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To: Water Policy Interim Committee
From: Millie Heffner, Water Rights Bureau Chief, DNRC *MH*
CC: John Tubbs, Director, DNRC
Jan Langel, Administrator, DNRC

Re: General rule notice and "combined appropriation" rule questions

Date: August 21, 2017

During the WPIC meeting on August 1, 2017, the Committee had questions regarding notice of rules and specifically about the DNRC's plans to make rules for exempt wells. Please see the attached draft copy of proposed rules that DNRC is planning to file with the Secretary of State on August 28, 2017 for amendment of ARM 36.12.101, 36.12.105, 36.12.107, 36.12.117, 36.12.121, 36.12.1301, 36.12.1501, 36.12.1702, 36.12.1801 and repeal of 36.12.106. Most of the proposed rule amendments are technical cleanup, and the purpose for each of the amendments is set forth in the reasonable necessity statement following each proposed amendment. There are three amendments that we would like to highlight for the committee: (1) amendment to the definition of "combined appropriation" in ARM 36.12.101(13); (2) amendment to ARM 36.12.105 to implement HB 429 (2017); and (3) amendment to ARM 36.12.1301 to make the DNRC's water right permit and change application process consistent with the Montana Sage Grouse Conservation Strategy. Each of these amendments is discussed below.

ARM 36.12.101(13). The purpose of the amendment to the definition of "combined appropriation" in ARM 36.12.101(13) is to make the department's rule consistent with the controlling judicial decisions. On September 13, 2016, the Montana Supreme Court, in *Clark Fork Coalition v. Tubbs*, 2016 MT 229, 384 Mont. 503, 380 P.3d 771, upheld the *Order on Petition for Judicial Review*, Cause No. BDV-2010-874, Montana First Judicial District Court, Lewis and Clark County (Oct. 17, 2014) invalidating the DNRC's 1993 administrative rule defining "combined appropriation" because the rule was inconsistent with the Montana Water Use Act. The Court also upheld the district court's order to reinstate the DNRC's previous rule defining "combined appropriation," originally adopted in 1987. See *Clark Fork Coalition*, 2016 MT at ¶¶ 27-28, 40-41, 46, 384 Mont. at 515, 519-520, 380

P.3d at 780, 782-783.¹ The reinstated rule is identical to the 1987 rule and is set forth in the proposed rules as:

"Combined appropriation" means an appropriation of water from the same source aquifer by two or more groundwater developments, the purpose of which, in the department's judgment, could have been accomplished by a single appropriation. Groundwater developments need not be physically connected nor have a common distribution system to be considered a "combined appropriation." They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the "combined appropriation."

The 1987 rule has been effective since Oct. 17, 2014, when the district court invalidated the 1993 rule and ordered reinstatement of the 1987 rule. With the Montana Supreme Court's decision to uphold the district court's order reinstating the 1987 rule, the 1987 definition remains in force as a matter of law. The amendment to the definition of "combined appropriation" provides notice to the public of the effective administrative definition. The amendment also ensures that the information provided by the Secretary of State is consistent – and not in conflict – with existing law. The reinstatement of the 1987 rule is the only amendment proposed regarding combined appropriation or exceptions to the water right permitting requirements under § 85-2-306, MCA.

It is also important to note that, while the district court ordered DNRC to conduct further rulemaking on exempt wells, the Montana Supreme Court reversed the district court's order on that issue. See *Clark Fork Coalition*, 2016 MT at ¶¶ 45- 46, 384 Mont. at 520, 380 P.3d at 783 (finding that the authority to adopt rules "includes, whether, in the judgment of the DNRC, a rule other than the reinstated 1987 rule should be implemented.").²

Please see attached (1) the district court's *Order on Petition for Judicial Review* of October 17, 2014; (2) the Montana Supreme Court's Opinion of September 13, 2016; and (3) DNRC's "Combined Appropriation Guidance" (updated Feb. 16, 2016) for more information.

¹ The district court's *Order on Petition for Judicial Review* (Oct. 17, 2014) that invalidated the 1993 rule and reinstated the 1987 rule is attached. See page 13. The Montana Supreme Court's Opinion (Sept. 13, 2016) upholding the district court's order is also attached. See page 17 (paragraphs 27-28), page 23 (paragraphs 40-41), and page 24 (paragraph 46).

² See page 24 (paragraphs 45-46) of the attached Montana Supreme Court Opinion.

ARM 36.12.105. The purpose of the amendment to ARM 36.12.105 is to implement HB 429 (2017) sponsored by Representative Cuff. This bill extends the water right permit exemptions for temporary emergency appropriations found in § 85-2-113, MCA, to include an exemption for “emergency fire training and emergency fire-related operations.” Representative Cuff was sent notification today as required by § 2-4-302, MCA. This is the only part of the rules that will be proposed for amendment for implementation of HB 429.

ARM 36.12.1301. The purpose of the amendment to ARM 36.12.1301 is to facilitate consultation between an applicant and the Montana Sage Grouse Conservation Program prior to submitting an application for a water right permit or a water right change authorization. As set forth in the reasonable necessity statement, the purpose of the proposed amendment is to facilitate pre-application consultation between the applicant and the Montana Sage Grouse Habitat Conservation Program, if the project is located within sage grouse habitat, in order for the department to ensure its decisions on permit and change applications are consistent with the Conservation Strategy. Pursuant to Executive Orders 12-2015 and 21-2015, regarding the implementation of the Montana Sage Grouse Conservation Strategy, all new land uses or activities subject to state agency review, approval, or authorization must be consistent with the Conservation Strategy. Because the department must adhere to statutory timelines that are triggered with the submittal and acceptance of an application, it is appropriate for an applicant to consult with the Program prior to submitting an application. Consistency with Executive Orders 12-2015 and 21-2015 is not part of the department’s review criteria for applications. However, unless the applicant demonstrates consistency with the Executive Orders, the department cannot accept the application for processing.

The remainder of the rules that will be proposed for amendment is technical clean up described fully in the reasonable necessity section for each section of rule being amended. Below is a tentative schedule for the rule making process. The schedule may be subject to change.

August 28, 2017	Proposal notice filed by DNRC with the Secretary of State's Office
September 8, 2017	Proposal notice published by Secretary of State's Office
October 6, 2017	Hearing
October 6, 2017	End of comment period
November 24, 2017	Adoption notice published by Secretary of State's Office
November 25, 2017	Rules effective