

Flathead Reservation Water Management Board Meeting Minutes

July 21, 2022 from 3:30-5:30 PM

In-person: Flathead Reservation Water Management Board Office
400 Main Street Southwest, Ronan, MT 59864

Virtual at Zoom Link: <https://bit.ly/FRWMB-Mtg-July21>

Board Members Present: Roger Noble, Kenneth Pitt, Georgia Smies, Clayton Matt, and at item 2.3.2 Teresa Wall-McDonald joined meeting

1. Call to Order (Board Chair)

- 1.1. Opening Prayer
- 1.2. Attendance
- 1.3. Safety procedures and Covid-19 protocols
- 1.4. Announce meeting recording & minutes on DNRC & CSKT websites
- 1.5. Clarify public comment periods for agenda and non-agenda items

2. Board Business (Board Chair)

2.1. Adopt agenda

Motion by K. Pitt to adopt agenda as modified (removing 2.4.4.1)

Second by G. Smies

Vote result: Approved (4 to 0)

2.2. Approve minutes for July 7, 2022

Motion by G. Smies to approve July 7, 2022 minutes

Second by K. Pitt

Vote result: Approved (4 to 0)

2.3. Review of complete domestic allowance applications

2.3.1. Application recommendations for authorization (Board-Anna Butterfield)

2.3.2. Board Action on domestic allowance applications

- A. Butterfield: Staff recommends 27 applications for authorization. None of these 27 applications need further discussion.
- T. Wall McDonald joined meeting.

Motion by G. Smies to authorize the following 27 applications: MT Reacquisition Company LLC, Schiele, Bolen, Brovont, Miller, Judge, Thingelstad, Tullis, Legare, Guillory, Hoffner, Elliott, Koppelman, Grady, Dutter (North), Dutter (South), Polson Stone and Tile/PST2, Black Hills SD LLC, Larson, Wetherell, J Johnson, Heidlebaugh, Fernandez, Kinast, Dougherty-McMichael/Miller, Day, and Wieder.

Key: Underline = Action item

Normal = Discussion, comment, and/or update

Second by K. Pitt

Vote result: Approved (5 to 0)

2.3.3. Applications in need of discussion (DNRC-Ethan Mace)

2.3.3.1. Timing of putting water to use

- E. Mace: An applicant drilled well on 6-14-2021. The water was not put to use. Applicant filed request for a domestic allowance. The drilling date precedes the effective date of the compact. It was drilled at a time when they would have needed to register their use with state when they put water to use. But they couldn't register the use at the time, because they hadn't put water to use at that time. They also were not eligible under Compact's registration process either to register. The well log corroborates the drilling date on application. We checked the aerial to corroborate use and it appears water has not put to use. What would board like to do?
- Clayton: Are there questions from the board?
- Ken: It was drilled before the effective date? They have not put water to use?
- Ethan: Yes, they drilled before the effective date. They have not put the water to use.
- Georgia: IT seems like they have tried to comply with law.
- Roger: Their intent is in line with the purpose of permitting.
- Teresa: I don't have questions. I am concerned about how we handle these applications in need of discussion from a global perspective.
- Clayton: We don't want to open a door that shouldn't be open, but they seem like they are intending to comply.

Motion by K. Pitt to authorize Kack based on the specific circumstances of the application.

Second by G. Smies

T. Wall-McDonald abstained from voting

Vote result: Approved (4 to 0)

2.3.3.2. Water use standards

- E. Mace: We see a need for the board to establish water use standards. E. Mace described DNRC's water use standards. These include the number of cattle and the maximum acre foot for livestock. Showed the DNRC's water use standards. I am not proposing that you adopt these standards. I just want to show you one way of establishing them.
- Clayton: Is there a specific application that needs water use standards to review?
- Ethan: There is one with a particularly large number of bison proposed with the domestic allowance. We want the applicant to clarify how much of the year the bison would use the water.
- Clayton: We need to make sure the board is clear about its role and authority on these types of things. This specific one deserves some individual focused discussion. We need to get some technical input on how to adopt in these types in the future. We will look forward to a future discussion.

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2.3.3.3. Request to void authorized Part A and submit new Part A & transfer fee to another application

- E. Mace: Application was authorized by the Board. When the applicant learned how much a well costs, they decided they wanted to do a shared well with a neighbor. We have something authorized as an individual domestic allowance. We would like guidance from the board on how to proceed. We could void the application and transfer the fee over to the new application. We would have to re-evaluate the new application. We would ask for written statement from the applicant requesting the application to be voided. I don't know if it justifies a new application fee.
- A. Butterfield: Can we withdraw an application that has been authorized?
- Board looked at how the fee is described in the application.
- K. Pitt: The fee is supposed to cover the work.
- E. Mace: We would have to re-do some of the work. But we have not had to look at form B for this authorization.
- G. Smies: We need a process for withdrawing an application and maybe including a small fee for the additional work. My guess is this will not be the first instance where this occurs
- R. Noble: Staff has processed the original application, so I don't think the fee should be refundable. If staff hadn't processed the application then it could be refundable. I think it should come in with a new application fee. Keep it simple. Processed or not. Submit a new application.
- K. Pitt: Do we have a form to fill out to withdraw an application?
- E. Mace: There is not withdrawal form. We could make one, or we could ask the applicant to send a signed letter requesting a withdrawal.
- K. Pitt: A letter would suffice for me for now for a withdrawal.
- G. Smies: There could be someone who wants to withdraw all together, and we would need a mechanism for that as well. We need a procedure for these types of things.
- K. Pitt: If we don't allow to an applicant withdraw, the authorization will be out there.
- C. Matt: If they don't complete the process, it terminates.
- E. Mace: They have authorization now but not a water right.
- R. Noble: They have one year to drill and if not its terminated. Either way staff has put time into this. We have incurred a cost. They should have checked on drilling costs before submitting an application.
- C. Matt: Ken you are suggesting documentation is needed? In this instance we need to provide guidance.
- K. Pitt: I concur with Roger
- T. Wall-McDonald: I agree with Roger. If work has been done on our side, we have incurred a cost. I am not in favor of setting up a refund process.

Motion by R. Noble to deny the transfer of a fee.

Second by T. Wall-McDonald

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- M. Schlichting: Raised a point of order. You have provided guidance without taking a formal motion in the past. I don't want to confuse things and have the board do a formal motion in one instance and not in another. If your guidance is going to be by consensus of the board, you don't need a formal motion. The board has not had a motion on this type of guidance in the past.

Motion withdrawn by R. Noble.

Second withdrawn by T. Wall McDonald.

- R. Noble: I recommend that this type of item be addressed in a procedure.

~~2.3.3.4. Request to transfer fee to another application~~

~~2.3.3.5. Amendment to authorized Part A application~~

2.3.3.6. Withdraw request/refund request

- E. Mace: This applicant submitted application with a filing fee. While working on application we realized that only half of the possessory interest was represented on the application. Applicant informed us that there will be a delay in deed being cleaned up while they address their life circumstances. They wrote us a letter asking us not to pursue authorization and asked the board to refund their application fee. In this situation, the difference is you have not approved this application. It similar but in an earlier stage in the application process. Staff does not have authorization to refund at this point. They are not asking to transfer the fee to another application. This application was received from out of state and they did not contact office before office deposited fee. Anna opened mail and deposited check in a timely manner.
- C. Matt: How much work went into application review?
- A. Butterfield: I had thoroughly reviewed the application to identify defects and emailed and called the applicant. It was a moderate amount of work. I created maps but those are quick to create.
- K. Pitt: I think Roger's rational applies here.
- G. Smies: I feel like it's important when someone enters into an application process they do their due diligence. There is responsibility incumbent upon the applicant that they are ready to proceed so we don't have these situations.
- The Board agreed by consensus not to refund the application fee, because staff worked on the application.
- C. Matt: Is there any legal review of these applications in need of discussion that the technical team presents? I recommend that if we have these case-by-case applications come through, we should have legal review. As these unique ones are brought to us, I would like your legal eyes on them even there is a policy issue you would like to raise, Melissa.
- Board agreed by consensus that they would like legal review on the applications in need of discussion.
- M. Schlichting: I don't think you need a motion to give staff guidance. You do need a motion to apply that guidance to a specific application.

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2.3.3.7. Possible Board action on applications discussed

2.4. Water Rights Database access and enhancements (DNRC-Pelah Hoyt)

2.4.1.1. Board letter requesting access to database

- P. Hoyt: The Compact and Ordinance require water rights on the Flathead Reservation to be recorded in the DNRC managed water rights Database. DNRC needs to make changes to the database so that it can record Flathead Reservation specific water rights. DNRC is requesting a letter from the Board formally requesting access to the database and agreeing to make staff available to participate in the database development process.
- C. Matt: I asked Melissa if she looked at this. Is the staff recommendation?
- P. Hoyt: Yes.
- A. Butterfield: At the last meeting we discussed me helping with database development on the days I am not in the office
- C. Matt: Once we start keep us posted and let us know if we need additional expertise.
- A. Butterfield: I have experience working on the development of the new database from my work at DNRC

Motion by K. Pitt to authorized Clayton to sign letter to DNRC requesting database access and making Board staff available for database development.

Second by G. Smies

Vote result: Approved (5 to 0)

2.5. Tribal existing water use registration update (CSKT-Mary Price & Christina Courville)

- M. Price: I am going to talk about a letter you have in your packet and want to provide some guidance and background about letter. The Compact provides for a tribal water right registration process. The Board is required to transfer a report to DNRC documenting tribal water right registrations. This intersects with the provision to use the DNRC managed database to record water uses on the reservation including tribal water right registrations. The Board and DNRC must agree on the database format and the board must cause all water rights to be entered into the database.
- M. Price: This is for all tribal existing uses. There is a tribal technical team compiling and preparing the registrations that we will file with the Board on behalf of them. We haven't discussed with allottees yet and we are not sure if we will file or if BIA will file on behalf of allottees. Christina Courville is managing tribal water rights office and it is assisting tribal members in filling out forms and providing that info. The reason that letter was written is we anticipate that there will be wells constructed by the SK Housing Authority. We are building a database of those wells. We are looking at 1,200-1,500 wells primarily for domestic uses, and also some stockwater uses and tribal community water uses. There is also stockwater use on about 200 stock ponds. There are also wells on tribal range units for stock uses. We are talking about a significant number of registrations. The ordinance lays out the process of what info is required. The tribal legal department is using the a format from the claims the Tribes filed in 2015. We worked with DNRC to develop the format for those 2015 claims. We see this process

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being similar in terms of an end product. We don't want to get too far ahead of the board in creating the report that the board would transfer to the DNRC.

- M. Price: We would submit these registrations in batches. For example, we would batch all the wells together. We would submit the spreadsheet and GIS layers together for stockwater uses. This is to give you a sense of the scale of this. We need to have verification from DNRC of what the data format would be. When we did the 2015 filings, we got data load sheets from DNRC with code table for elements of the water rights. We want to confirm with DNRC if anything has changed since 2015. It's a critical path item. There's five years allowed for this process and the tribes have a desire to complete it as soon as possible. We have a meeting scheduled with Dave Coey at DNRC to discuss on August 10 to confirm the format of the forms. We worked with him previously. We appreciate that. Perhaps a board member would like to attend. We don't want to get ahead of the board. We want to make sure we all have a common understanding of where we are headed. We would find it helpful if a board member or subcommittee would attend.
- C. Matt: Would we develop answers to those questions in the meeting?
- M. Price: The questions in the letter were directed towards DNRC. For example, how place of use is described. Those are more technical questions.
- C. Matt: Are there questions from the board?
- C. Matt: It would be good for board or staff to participate.
- A. Butterfield: I can participate, but my time here is winding up.
- M. Price: We could also report back to the board. It's going to be very technically focused. Has anything changed with your code table or data load spreadsheets. We understand the board has worked with DNRC in creating a spreadsheet for new appropriations. There are all these spreadsheets that are being created for the board and we want to make sure we are giving the board information in a format that works for uploading into the database. Right now, the tribal teams wants our questions answered, so we make sure we have the right fields and are gathering the right information.
- A. Butterfield: We have our own spreadsheets that we are entering domestic allowance info into that came from Dave Coey.
- C. Courville: One of our big tasks is to identify the 1660 that tribal housing has drilled. We are confirming the location of these. Some were drilled in the 60s. We also need the tribes water rights.
- C. Matt: I see what is happening. For continuity, it would be good to have board or staff participating.
- G. Smies: Thank you for your work. It sounds like a huge effort.
- C. Matt: I ask the board to keep something in mind.

2.6. Office of the Engineer Operations

2.6.1. Operations & staffing update through August 12, 2022 (Board-Anna Butterfield)

- A. Butterfield: My orientation for law school starts on August 15th and law school starts the next week. My last full week in office will end on August 12th.
- C. Matt: We knew this was coming and will be looking more to Seth and Ethan. Anna will you be available part time?

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- A. Butterfield: I don't know. I would like to put in a maximum of 10 hours a week once I know more about my schedule.

2.6.2. Processing applications & staffing office after August 12, 2022 (Board-Anna Butterfield)

- C. Matt: Will Seth and Ethan be able to handle applications?
- E. Mace: We are encouraging the Board to hire new staff. I know Seth struggles to get in here with his other many assignments. My availability is also uncertain. We encourage the Board to keep eyes on staffing in office.
- C. Matt: What are options for administrative duties?
- M. Schlichting: If we don't have someone here when Anna leaves, the board will need to consider limiting the number of days the office is open. The availability to help people who need help with applications is going to be severely limited.
- C. Matt: We need to get on with interviews and hiring people.

2.6.3. Standing subcommittee meeting times (DNRC-Pelah Hoyt)

- P. Hoyt: Recommend the board set standing subcommittee meeting times in order to make more progress on pressing Office of the Engineer needs.

2.6.4. Water Engineer/Manager recruitment update (Teresa Wall-McDonald)

- T. Wall-McDonald: The subcommittee met. We received an additional application. We would like to communicate that received the application and we want to proceed with the original board action with interviewing the three other identified applicants. A poll was taken for board member availability. We need to determine if we will interview candidates back to back or do more than one applicant interview per day.
- C. Matt: Let's confirm dates to interview: July 25, 26, 27th. There was not a time all five could attend. I picked the ones with the most votes.
- R. Noble: I recommend we use similar process we used for fifth board member. Schedule an hour with a 15-minute break and do them back to back.
- The Board agreed to interview candidates July 27th with the 28th as a backup.

2.6.5. Legal Services update (Ken Pitt, Roger Noble, CSKT-Melissa Schlichting)

- M. Schlichting: The subcommittee met and developed list of additional questions that we want to ask three of the four proposals. We sent those questions to those three. When we get answers we will make recommendations. Additional questions had to do with experience in administrative law, specific examples of their water law experience, any potential conflicts of interest, and general questions. We talked about 2 types of legal service. One for bylaws, policies, procedures and board governance versus someone who might be more versed in administrative litigation and water law. Is there a single firm that could offer everything we need or do we need more than one law firm on retainer.

2.6.6. Admin Assistant update & application review (Board-Anna Butterfield)

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- A. Butterfield: We have five applications. I did a quick review, and we have a decent pool of applicants. I didn't see a lot of water rights experience, but I think they can gain that on the job.
- Ken Pitt, Georgia Smies, Pelah Hoyt, and Anna Butterfield agreed to serve on a subcommittee to make recommendations to the board for this position.

2.6.7. Hiring business manager & water conservation specialist (DNRC-Arne Wick)

- A. Wick: I prepared draft position descriptions and shared them with Anna and Melissa. I want to stress that budget had two water conservation specialists. Getting those folks on board would be tremendous to develop your operational capacity.

2.6.8. Zoom recommendation: Webinar for \$790 annually (DNRC-Pelah Hoyt)

- P. Hoyt: The state-tribal technical team recommends that the board purchase a zoom package that includes the option to host both webinars and meetings. The state uses webinars to host these public board meetings. Webinars lets the host promote board members and technical staff to panelist positions so they can present documents and be seen on the screen. The host can also allow members of the public to speak during public comment periods.

Motion G. Smies to approve webinar and meeting Zoom plan

Second by K. Pitt

Vote result: Approved (5 to 0)

2.6.9. Lake & Flathead records access requests for \$700 annually (Board-Anna Butterfield)

- A. Butterfield: In consultation with the technical team, I recommend subscribing to the Lake and Flathead County online records systems for up to \$700 annually. We need access to these records to check possessory interest in land. Accessing them online is more efficient than going to Lake and Flathead County records offices to review. Missoula and Sanders County's make their records available online for free.

Motion by R. Noble to authorize up to \$700 annually for a subscription to access Lake and Flathead County records online.

Second by T. Wall-McDonald

Vote result: Approved (5 to 0)

2.6.10. Grand opening recommendation (DNRC-Pelah Hoyt)

- P. Hoyt: The technical team recommends postponing the grand opening until the office has more staff and is more equipped to invite the public to a grand opening.
- C. Matt: That makes sense.
- T. Wall-McDonald: It makes sense to delay.

2.6.11. Public Comment on operations items

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2.6.12. Board Action on operations items

2.7. Brief overview of scope of state-tribal technical assistance to Board & priorities (DNRC-Arne Wick)

2.7.1. Office of Engineer operations, administrative assistance to Board, database enhancements, pre-review of suspended registrations, pre-review of 180-day registrations, interim process, DEQ subdivision process, tribal water rights registration, CSKT's work on irrigation project and other implementation duties, annual budget development, and unfiled pre-Effective Date existing uses.

- A. Wick: I wanted to reflect on what has been done and look strategically at staffing and other items that are coming. Technical staff has spent a significant amount of time on in support of the board and getting the office functional. There are also database enhancements that need to be completed. The Compact and Ordinance call for water rights to be recorded in the state water rights database. The exiting database will need significant changes. This process is starting in August. The pre-review of suspended registrations also needs to be completed. This is a DNRC commitment to prereview registrations for suspended and other registrations. Ethan presented on these registrations on March 3rd. I wanted to flag for board that with the assistance we have been providing to support the board and office functionality, we have made little progress on these commitments. When board is staffed up, we will be able to get back to working on pre-review of registrations. We will have an update in the near future on the registrations. In closing, with Anna leaving full time work soon, I want to encourage the board to get staffed up as soon as possible.

2.8. Discussion on procedures development (Compact, Article IV.1.5.a)

2.8.1. Adopting governing bylaws with process for approving procedures and forms (CSKT-Melissa Schlichting)

- M. Schlichting: At the last meeting we had some discussion about the need to have written policies and procedures and the board's authority in this regard. The actual authority for the board to promulgating procedures is in the Ordinance. Melissa read relevant section of the Ordinance. Once you have legal representation, you can create bylaws. The bylaws will be your governing document and will describe the process the Board will go through to adopt procedures and conduct meetings.
- C. Matt: That helps to understand.

2.8.2. Tracking document of case-by-case discussions (Board-Anna Butterfield)

- A. Butterfield: I created a tracking document based on guidance from board meetings about applications in need of discussion. I am updating that after each meeting with the Board's guidance from that meeting.
- C. Matt: Please email that out to the board when you update it.

2.9. DEQ Subdivision Application flowchart proposal (DNRC-Pelah Hoyt)

- P. Hoyt: Described a process for addressing the administrative gap in water right predetermination requirements for DEQ subdivision review and showed the draft flowchart. This process would only be available for applicants seeking new individual or shared domestic allowances. In this process, regional DNRC office would complete a review of existing water rights and document that in an

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email to the applicant. The applicant could apply for a domestic allowance from the board. If the applicant got a domestic allowance authorization from the board they could submit the authorization letter and the DNRC water right review email to DEQ to meet the water right predetermination requirements. DNRC and CSKT technical staff and Roger Noble met with DEQ staff to review this proposal. DEQ said it would meet their requirements. DEQ will let DNRC know if they think they need an MOU with the Board for this process.

- C. Matt: In concept this makes sense. Hopefully its meets the needs of the public. Will this come back to the Board for finalizing?
- Pelah: Yes.
- R. Noble: Melissa and I sat in on this discussion. It seems like we are making headway. I don't think we need an MOU since this fits our existing process and we are not agreeing to a new processes. DNRC doing review of state-based water rights is a low impact on the board's staff.
- Clayton: Is DNRC asking to transfer the review of existing water rights to Board staff when the office is staff up?
- P. Hoyt: Yes

3. Other Updates

3.1. Board member updates

- R. Noble: Rob and I met with the Flathead Lakers. We presented information on the Board and heard about some of the misinformation going around. Their membership may have questions.
- C. Matt: I was invited in October to address Montana Water Law Conference. I encourage board members and key staff to be there. I asked Melissa to work up a one- or two-page outline with key features of ordinance. Previous presentations will help. I will share it with the board beforehand.

4. Next steps

4.1. Set next meetings and location

- 4.1.1. August 4, 2022 (virtually) and August 11, 2022 (in person)

4.2. Choose meeting topics

- 4.2.1. Annual budget presentation/discussion (DNRC-Arne Wick & CSKT-Melissa Schlichting)
- 4.2.2. Suspended and "180 day" Registrations update (DNRC-Arne Wick)

5. Public Comment

- Brad Forman: I have been trying to subdivide two acres for my daughter. This has been going on for a year. DEQ will not approve it, because we need to share a well. So that will require some action on the board's part. She can't get financing, because we can't get the subdivision approved. When will there be a way forward on this? I own the well on the rest of the acreage. I have a water right on the well.
- C. Matt: I encourage you to meet with staff and Ethan about this and consider our previous discussion on the DEQ subdivision process.
- E. Mace: I can offer additional information. The issue Mr. Forman is facing is he has an existing well hooked up to a house. He wants to hook his daughter's house up to an existing well. We don't have

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a process at this time for applying for a domestic allowance for a new use on an existing use. He could drill on a brand new well. But there isn't an option for filing on an existing well. What he has is a modest use and adding another house looks, at a cursory level, like it would fit within the two - acre feet limit. The interim process is only for a new wells.

- C. Matt: Do you have a recommendation?
- E. Mace: I recommend getting the office staffed up and get expanded procedures for these types of situations. This would require reconfiguring an existing point of diversion. They could withdraw their existing use and then apply for a new domestic allowance that is shared. Technical staff can only take this conversation so far without Board staff and procedures.
- C. Matt: Please review this issue within the existing rules and come back with a recommendation.

6. End meeting (Board Chair)

- Adjourn meeting at 5:51pm.

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