Column F
County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 - 1973
	Billings WSO	3648	23.94	27.06	
	Huntley Exp Station	3034	20.39	23.47	

AUTH: 85-2-112, MCA

IMP: 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-436, MCA

REASONABLE NECESSITY: An applicant and the department must be certain that the historic use of a water right that is being changed is accurately known. If a change authorization is granted that exceeds the historic use of the water right being changed, adverse affect to junior or senior water rights may occur. Often, the individuals who know about the historic use are no longer available; so, there can be difficulty in determining the exact amount of water that was historically used, and how that water right was historically operated. These rules are necessary to assist the public and the department to identify a credible amount of water that may have been historically used on irrigation water rights to facilitate changes in water rights.

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 in writing to Kim Overcast, Department of Natural Resources and Conservation, 1424 Ninth Avenue, Helena, MT 59620; fax (406) 444-5918; or e-mail kovercast@mt.gov, and must be postmarked no later than June 29, 2009.

5. Kim Overcast, Department of Natural Resources and Conservation, has been designated to preside over and conduct the hearing.

6. An electronic copy of this Proposal Notice is available through the department's site on the World Wide Web at <http://www.dnrc.mt.gov>. The department strives to make the electronic copy of this Notice of Public Hearing on 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.

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 sent or delivered to the contact person in (4) above or may be made by completing a request form at any rules hearing held by the department.

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

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

Mary Sexton
MARY SEXTON
Director
Natural Resources and Conservation

Anne Yates
ANNE YATES
Rule Reviewer

Certified to the Secretary of State May 18, 2009.