

**BEFORE THE PHILLIPS CONSERVATION DISTRICT
BOARD OF ADJUSTMENT**

IN THE MATTER OF American Prairie Reserve’s Petition for Variance from Phillips Conservation District Ordinance 2016-1	PROCEDURAL RULES, SCHEDULING ORDER, AND NOTICE OF HEARING
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The Board of Supervisors (the “Supervisors”) of the Phillips Conservation District (the “District”) adopted Ordinance 2016-1, “An Ordinance for the Protection of Soil and Water from all Bison/Buffalo Grazing in Phillips Conservation District” (the “Ordinance”).

On October 28, 2016, Petitioner American Prairie Reserve (“APR”) submitted its Management and Conservation Plan and Petition for Variance from sections 7(1)(b) and 7(1)(e) of the Ordinance (the “Petition”).

Pursuant to Mont. Code Ann. § 76-15-721, a Board of Adjustment (the “Board”) has been convened by the State of Montana Department of Natural Resources and Conservation (the “Department”) to decide APR’s Petition. The Board consists of Mr. Dale Krause, Mr. Jay Bodner, and Mr. Dave Hinman.¹

The Board serves until it reaches a final decision on the Petition. A member of the Board may be removed by the Department, on notice and hearing, only for neglect of duty or malfeasance in office. Any hearing to remove a member of the Board must be conducted jointly by the Department and Supervisors of the District. Vacancies in the Board shall be filled in the same manner as original appointments.

Pursuant to Mont. Code Ann. § 76-15-722, the Board must adopt rules to govern its procedures. On April 10, 2019, at its duly scheduled and noticed meeting, the Board adopted the

¹ On February 3, 2017, the Department appointed Krause, Bodner, and Sierra Stoneberg-Holt to the Board. By letter dated February 22, 2017, APR notified the Department of its concerns that Stoneberg-Holt previously exhibited bias against APR and its mission. On March 23, 2017, Stoneberg-Holt voluntarily resigned from the Board. On May 1, 2018, the Department appointed Dave Hinman to the Board. By letter dated July 23, 2018, APR notified the Department of its concerns with Hinman’s appointment to the Board. The Department responded by letter dated September 21, 2018 that it had investigated and found no evidence of bias on the part of Hinman.

following Procedural Rules, Scheduling Order, and Notice of Hearing (the “Order”). This Order includes procedural rules that are purposely designed to meet the requirements of Mont. Code Ann. Title 2, Chapter 4, Part 6 (relating to the contested case provisions of the Montana Administrative Procedure Act (“MAPA”)) and any specific requirements in Mont. Code Ann. §§ 76-15-721 through 76-15-725 (relating to the Board’s authority for hearing a petition for variance).

In the interest of creating a comprehensive record and delivering due process to all parties, the Board will interpret its rules to afford all parties and potential intervenors maximal notice and opportunity to be heard.

All documents to be filed with the Board and/or the Hearing Examiner must be sent by mail to the Department’s staff attorney who has been assigned to assist the Board and Hearing Examiner with its process during this proceeding at the following:

Barbara Chillcott, Attorney
Montana Department of Natural Resources and Conservation
1539 Eleventh Avenue
PO Box 201601
Helena, MT 59601
barbara.chillcott@mt.gov

All documents presented for filing must conform to the requirements of Rule 1 of the Montana Uniform District Court Rules. For purposes of determining compliance with filing deadlines, filing shall be deemed to be complete upon mailing.²

All documents filed with the Board must be served simultaneously on all parties by mail. The parties may agree to also provide courtesy service by email, if desired. Parties must file a notice of appearance indicating their preferred physical service addresses. All documents presented for filing with the Board must include a certificate of service.

I. PRESIDING OFFICER

Pursuant to Mont. Code Ann. § 76-15-722, the Board must elect a presiding officer from among its members. Meetings of the Board must be held at the call of the presiding officer and at other times that the Board may determine. Any two members of the Board constitute a quorum. The presiding officer or in the presiding officer's absence another member of the Board that the presiding officer may designate to serve as acting presiding officer may administer oaths

² Available at https://courts.mt.gov/portals/189/dcourt/dc_rules/uniform.pdf.

and compel the attendance of witnesses.

At its March 20, 2019 meeting, the Board elected Mr. Jay Bodner as its presiding officer.

II. PARTIES

As Petitioner, APR is a party to this proceeding.

Pursuant to Mont. Code Ann. § 76-15-724, the Supervisors of the District and the Department are entitled to appear and be heard at the hearing. At the Board's April 10, 2019 meeting, the Department notified the Board that it does not intend to appear and be heard at the hearing. The Supervisors of the District notified the Board that they intend to appear and be heard at the hearing. Accordingly, the Board shall recognize the Supervisors of the District as a party to this proceeding.

Any intervenor who properly intervenes in accordance with Mont. Code Ann. § 76-15-724 and this Order, as set forth below in Section IV, shall be considered a party to this proceeding.

III. APPOINTMENT OF HEARING EXAMINER

Pursuant to Mont. Code Ann. § 2-4-611, the Board is entitled to appoint a hearing examiner to conduct a contested case hearing on APR's variance petition. To aid in the efficient conduct of the proceedings, protect the rights and interests of all parties, and ensure preparation of a comprehensive record, the Board at its March 20, 2019 meeting elected to appoint a hearing examiner. The Board, with assistance from the Department, shall timely appoint a hearing examiner consistent with the requirements of Mont. Code Ann. § 2-4-611, who will be responsible for the tasks outlined in this order and such other tasks as the Board may direct to aid in the fair and efficient conduct of the proceedings.

IV. INTERVENTION

Pursuant to Mont. Code Ann. § 76-15-724, "a qualified elector within the district who objects to the authorizing of the variance prayed for may intervene and become a party to the proceedings. A party to the hearing before the board may appear in person, by agent, or by attorney." All legal entities seeking intervention, including but not limited to corporations, limited liability companies, trusts, partnerships, and not for profit associations must be represented by an attorney licensed to practice law in the state of Montana throughout the proceedings. At its March 20, 2019 meeting, the Board determined that a legal entity may qualify as a qualified elector for the purposes of this proceeding if that entity has a principal or

officer who is a qualified elector within the district. The Board also determined that both objectors and supports of the proposed variance may be granted intervention.

Intervention is effective upon approval by the Board. The notice of intervention must: (1) demonstrate the proposed intervenor is a qualified elector within the district, (2) summarize the proposed intervenor's objection to or support of the variance prayed for by APR in its Petition, (3) summarize the information and evidence the proposed intervenor would intend to present at the hearing in this matter, and (4) be signed by the proposed intervenor under penalty of perjury. Proposed intervenors must submit this information on the form attached to this Order as Exhibit A. A proposed intervenor shall file its notice of intervention with the Hearing Examiner, the Board, the Supervisors of the District, and APR.

In the interest of efficiency, the Board may consolidate issues and/or parties.

The Board shall prepare a *Notice of Intervention Deadline* and serve it on the Supervisors of the District, APR, and the Department. The Board shall also publish the *Notice of Intervention Deadline* in a newspaper of general circulation within the District.

The deadline for filing of a notice of intervention in this proceeding shall be May 24, 2019. The Board sets this deadline in order to protect the interests of all parties to the proceeding. APR and the District shall have an opportunity to object to intervention by those who file a notice of intervention by this deadline. Any objections shall be filed by no later than June 12, 2019. The Hearing Examiner shall timely consider and rule on any objections to intervention.

The Board recognizes that late intervention may unjustly prejudice the parties and imperil the integrity of the record. A party seeking late intervention shall file a petition to intervene complying with all of the requirements for timely intervention discussed above and also explaining: (1) how its position cannot be adequately represented by another party, including any intervenors; (2) whether late intervention would unreasonably delay the proceeding or unreasonably prejudice another party; and (3) good cause for not having timely filed to intervene. APR shall be afforded an opportunity to object to any such petition and late intervention will become effective only upon approval of the Hearing Examiner.

The Board encourages potential intervenors to file notices of intervention as soon as possible. The Board reserves the right to limit a late intervenor's rights to discovery or

prehearing requests if, due to the intervenor's unjustified delay in intervening, honoring those rights would be overly burdensome or unjust to other parties.

Parties granted intervention by the Board must appear and present testimony and any other evidence in person and be subject to cross-examination. Written comments will not be accepted by the Board as a substitute for in-person presentation of testimony and any other evidence.

Authority: Mont. Code Ann. § 76-15-724.

V. NOTICE OF HEARING

At 9 a.m. on November 12, 2019, in Malta, Montana, a hearing will be held on APR's Petition. The hearing may continue from day to day as necessary. The Department will make reasonable accommodations for persons with disabilities who wish to participate in this hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department no later than October 11, 2019, to advise of the nature of the accommodation that is needed. Please contact **Laurie Zeller, Chief, Conservation Districts Bureau, DNRC, PO Box 201601, Helena, MT 59620; lzeller@mt.gov; 406-444-6669.**

This hearing is held under the authority of the MAPA contested case provisions (Mont. Code Ann. §§ 2-4-601 through 2-4-631). APR requests a variance from sections 7(1)(b) and 7(1)(e) of the Ordinance on the ground that APR would face "great practical difficulties and unnecessary hardships" in complying with these provisions and can satisfy the provisions' purpose through reasonable alternative measures. Petition at 1. Further, APR states, "a variance would not be contrary to the public interest and would be such that the spirit of Ordinance 2016-1 is observed, the public health, safety, and welfare is secured, and substantial justice is done." *Id.* at 2-3.

All parties to this proceeding are entitled to attend the hearing and respond and present evidence and arguments only on the issues involved in this action. A party to the hearing may appear in person, by agent, or by attorney. Any party has a right to be represented by counsel at the hearing. A party appearing as a legal entity must be represented by counsel.

If the parties desire to waive formal proceedings pursuant to Mont. Code Ann. § 2-4-603, the parties must jointly notify the Board and the Hearing Examiner in writing by June 24, 2019. Formal proceedings may be waived only after the deadline for intervention has passed and all parties to this proceeding notify the Board and the Hearing Examiner in writing of their desire to

waive formal proceedings. Late intervenors shall not have the right to insist upon formal proceedings if formal proceedings have been waived.

All meetings of the Board, and any hearings and conferences convened in this matter by the Hearing Examiner, shall be open to the public. The Board shall keep a full and accurate record of all proceedings, of all documents filed with it, and of all orders entered, which must be filed with the Department, who will maintain the record on behalf of the Board. All documents filed with the Board are a public record.

Authority: Mont. Code Ann. §§ 2-4-601, 76-15-722; Mont. Admin. R. 1.3.212

VI. SCHEDULE

The Board adopts the following procedural schedule for this proceeding:

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| May 20, 2019: | Deadline for production of administrative record. |
| May 24, 2019: | Deadline for proposed intervenors to file a notice of intervention. |
| June 12, 2019 | Deadline for APR or the District to object to proposed intervenors. |
| June 17, 2019: | Deadline for disclosure of APR's lay witness(es). |
| June 19, 2019: | Hearing Examiner rules on any objections to intervention and notifies intervenors of decision on intervention. |
| June 24, 2019: | Deadline for disclosure of lay witness(es) of respondents (District Supervisors, Department, and any intervenors). |
| July 24, 2019: | Deadline for depositions of lay witnesses. |
| July 31, 2019: | Deadline for disclosure of APR's expert witness(es) and service of expert report(s). |
| Aug. 7, 2019: | Deadline for disclosure of expert witness(es) of respondents and service of expert report(s) to rebut APR's expert witness(es). |
| Sep. 6, 2019: | Deadline for depositions of expert witnesses. |
| Sep. 13, 2019: | Deadline for disclosure of exhibits that each party intends to introduce at hearing. |
| September 20, 2019: | Deadline for submission of prehearing motions. Response briefs and reply briefs on motions must be filed in accordance with the time periods set forth in section VII below, unless a |

modification of applicable deadlines is requested by one or more parties in advance and approved by the Board or Hearing Examiner.

- Nov. 1, 2019:** Deadline for submission of prehearing memorandum.
- Nov. 6, 2019 (time TBD):** Prehearing telephone conference.
- Nov. 12, 2019, 9:00 AM:** Hearing before the Board/Hearing Examiner on APR's Petition to be held at location to be determined.
- Dec. 20, 2019:** Deadline for submission of parties' post-hearing briefs.

VII. DISCOVERY

Discovery is addressed in the Joint Discovery Plan agreed to by APR and the Conservation District, which is attached to this Order as Exhibit B and shall govern the scope and deadlines for discovery in this proceeding.

If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by Board or Hearing Examiner, the refusal to obey the order may be enforced as provided in Mont. Admin. R. 1.3.230.

The Board, through its presiding officer, or the Hearing Examiner may require the furnishing of information, attendance of witnesses, and production of evidence through subpoena and subpoena duces tecum. The Board, through its presiding officer, or the Hearing Examiner may petition a district court to compel compliance with a subpoena or the giving of testimony.

Subpoenas must be issued and served pursuant to the Montana Rules of Civil Procedure. Except as otherwise provided by law, costs associated with the subpoena must be paid by the party who requested it.

Authority: Mont. Code Ann. § 2-4-602; ARM 1.3.217, 1.3.230

VIII. PREHEARING MOTIONS, CONFERENCES, AND MEMORANDA

The Board or Hearing Examiner may, in its discretion, schedule a prehearing conference at any time prior to the hearing. The Board or Hearing Examiner may require the presence of any party at any prehearing conference set by the Board.

Prehearing motions must be served on all parties, including intervenors, existing at the time of filing. Responding parties must file and serve response briefs within fourteen (14) calendar days of service of the motion. If the movant wishes to reply to a response brief, the

movant must file and serve its reply brief within fourteen (14) calendar days of service of the response brief. Upon the request of a party, the Board or Hearing Examiner may allow oral argument on a pre-hearing motion.

Motions and supporting briefs must conform to the requirements of Rules 1 and 2 of the Montana Uniform District Court Rules. All briefs shall be limited to 20 pages, not including attachments/exhibits, unless the Hearing Examiner approves, in advance of the governing filing deadline, an expansion of the page limit upon good cause shown.

By the deadline established above, each party must file a prehearing memorandum that includes the following: (1) a brief summary of contested issues; (2) witnesses it intends to call and brief summaries of the content of each witness's testimony; (3) any exhibit it intends to introduce into the evidentiary record; and (4) any special accommodations sought regarding witness sequence or scheduling.

IX. HEARING

Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved, subject to the Board's or Hearing Examiner's discretion to consolidate issues and/or parties in the interest of efficiency, as discussed above.

The Hearing Examiner will hear and rule on objections made during the hearing.

Absent a determination by the Hearing Examiner that the interests of justice require otherwise, the order of hearing shall be substantially as follows:

- (a) Opening remarks by the Board/Hearing Examiner;
- (b) (Optional) Opening statements by Petitioner and opposing parties;
- (c) Presentation of testimony and evidence by the Petitioner;
- (d) Cross examination of Petitioner's witnesses by opposing parties;
- (e) Presentation of testimony and evidence by the opposing parties;
- (f) Cross examination of opposing parties' witnesses by the Petitioner;
- (g) Petitioner and opposing parties may call rebuttal witnesses and such witnesses may be cross-examined.
- (h) The Board members and/or the Hearing Examiner may question any party or witness to clarify testimony or elicit additional information;
- (i) (Optional) Closing statements by Petitioner and opposing parties; and
- (j) Closing remarks, including scheduling of post-hearing deadlines, if any, by the presiding officer of the Board and/or the Hearing Examiner.

The Board and Hearing Examiner shall be bound by common law and statutory rules of evidence. Objections to evidentiary offers may be made and shall be noted in the record. If the hearing will be expedited and the interests of the parties will not be prejudiced substantially, any

part of the evidence may be received in written form.

Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

Exhibits must be marked and must identify the person offering the exhibits. The exhibits shall be preserved by the Board as part of the record of the proceedings.

All testimony shall be given under oath or affirmation.

A party shall have the right to conduct cross-examinations required for a full and true disclosure of facts, including the right to cross-examine the author of any document prepared by or on behalf of or for the use of a party and offered in evidence.

Notice may be taken of judicially cognizable facts. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed, including any staff memoranda or data. They shall be afforded an opportunity to contest the material so noticed.

The Board/Hearing Examiner may grant recesses or continue the hearing.

The hearing will be recorded, and any party may request copies of the verbatim audio record upon payment at the Department's current rates.

The record will be closed at the end of the hearing, unless good cause is shown why evidence could not be presented at the hearing.

Authority: Mont. Code Ann. § 2-4-612, MCA; ARM 1.3.219

X. EX PARTE CONSULTATIONS

Unless required for disposition of ex parte matters authorized by law, the Board members and Hearing Examiner 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.

Authority: Mont. Code Ann. § 2-4-613.

XI. RECORD

The record shall include:

- (a) the administrative record produced by the Board;
- (b) all pleadings, motions, supporting briefs and exhibits, and intermediate rulings;
- (c) all evidence received or considered, including a stenographic record of oral proceedings when demanded by a party;

- (d) a statement of matters officially noticed;
- (e) questions and offers of proof, objections, and rulings on those objections;
- (f) proposed decision and exceptions;
- (g) any decision, opinion, or report by the Board or Hearing Examiner, which must be in writing;
- (h) all staff memoranda or data submitted to the Board as evidence in connection with their consideration of the case.

The stenographic record of oral proceedings or any part of the stenographic record shall be transcribed on request of any party. Unless otherwise provided by statute, the cost of the transcription must be paid by the requesting party.

XII. PROPOSAL FOR DECISION AND FINAL ORDER

Pursuant to Mont. Code Ann. § 2-4-621, after close of the record, the Hearing Examiner shall make a proposal for decision to the Board and serve the same upon all parties. In compliance with Mont. Code Ann. § 76-15-725, the proposal for decision must set forth whether there are great practical difficulties or unnecessary hardship in the way of applying the strict letter of any part of the Ordinance upon the lands of the Petitioner, with findings of fact as to the specific conditions which establish the great practical difficulties or unnecessary hardship. The findings of fact must be based exclusively on the evidence and matters officially noticed. Each party adversely affected by the proposal for decision may file exceptions and present briefs to the Board and Hearing Examiner.

The Board may adopt the proposal for decision as the Board's final order. The Board in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the Board 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.

Pursuant to Mont. Code Ann. § 76-15-725, upon the basis of the findings and determination, the Board may order a variance from the terms of the Ordinance in its application to the lands of the Petitioner that:

- (a) will relieve the great practical difficulties or unnecessary hardship;
- (b) will not be contrary to the public interest; and
- (c) will be such that the spirit of the Ordinance is observed, the public health, safety, and

welfare is secured, and substantial justice is done.

A copy of the final order and decision on the Petition shall be emailed and mailed in a timely manner to each party and to each party's attorney of record.

A majority of Board members must concur with every factual, legal, and substantive determination in the Final Order.

XIII. QUESTIONS

Questions about the procedures described herein may be directed to the Department's staff attorney, who has been designated to assist the Board and Hearing Examiner during this proceeding:

Barbara Chillcott, Attorney
Montana Department of Natural Resources and Conservation
barbara.chillcott@mt.gov
406-444-6336

DONE AND DATED this 10th day of April, 2019 by a vote of 3 to 0.

BY ORDER OF THE PHILLIPS CONSERVATION DISTRICT BOARD OF ADJUSTMENT

JAY BODNER, MEMBER



DALE KRAUSE, MEMBER

DAVE HINMAN, MEMBER

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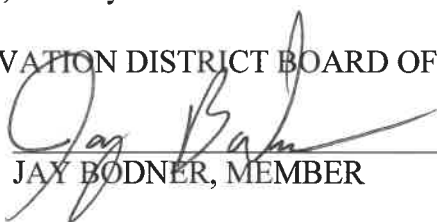
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406-444-6336

DONE AND DATED this 10th day of April, 2019 by a vote of 3 to 0.

BY ORDER OF THE PHILLIPS CONSERVATION DISTRICT BOARD OF ADJUSTMENT



JAY BODNER, MEMBER

DALE KRAUSE, MEMBER

DAVE HINMAN, MEMBER

COPIES TO:

Walter E. Congdon

445 Brooks Street

Missoula, MT 59801

Attorney for Phillips Conservation District

Katherine O'Brien

Timothy Preso

Earthjustice

313 East Main Street

Bozeman, MT 59715

Attorneys for American Prairie Reserve

EXHIBIT A

**BEFORE THE PHILLIPS CONSERVATION DISTRICT
BOARD OF ADJUSTMENT**

IN THE MATTER OF American Prairie
Reserve's Petition for Variance from Phillips
Conservation District Ordinance 2016-1

NOTICE OF INTERVENTION

A qualified elector within the Phillips Conservation District who objects to the authorizing of the variance requested in this matter may intervene and become a party to the proceedings upon approval by the Board of Adjustment. A party to the hearing before the Board may appear in person, by agent, or by attorney. However, all legal entities seeking intervention, including but not limited to corporations, limited liability companies, trusts, partnerships, and not for profit associations, must be represented by an attorney licensed to practice law in the state of Montana throughout the proceedings. A legal entity may qualify as a qualified elector for the purposes of this proceeding if that entity has a principal or officer who is a qualified elector within the district.

Parties granted intervention by the Board must appear and present testimony and any other evidence in person and be subject to cross-examination. Written comments will not be accepted by the Board as a substitute for in-person presentation of testimony and any other evidence.

If you wish to apply to participate as an intervenor in this matter, please supply the following information to the Board at the following address. All notices must be received by May 24, 2019. If you need more space, you may attach additional pages.

Submit completed form to:

Montana DNRC
Board of Adjustment – APR
Petition for Variance
Attn: Barbara Chillcott
1529 Eleventh Ave.
Helena, MT 59620
barbara.chillcott@mt.gov

With copies to:

Katherine O'Brien
Timothy Preso
Earthjustice
313 East Main Street
Bozeman, MT 59715

Attorneys for American
Prairie Reserve

Walter E. Congdon
445 Brooks Street
Missoula, MT 59801

Attorney for Phillips
Conservation District

I. Name, mailing address, and email address of Proposed Intervenor:

II. If you are an individual, are you a qualified elector within the Phillips Conservation District? Alternatively, if you are a legal entity rather than an individual, do you have a principal or officer who is a qualified elector within the Phillips Conservation District?

III. American Prairie Reserve requests a variance from sections 7(1)(b) and 7(1)(e) of Phillips Conservation District Ordinance 2016-1, "An Ordinance for the Protection of Soil and Water from all Bison/Buffalo Grazing in Phillips Conservation District." Summarize your objection to or support of the variance requested in this proceeding.

IV. Summarize the information and evidence you would intend to present at the hearing in this matter.

Pursuant to Montana Code Annotated § 1-6-105, I declare under penalty of perjury that the foregoing is true and correct.

Date and Place

Signature