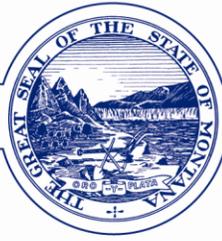


# RESERVED WATER RIGHTS COMPACT COMMISSION



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## **Montana Proposal for** **New Permit and Change Process in the** **Flathead Reservation Unitary Administration and** **Management Ordinance**

January 7, 2011

The following language is intended to substitute for the New Permit and Change process set forth in Parts 2 and 3 of Chapter II of the November 3, 2008 Draft Unitary Administration and Management Ordinance (“Draft Ordinance”), and in Chapter III, Objections and Hearings. The full text of the 11.3.08 draft ordinance is at:

[http://www.cskt.org/tr/docs/nrd\\_unitaryadmin-mgmtordinance110308.pdf](http://www.cskt.org/tr/docs/nrd_unitaryadmin-mgmtordinance110308.pdf). This proposed new permit and change process has been developed by the Montana Department of Natural Resources and Conservation (“DNRC”), in consultation with the Montana Reserved Water Rights Compact Commission (“RWRCC”). It reflects lessons learned by the DNRC in its 30+ years of experience implementing the new permit and change process delineated by the Montana Water Use Act.

The proposed language is styled as an independent Part of the Draft Ordinance. There are provisions in Chapter II, however, that are outside the scope of what is being proposed here. (See, *e.g.*, Section 2-2-101 of the Draft Ordinance). The following is not intended to suggest that such provisions should be stricken from the Draft Ordinance. Rather, the intent is that the approach proposed here can be integrated into a revised draft Ordinance that moves us closer to our goal of promulgating a set of rules that can be adopted into Tribal and State law to govern the operation of the Water Management Board currently being contemplated in our negotiations.

Please note that there are a set of forms (Exhibits A, B and C) that go with this proposed language, as well as a flow chart visually depicting how the process being described here is to work. The forms are a critical component of this proposal, as they are geared to the on-the-ground implementation of the approach being described here. References in brackets in the document below to “implements boxes...” refers to boxes on the attached flow chart.

## Chapter II

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“Board” refers to Water Management Board, defined at 1-1-104(44).

“Engineer” refers to Water Engineer, defined at 1-1-104(42)

“Staff” refers to staff of the Engineer (not yet a defined term).

### PART 2. PERMIT AND CHANGE APPLICATION PROCESS

**2-2-101. Water Permits and Change Authorizations on Flathead Reservation.** [Implements part of Box 2 (similar to § 85-2-302, MCA.)]

Except as provided for at \_\_\_\_ (for any exception, e.g., domestic wells), after enactment of the Flathead Reservation Unitary Water Code, a person within the exterior boundaries of the Flathead Reservation may not appropriate ground or surface water for new beneficial use, or change an existing water right, or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a ground or surface water permit, or change authorization, from the Water Management Board (Board).

**2-2-102. Burden of Proof for Ground or Surface Water Permits and Change Authorizations.** [Implements Box 2]

1. Applicants for a ground or surface water permit, or for a change authorization, within the exterior boundaries of the Flathead Reservation must prove by a preponderance of the evidence:

- a) for a ground or surface water permit, that unappropriated water exists; or,
- b) for a change authorization, that no harm to other water rights will occur.

2. The Board, Engineer, or Staff may modify or condition any ground or surface water permit, or change authorization, to assure that:

- a) for a ground or surface water permit, prior appropriators will not be harmed; and
- b) for a change authorization, other appropriators will not be harmed;
- c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

d) except in the case of instream flows, the applicant has the possessory interest or the written consent of the person with possessory interest in the property where the water is to be put to beneficial use;

e) the water quality of an appropriator will not be harmed;

f) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to [§ 75-5-301(1), MCA, or analogous provision of Tribal law, as applicable];

g) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with [Title 75, chapter 5, part 4, MCA, or analogous provision of Tribal law, as applicable] will not be harmed.

**2-2-103. Pre-Application Meeting with Office of the Engineer.** [Implements Box 1]

Prior to applying to the Board for a ground or surface water permit, or change authorization, within the exterior boundaries of the Flathead Reservation, applicants may meet informally with Staff regarding the application process and information requirements.

**2-2-104. Application to Board.** [Implements Boxes 3, 4, 5]

1. An applicant for a ground or surface water permit, or change authorization, must:
  - a) pay the appropriate application fee in the amount set by the Board;
  - b) fill out completely the:
    - (i) “Flathead Reservation Water Permit Application” (Exhibit A); or
    - (ii) “Flathead Reservation Application to Change a Water Right” (Exhibit C); and
    - (iii) All applicable addenda (Exhibit B).
  - c) attach to each application the required map; and
  - d) sign, date, and notarize or otherwise swear under appropriate oath to the accuracy of the contents of each application.
2. Upon the day of the receipt of an application from an applicant for a ground or surface water permit, or change authorization, the Board must stamp it received.
3. For a ground or surface water permit, the priority date of the application is the date the application is stamped received.
4. After receiving and date stamping an application for a ground or surface water permit, or a change authorization, the Board shall forward the application to the Engineer.
5. Form \_\_\_ (Exhibit A), Form \_\_\_ (Exhibit B), and Form \_\_\_ (Exhibit C) may, upon recommendation by the Engineer, be modified by a unanimous vote of the Board.

**2-2-105. Engineer’s Office Adequate to Process Review.** [Implements Box 6]

1. Within 30 days of receipt of a forwarded application for a ground or surface water permit, or change authorization, from the Board, Staff shall review the application and make a determination whether the application is adequate to process.

An application is adequate to process if it:

- a) clearly identifies the proposed project; and
  - b) contains the information required by the following forms:
    - (i) Form No. \_\_\_, “Flathead Reservation Water Permit Application” (Exhibit A), including for ground water applications “Addendum B - Flathead Reservation Ground Water Minimum Aquifer Testing Requirements.” (Exhibit B)
    - (ii) Form No. \_\_\_, “Flathead Reservation Application to Change a Water Right” (Exhibit C).
2. Staff may waive aquifer testing requirements if sufficient hydrogeologic information already exists on the source and in the location of the proposed development.
  3. An application determined to be adequate to process shall be posted on the Engineer’s website within 10 working days of the determination of adequacy.

**2-2-106. Not Adequate to Process Determination.** [Implements 7, 7A, 7B, 7C, 8].

1. If Staff determines an application for a ground water or surface water permit, or a change authorization, is not adequate to process, it shall send a letter to the applicant notifying the applicant of defects in its application.

2. After notice of application defects, an applicant has 90 days from the date of mailing of the notice of inadequacy to make the application adequate to process. A ground or surface water permit application timely made adequate to process retains its priority as of the date of the application. A change authorization retains the priority date of the water right for which the change authorization is sought.
3. Upon submittal of the information by the applicant to correct deficiencies, the Staff must review an application and make a determination within 30 days whether it is adequate to process.
4. An application not timely made adequate to process is automatically terminated as a matter of law.

**2-2-107. Engineer's Office Analysis and Recommended Decision.** [Implements Box 9].

1. Prior to the expiration of the time periods set forth in 2-2-105(1), 2-2-106(2) or (3), or 2-2-108(2), Staff may meet informally with an applicant to discuss application materials. The results of such meetings shall be documented by a summary memo prepared by the Staff. An applicant may also submit a memo documenting the meeting, which becomes part of the application file. An application for a permit for ground or surface water, or a change authorization, may be amended at this time. Amendments to an application will be reviewed to determine whether they are so substantial that they amount to a new application.
2. The office of the Engineer shall analyze an application determined to be adequate using tools or techniques that may include:
  - a) independent resources compiled by Staff (WRS and field notes, aerials, decrees, stream gauging, records, water right records);
  - b) water use records (water measurement, ranch logs, etc.) submitted by the applicant;
  - c) field inspection by Staff, if necessary;
  - d) hydrologic or geohydrologic evaluation completed by Staff. Model results, if any, shall be documented.
3. Physical availability shall be determined by Staff.
4. Staff, using information from the application as well as their own compilation of independent resources and analysis, shall draft a recommended decision with findings of fact and conclusions of law determining:
  - a) for a ground or surface water permit, unappropriated water exists, and the need for, and amount of, any required mitigation necessary to prevent harm to prior water rights;
  - b) for a change authorization, whether harm to other water rights will occur.
5. If the recommended decision is to grant the application, a summary of the application and the recommended decision shall be publicly noticed by [either Board or Engineer] once via a legal notice in a local newspaper of general circulation and posted by the Board on its website for a period not less than 30 days from the date the recommendation is issued. A summary of the application and the recommended decision shall also be distributed electronically to individuals or entities who have registered with the Board to receive electronic notice. *[as there are other ways to structure identifying who gets delivery of electronic notice, this language is best viewed as a placeholder – the legal and technical details of what constitutes adequate notice need to be refined further]*
6. Amendments to applications are not allowed after the issuance of a recommended decision on that application, except as provided in subsection 2-2-108(2).

**2-2-108. Process if Mitigation Required.** [Implements Box 9A].

1. If a recommended decision by Staff determines the necessity and amount of mitigation water for an application, the applicant may:
  - (a) withdraw the application;
  - (b) appeal the determination to the Engineer pursuant to Section 2-2-109 of this Ordinance; or
  - (c) prepare a mitigation plan.
2. If the application chooses to submit a mitigation plan, the timeframes for processing that application are stayed until a mitigation proposal is received from the applicant. The mitigation plan must include either:
  - (a) an application for authorization to change another water right so as to provide for the required mitigation water; or
  - (b) amendments detailing mitigation water that comes from other than a change authorization, e.g., contract water.
3. The processing time resumes upon the Engineer's receipt of a timely and complete amendment to an application, or a timely filed change authorization application
4. Applicants agreeing with the recommendation that mitigation is necessary will have 180 days to submit a mitigation proposal necessary to complete the permit application.

**2-2-109. Process if Recommended Decision is to Mitigate or to Deny.** [Implements Box 10, 11, 12A, 12B.]

1. If the recommended decision is to deny an application, or grant with conditions, or require mitigation, the applicant may appeal to the Engineer and request a hearing by filing a notice of appeal (Form \_\_) within 30 days of issuance of the recommended decision. The notice of appeal must specify exceptions designating those parts of the recommended decision claimed to be in error. Within 60 days from the filing of the notice of appeal, or any extended period of time granted by the Engineer, the applicant may submit additional factual evidence and legal argument in support of the application.
2. The applicant bears the burden of demonstrating by a preponderance of the evidence to the Engineer, whether a hearing is held or not, that the recommended decision is in error.
3. If the applicant requests a hearing before the Engineer, a hearing shall be held within 90 days of the filing of the notice of appeal. The hearing shall be recorded electronically and an official record maintained. All evidence that, in the opinion of the Engineer, possesses probative value shall be admitted, including hearsay, if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. Rules of privilege recognized by law shall be given effect. Evidence which is irrelevant, immaterial, or unduly repetitious may be excluded.
4. A decision by the Engineer to reverse, modify, or affirm the recommended decision shall be made in writing within 60 days after the later of:
  - a) the timely filing of exceptions or additional evidence or legal support; or
  - b) the completion of the hearing.
5. If the Engineer reverses the recommended decision, and determines that the application should be granted, the application shall be publicly noticed pursuant to the notice provisions of 2-2-107(5) and processed according to 2-2-110.
6. If the Engineer affirms the recommended decision, resulting in the denial of an application, or the granting of an application with conditions, the applicant may:

- (a) withdraw the application (without filing fee refund);
- (b) present a mitigation plan, if required under Section 2-2-108 of this Ordinance; or
- (c) appeal to the Board and obtain review of the Engineer's decision.

**2-2-110. Notice and Hearing on Recommended Decision to Grant.** [Implements 10A].

1. Any person alleging that they will suffer harm from the grant of an application for a ground or surface water permit, or a change authorization, may file an objection to a recommended decision to grant an application. Objections that do not substantively describe the alleged harm from the grant of a permit or change authorization are not valid and will be rejected.

2. Discovery prior to hearing will be as provided by the Board, and may commence following the receipt of valid objections.

3. The Engineer may hold the hearing on the objections, or designate a Staff member from the office of the Engineer other than the Staff who prepared the recommended decision, to hold the hearing.

4. The person or persons who are charged with the duty of rendering a decision or to make findings of fact and conclusions of law in a case, after issuance of notice of hearing, may not communicate with any party or a party's representative in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate.

5. The hearing shall be recorded electronically and an official record maintained.

6. All evidence that, in the opinion of the Engineer, possesses probative value shall be admitted, including hearsay, if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. Rules of privilege recognized by law shall be given effect. Evidence which is irrelevant, immaterial, or unduly repetitious may be excluded.

7. The burden of proof is on the applicant to prove the applicable criteria of 2-2-102 1 (a) or (b) by a preponderance of evidence.

8. A written decision by the Engineer or a Staff member designated by the Engineer shall be rendered within 60 days of the hearing, disseminated to the parties, and posted on the Engineer's website within 10 days of its issuance. If the person who conducted the hearing becomes unavailable to the office of the Engineer, a recommended decision may be prepared by a person who has read the record only if the demeanor of witnesses is considered immaterial by all parties.

9. If a hearing is held by a Staff member, parties to the decision shall have 30 days of the date of decision to file exceptions to the decision with, and additionally request oral argument before, the Engineer.

10. The Engineer's final decision may reject or modify the conclusions of law and interpretation of any applicable administrative rules in the recommended decision but may not reject or modify the findings of fact unless the Engineer first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

A written decision by the Engineer, with additional findings of fact and conclusions of law, if necessary, shall thereafter be issued:

- a) within 60 days after the exceptions are filed if no oral argument is requested; or
- b) within 60 days after oral argument is held.

9. Any party dissatisfied with the final decision of the Engineer may appeal to the Board and obtain review of the Engineer's decision. A notice of appeal to the Board (Form \_\_) must be received by the Board within 30 days of the Engineer's decision.

**2-2-111. Appeal to the Board.** [Implements Box 13, 14, 14A]

1. A preliminary, procedural, or intermediate ruling from the Engineer is immediately reviewable if review of the final recommended decision would not provide an adequate remedy.

2. A party may not raise any question not raised before the Engineer or Staff unless it is shown to the satisfaction of the Board that there was good cause for failure to raise the question before the Engineer or Staff.

3. Appeal to the Board of decisions of the Engineer shall be confined to the record. If, before the date set for hearing the appeal, application is made to the Board for leave to present additional evidence and it is shown to the satisfaction of the Board that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the Engineer or Staff, the Board may order that the additional evidence be taken before the Engineer or Staff upon conditions determined by the Board. The Engineer or Staff may modify their findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the Board.

4. If the appellant requests an oral argument, the Board must hold oral argument on the appeal. If the applicant does not request an oral argument, the Board may, in its discretion, order oral argument or may resolve the appeal without one.

5. (1) The review by the Board must be confined to the record. In cases of alleged irregularities in procedure before the Engineer or Staff not shown in the record, proof of the irregularities may be taken by the Board. The Board, upon request, shall hear oral argument and receive written briefs.

(2) The Board may not substitute its judgment for that of the Engineer or Staff as to the weight of the evidence on questions of fact. The Board may affirm the decision of the Engineer or Staff or remand the case for further proceedings. The Board may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the Engineer or Staff findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the authority of the Engineer or Staff;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(b) findings of fact, upon issues essential to the decision, were not made although requested.

**2-2-112. Appeal to Court of Competent Jurisdiction.** [Implements Box 15].

An aggrieved party may obtain review of a final decision of the Board by filing an appeal within 30 days of the final decision to a court of competent jurisdiction.

**Additional Sections that may need to be developed:**

**2.2.113. Wetlands.**

**2.2.114. Replacement wells and redundant wells.**

**2.2.115. Additional matters for inclusion? [MEPA or analogous process?]**

**2.2.116. Specific process for a change to instream flow & a form?**

**2.2.117. Exception for domestic wells.**

**2.2.118. Streamlined process for development of new uses from supplemental water.**

Additional matters to consider: Ability of Water Engineer to recommend or propose adoption of rules and forms and procedures (including hearing notice, hearing rules, discovery, etc.) for implementation of the Unitary Water Code; ability of Water Engineer (and Board) to issue subpoenas; ability to issue, deny condition permits and changes, hold hearings, and designate staff to do the same (similar powers now given to the Board at 1-2-109).