

**FLATHEAD RESERVATION WATER MANAGEMENT BOARD  
AND THE OFFICE OF THE WATER ENGINEER**

**WATER POLICIES & PROCEDURES**

# FRWMB



**REVISION HISTORY**

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## INTRODUCTION

The Water Policy & Procedures (“WP&P” or “Procedures”) are created by the Flathead Reservation Water Management Board (“FRWMB” or “Board”) and the Office of the Water Engineer (“OE”) to specify and clarify details relating to water administration for the achievement and implementation of the Unitary Administration and Management Ordinance (“UAMO” or “Ordinance”). These Procedures, and amendments thereof, shall be published by the OE on the FRWMB website ([www.frwmb.gov](http://www.frwmb.gov)).

The FRWMB has the authority to develop and promulgate these Procedures pursuant to the Confederated Salish and Kootenai Tribes (CSKT)—Montana (MT) Water Compact (Compact):

### **Compact Article IV.I.5.a: Powers and Duties.**

*a. In General. The Board shall have the power to promulgate procedures, prescribe forms, develop additional materials, and implement amendments thereto as may be necessary and proper to exercise its jurisdiction and carry out its assigned functions under this Compact and the Law of Administration. A set of forms for initial use by the Board in the implementation of the Law of Administration is attached hereto as Appendix 37. The Board may amend these forms at its discretion. Such modifications are pursuant to, and shall not be deemed an amendment of, this Compact.*

The Board shall promulgate the Procedures through public meetings of the Board. These meetings shall be open to the observation of the general public pursuant to the Compact, Ordinance, and Policies of the Board. Where there is a conflict of laws, the law that provides for greater openness to the public applies. The Board shall notice the public of any scheduled drafting workshops in the creation of these Procedures and shall encourage the participation of the public through public comment, to be considered by the Board at the next scheduled Board meeting. The Board shall not approve any portion of these Procedures until public comment has been solicited.

These Procedures are intended to clarify and supplement details into the implementation of the Ordinance and the administration of water within the exterior boundaries of the Reservation. In the event that these Procedures conflict with the Ordinance or the Compact, the language of the Ordinance or the Compact shall control.

This document is intended to track the organization of the Ordinance for purposes of easy referencing to sections of the Ordinance for which the procedural clarification is intended to elucidate; 100 is added to each Ordinance section directly referenced with less direct sections added before and after.

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## CHAPTER I: WATER RESOURCES CONSERVATION, DEVELOPMENT AND ADMINISTRATION

### PART 0: OPERATIONS. SECTION

#### WP&P 10-101. Acronyms

ADU	Accessory Dwelling Unit
AF	Acre-Feet (Volume)
AU	Animal Units
CFS	Cubic Feet per Second (Flow Rate)
Compact	Water Compact between the CSKT, MT, and the United States
CSKT	Confederated Salish and Kootenai Tribes
DNRC	Montana Department of Natural Resources and Conservation
ET	Evapotranspiration
FRWMB or Board	Flathead Reservation Water Management Board
FIIP	Flathead Indian Irrigation Project
FIR	Flathead Indian Reservation
GPM	Gallons Per Minute
GW	Groundwater
IWR	Irrigation Water Requirement
MT	Montana
OE	Office of the Water Engineer
UAMO or Ordinance	Unitary Administration and Management Ordinance

#### WP&P 10-102. OE Form Descriptions, Status, Fees, and Version Dates

- 1) Application Forms and Petitions. Form types, numbers, descriptions, form status information, application fees and active versions are listed in Appendix 10-1 and are updated as needed.

#### WP&P 10-103. Water Right Application Submission.

- 1) Successful Application Submission. Applies to all water use applications. The Application is submitted to the OE with all required information and submission, including payment of all application fees, original signatures of all necessary parties, all forms fully completed as required in the **Ordinance** and these **WP&Ps**. Applicants must provide proof of possessory interest in the place of use, point of diversion, conveyance, and all areas of a water development. Failure to meet Ordinance or WP&P submission requirements allows the OE to terminate an application without providing either a notice of inadequacy as per **Ordinance, § 2-2-106** or an **application defect letter**. Applications that do not contain all the required information and submissions will not be processed by the OE and shall be

returned, when applicable and possible, with any submitted application fees, to the applicant.

- 2) Wrong Form Filed: If an applicant files the wrong form the OE may determine that the applicant has failed to successfully submit an application and the wrong form filed may be cancelled pursuant to WP&P 10-103(1). In these cases, when applicable and possible, the OE will return the application fee to the applicant. Wrong form filed includes applications whose sources, completion status, maximum volumes/flow rates, and other fundamental parameters do not comply with requirements specified on the application form, in the Ordinance, or in these WP&Ps.
- 3) Application Material Quality: Applicants must provide clear, legible, and comprehensible application materials with fonts no smaller than 10-point in a clean font such as Arial on all application materials, including maps. Equivalent hand-written printed text is also acceptable. Failure to meet application material quality requirements is failure to make a successful application submission pursuant to WP&P 10-103(1).
- 4) Acceptable Forms of Payment when Application Fees are Due:
  - a) Payment, in full, is required at the time of application, petition, or other form filing.
  - b) Acceptable Payment Forms: Check & Money Order only.
  - c) Refunds for applications where OE staff have committed any work will not be allowed under normal circumstances. Refunds are only allowed in extenuating circumstances where either the OE, the Ordinance, or these Policies and Procedures are likely responsible for an incorrect application fee being administered by the OE. All refunds require written authorization from the Water Engineer. An applicant may withdraw an application, but application fees will only be refunded if OE staff have not commenced work on the Application.
- 5) Original Signatures Required: Only original signatures are accepted for declarations of ownership and written permission(s) needed for possessory interest. Photocopies, facsimiles, stamps, or scans of signatures and electronic signatures are not acceptable.
- 6) Written Permission of Possessory Interest: If the applicant does not have a possessory interest in the property, the Application must contain notarized written permission from someone with possessory interest in the property. The written permission must include that name of the person giving permission, what actions of the applicant are permissible on the property, what parcels are included in the permission, the duration of permission, and the name of the person to whom permission is being given. The written permission must be signed by both parties and be notarized. In some instances, the written permission may require filing with the county Clerk and Recorder's office to be made appurtenant to the land.
- 7) All owners' authorizations required: For applications with any portions of points of diversion, places of use, or conveyances located on fee land held by multiple owners, all owners of record must provide original signatures on the Application, or the Application must contain written permission pursuant to (6) above of all owners with the possessory interest for portions of the water development located on those lands.

- 8) Non-Tribal Trusts: For applications with any portions of points of diversion, places of use, or conveyances located on non-Tribal lands held in trust, the trustee(s) or trust executor(s) must provide original signatures or written consent on behalf of the trust for portions of the water development located on those lands. A copy of the active and enacted trust that designates who is authorized to act on behalf of the trust is required. If documentation is determined to be difficult to interpret or inconclusive, the OE may require the applicant to provide a written statement from an attorney that is licensed to practice law in Montana that explains that the trust is active, in order, and identifies who is authorized to act on behalf of the trust.
- 9) Properties Under a Contract for Deed: For applications with parcels that are under a contract for deed, both the transferor(s) and the transferee(s) must sign water right applications with original signatures. Water rights approved by the OE will be issued to both the transferor(s) and the transferee(s). If the contract for deed is finalized before the OE issues a water right, the transferee may provide a copy of the deed and file an Application Owner Update Form (620F) with the OE and any subsequent issuances will list only the transferee(s). If the contract for deed is finalized after the OE issues a water right, the transferee(s) must file a Water Right Ownership Form (608) with the Montana DNRC Water Resources Division.  
9 was reviewed by the board on 3/12/24
- 10) Corporate Ownership: For applications with any portions of points of diversion, places of use, or conveyances located on corporation owned lands, the corporation executor(s) must provide original signatures or written consent on behalf of the corporation for portions of the water development located on those lands. A copy of the active and enacted articles of incorporation, operating agreement, or bylaws that clearly designate who is authorized to act on behalf of the corporation is required along with proof that the corporation is allowed to do business in Montana. If documentation is determined to be difficult to interpret or inconclusive, the OE may require the applicant to provide a written statement from an attorney who is licensed to practice law in the state of Montana or the CSKT Tribal Court that certifies the corporation is active, in order, and identifies who is authorized to act on behalf of the corporation.
- 11) Tribal Trust: For applications with any portions of points of diversion, places of use, or conveyances located on Tribal Trust lands, the CSKT Lands Department must provide original signatures or written consent on behalf of the trust for portions of the water development located on those lands.
- 12) Individual Tribal Trust: For applications with any portions of points of diversion, places of use, or conveyances located on Individual Tribal Trust lands, the owner of that land must provide original signatures or written consent on behalf of the trust for portions of the water development located on those lands. A copy of the public version of the TSR documenting ownership of the Individual Tribal Trust lands is required.
- 13) Application is Adequate to Process. Applies to all water use applications. The OE will determine whether an application is adequate to process by reviewing (a) information publicly available within its expertise and (b) the information submitted in the application.



The application clearly identifies the proposed project, and contains the information required by the application form or application addendum(s). At this stage, the application may be amended in response to defects identified by the OE. All application amendment information must be submitted within the deadlines set forth by the OE, typically done through application meeting or defect letter sent to the applicant by the OE. If the applicant misses a response deadline the OE may terminate the application.

- 14) Adequate to Process Determination: A water right or water use application will only be determined adequate to process if an applicant's information contains substantial credible information and all the necessary parts of the application form requiring the information, including any required addendums, have been filled in with the information required by the Ordinance and these FRWMB Policies and Procedures for the requisite application type. The OE has the option but not the mandate to help applicants reach an Adequate to Process status, either through letters of deficiency or other written correspondence with the applicant, as guided by the discretion of the Water Engineer.
- 15) Adequate to Process Determination is not an Approval: An application deemed Adequate to Process does not entitle an applicant to an authorization and is not the same as proving the statutory criteria. The OE can only approve an application if the criteria for issuance is proven by a preponderance of the evidence.
- 16) Applicant Communication Representation:
  - a) Communications - Applicants wishing to copy a representative, such as consultant, advisor, counsel, or other agent, on OE communications, must provide written authorization that identifies the representative, including the correct contact information to be used and an original signature from the owner of record requesting copy to a representative.
  - b) Designation of Signatory other than Applicant - Applicants wishing to have someone else sign on their behalf must provide written authorization that designates who is allowed to sign on their behalf, what types of authorizations are allowed, the representatives correct contact information, and have it signed by the owner of record requesting the designation. The document must be notarized.

#### WP&P 10-104. Water Right Verification for DEQ Subdivision Applications pursuant ARM 17.36.103

- 1) Requirement for Water Right Verification: The OE will verify existing water rights required for active DEQ subdivision applications pursuant to ARM 17.36.103.
- 2) Timelines for Review: The OE will perform water right verifications within 30 days for verifications not requiring fieldwork and within 90 days for verifications requiring field or on-site examination. The Engineer or Designee may extend timelines to accommodate weather and access conditions that limit field inspections necessary for resolution of complaints. Extensions may be up to one month or until weather/travel restriction conditions permit, whichever is longer.
- 3) Additional Information Request: The OE may require additional information from the applicant, through a written request, for the purpose of verifying a water right. Failure to

respond to the written request within the deadline designated on the request may result in termination of the water right verification process; in this situation, any application fees submitted will not be refunded to the applicant.

- 4) Water Right is Verified (prima facie): If the elements of a water right as detailed on the abstract match the existing use, the OE will document the conclusion in an OE Water Right Verification Letter. This evaluation may include, but is not limited to, technical work, field review and examination of current aerial photography of the parcel(s) in question to determine quantities of irrigation, buildings, stock, ponds/pits, and other visually evident indicators of water use.
- 5) Water Right is not Verified (prima facie): If the elements of a water right as detailed on the abstract differ from the existing use, the OE will identify which elements differ, estimate the magnitude of variation, examine the historic water right records, and proceed with documenting the conclusion in an OE Water Right Verification Letter.
- 6) Appearance of Abandonment Discovered: If the investigation finds evidence of nonuse, the OE may examine the historic aerial photographs and provide an assessment of abandonment pursuant to Ordinance §2-1-111. If the water right appears abandoned, the OE will document this finding in an OE Water Right Verification Letter.
- 7) Illegal Water Uses Discovered: If there are uses of water on any of the parcels in question that lack a valid water right or are used for unauthorized purposes, the OE will not issue a Water Right Verification Letter until the illegal use is documented and formally curtailed or brought into compliance by conforming to the legal use of the water right or through final approval of a new water right application. The OE may implement enforcement actions based on this discovery [WP&P].
- 8) Adverse Effect: The OE water right verification request process does not include an adverse effects analysis.
- 9) Statement of Claims, the OE will not perform water right verifications on Statements of Claim that have not been adjudicated through the Montana Water Court. The OE will issue a letter to the applicants informing them that there is an existing Statement of Claim that has not been adjudicated by the Montana Water Court.

This section was reworked by the board on 3/12/24

## PART 1 – GENERAL PROVISIONS

### WP&P 11-104. Definitions.

- 1) **Connected**: Means permanent or temporary connections including aboveground plumbing and hose(s) that convey water from the well or source to a home or business.
- 2) **Corporate Ownership**: Includes ownership by legal entities, including but not limited to, corporations, limited liability companies, corporate trusts, partnerships, and not-for-profit associations.
- 3) **Seepage Water or Seepage**: means diverted flow which is not consumptively used and which slowly seeps underground and eventually returns to a surface or groundwater source. Typical examples of seepage water include underground losses from an irrigation ditch or pond.

**Reviewed by board 4/10 Board Consensus as of 4/23**

- 4) **Substantial Credible Information:** means probable, believable facts sufficient to support a reasonable legal theory upon which the OE should proceed with the action requested by the person providing the information.
- 5) **Wastewater Ditch Tailwater or Tailwater:** means part of a diverted flow which is not consumptively used and which returns as surface water to any surface water source. Tailwater occurs when an irrigation application of water exceeds what can be absorbed into the ground. The water that stays on the surface and is not absorbed into the earth and which remains at the end of the furrow and is collected in a wastewater *tailwater* ditch is *wastewater tailwater*.

**Reviewed by board 4/10 Board Consensus 4/23**

- 6) **Water Use Plan:** Organized description from an engineer, hydrologist, or design specialist describing how water will be used, including, but not limited to volumes, flow rates, purposes, timing, conveyance, all associated water rights to be used, points of diversion, places of use, and storage. A Water Use Plan should provide all the necessary information for the OE to confirm the accuracy of calculations and determine that a use is within the criteria set forth in the Ordinance and these WP&Ps.
- 7) **Wells:** Unless specifically stated otherwise, the use of the term well(s) includes developed springs.

WP&P 11-105. Measurement of Water.

WP&P 11-106. Measurement of Time.

WP&P 11-107. Appropriation Rights Allowed.

WP&P 11-108. Reservation Water Rights Database.

WP&P 11-109. Groundwater Management Areas.

**WP&P 11-110. Standards for Applications for Appropriation Rights and Changes in Use.**

- 1) **Seepage Water and Tailwater:** Seepage Water and/or Tailwater may not be used as the basis or source of physically available water for a new Appropriation Right or Mitigation of a new Appropriation Right or historic supply of a water right being Changed. Applicants seeking Appropriation Rights or Change Authorizations are required to assess whether or not Seepage Water and/or Tailwater are substantive portions of the water supply for a proposed new Appropriation or the historic water supply for a water right being Changed. Seepage Water and Ditch Tailwater are neither a Beneficial Use or a Waste.

**Reviewed by board 4/10 Board Consensus 4/23**

WP&P 11-111. Groundwater Diversion Standards

- 1) **Flowing Artesian Wells:** Flowing artesian wells must be capped and or sealed in a way that prevents the free flow of water from the well to avoid Waste or Wasting of water as defined by Ordinance, § 1-1-104(65).

This section was reworked by the board on 3/12/24

WP&P 11-112. Mitigation

WP&P 11,113. Codification, Severability and Defense.

WP&P 11,114. Effective Date.

## PART 2 – UNITARY ADMINISTRATION AND MANAGEMENT

**WP&P 12-112. Filing Fees.**

**Filing Fees.** See Table set forth in WP&P 10-102 for complete form filing fees. Form types, numbers, descriptions, form status information, application fees and active versions are listed in Appendix 10-1 and are updated as needed.

This section was reworked by the board on 3/12/24

## **CHAPTER II – WATER USE**

### PART 1 – GENERAL PROVISIONS

WP&P 21-101. Registration of Uses of the Tribal Water Right in Existence as of the Effective Date of the Compact.

WP&P 21-102. Process for Registration of Existing Use of the Tribal Water Right.

WP&P 21-103. Fee for Filing Registration of Existing Use of the Tribal Water Right.

WP&P 21-104. Tribal Member and Allottee Entitlements Pursuant to 25 U.S.C. Section 381.

WP&P 21-105. Tribal- Tribal Member and Allottee Challenge of a Registration Certificate Issued by the Office of the Engineer.

WP&P 21-106. Registration of Certain Other Previously Unrecorded Existing Uses.

WP&P 21-107. Process for Registration of Certain Other Previously Unrecorded Existing Uses.

WP&P 21-108. Failure to Register an Existing Use of Water.

WP&P 21-109. Limitation to Beneficial Use.

WP&P 21-110. No Adverse Possession.

WP&P 21-111. Abandonment of Appropriation Right.

WP&P 21-112. Procedure for Declaring Abandonment.

WP&P 21-113. Prevention of Waste and Interference with Lawful Use.

WP&P 21-114. Issuance of Appropriation Right Does Not Constitute Permission to Trespass.

WP&P 21-115. Development of Enforceable Schedule for the Tribes' Other Instream Flow Rights.

## PART 2 – PERMIT AND CHANGE APPLICATION PROCESS

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WP&P 22-101. Appropriation Rights and Change in Use authorizations on the Reservation.

WP&P 22-102. Burden of Proof for Ground or Surface Water Permits and Change Authorizations.

WP&P 22-103. Pre-Application Meeting with Office of the Engineer.

WP&P 22-104. Application to Board [Permits and Changes].

WP&P 22-105. Adequate to Process Review [Permits and Changes].

WP&P 22-106. Not Adequate to Process Determination.

WP&P 22-107. Application Analysis and Recommended Decision.

WP&P 22-108. Process if Mitigation Required.

WP&P 22-109. Appeal to Engineer from Recommended Decision.

WP&P 22-110. Notice and Hearing on Recommended Decision to Grant.

WP&P 22-111. Appeal to the Board.

WP&P 22-112. Appeal to Court of Competent Jurisdiction.

WP&P 22-113. Completion.

WP&P 22-114. Compliance with Completion Deadline.

WP&P 22-115 Redundant and Substitute Wells.

### **WP&P 22-116. Appropriation Rights for Stock Water Allowances.**

- 1) Existing Wells – New Uses: Existing Wells may be used as a point of diversion for new uses, so long as they were drilled before June 01, 2022<sup>1</sup>. Existing Wells must meet all the same domestic allowance application, construction, and use standards as would be required for new Wells [WP&P]. Existing Wells that are currently serving and will continue to serve other water rights may have additional conditions imposed to ensure the new use does not exceed volume or flow rate standards when combined with the existing uses. If an applicant chooses to use an existing Well, the OE may require modifications to comply with standards associated with volume, flowrate, purpose, and place of use of existing water rights associated with the existing Well on the new use and examination of the old use.

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<sup>1</sup> June 01, 2022 was the date upon which the Board concluded public notice of the well drilling preapproval requirements had been sufficiently communicated.

- 2) Wells drilled after June 01, 2022: Applicants who drill Wells for a beneficial use without preapproval from the OE may be subject to a fine, or other conditions, for failure to comply with the Ordinance's requirement to obtain preapproval before drilling a Well to be used for beneficial use. Exceptions include Replacement Wells, Substitute Wells, and Wells drilled solely for aquifer testing that will not be used for a beneficial use.
- 3) Existing Wells – Retired Uses: An applicant using an existing Well that is associated with an existing water right that will be replaced or modified by a different use being applied for through the OE may be required by the OE to terminate the water right being replaced as a condition of approval of a new application.
- 4) Existing Wells – Priority Date(s): Existing Wells to be used exclusively for a new use will receive a priority date of the date of application. Existing Wells to be used for a new use, in conjunction with other existing uses that are approved to be used simultaneously on the same Well, will receive a new priority date of the date of application for the new use portion, and will retain the historic priority date for those existing uses approved to be used simultaneously on the same existing Well.
- 5) Automatic Waterers Allowed: Automatic stock waterers equipped with overflow protection may be used in-place of stock tanks.
- 6) 60SF Maximum Number of Wells: There is no limitation to the number of Stock Water Allowances so long as each allowance meets the application, construction, and use terms set forth in the Ordinance. Stock Water Allowances are not counted toward the total number of domestic allowances set forth in WP&P 22-117.
- 7) Animal Unit Calculations: Stock use volumes are to be calculated in the same fashion as is applied by the State of Montana: a consumptive use of 15 gallons per day or .017 acre-foot per year per animal unit. Animal unit equivalencies for water consumption are set out in ARM 36.12.101 and the water conversion table, Form No. 615. Form No. 615 prescribes animal unit rates for common varieties of stock animals.
- 8) Stock Water POD Fencing Requirement: if the stock water allowance is sourced from a spring, the point of diversion must be fenced to exclude stock.

WP&P 22-117. Appropriation Rights for Domestic Allowances for Homes and Businesses; process for application, review, and issuance. Includes Individual, Shared, and Development Domestic Allowances.

- 1) Using Existing Wells for Unregistered and New Uses: Existing Wells may be used as a point of diversion for new or existing uses, so long as the Well was drilled before June 01, 2022<sup>2</sup> and the existing uses have not been registered under Ordinance §2-1-101 through 2-1-108. Existing Wells must meet all the same domestic allowance application, construction, and use standards as would be required for new Wells. Existing Wells that are currently serving and will continue to serve other water rights may have additional conditions imposed to ensure the new use does not exceed

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<sup>2</sup> June 01, 2022 was the date upon which the Board concluded public notice of the well drilling preapproval requirements had been sufficiently communicated.

volume or flow rate standards when combined with the existing uses. If an applicant chooses to use an existing Well, the OE may require modifications to comply with standards associated with volume, flowrate, purpose, and place of use of existing water rights associated with the existing Well on the new use and examination of the prior use.

- 2) Wells drilled after June 01, 2022: Applicants who drill Wells for a beneficial use without preapproval from the OE may be subject to a fine, or other conditions, for failure to comply with the Ordinance's requirement to obtain preapproval before drilling a Well to be used for beneficial use. Exceptions include Replacement Wells, Substitute Wells, and Wells drilled solely for aquifer testing that will not be used for a beneficial use.
- 3) Existing Wells – Retired Uses: An applicant using an existing Well that is associated with an existing water right that will be replaced or modified by a different use being applied for through the OE may be required by the OE to withdraw the water right being replaced as a condition of approval of a new application.
- 4) Existing Wells – Priority Date(s): Existing Wells to be used for water uses not associated with an existing valid water right will receive a priority date of the date of application. Existing Wells to be used simultaneously for a new use, and an existing use associated with a valid water right, will receive a new priority date of the date of application for the new use portion. Such Existing Wells will retain the historic priority date for those existing uses associated with a valid water right.
- 5) Other Buildings Defined: Buildings in close proximity to a main “home” or “business,” including shops, outbuildings, ADUs, and other smaller affiliated building connections, do not count as an additional “home” or “business” and can be added to the water right purposed as “Other” so long as the connections do not exceed three in number and are located within the same parcel boundary. This does not apply to buildings that are already or planned to be separated by a parcel boundary.
- 6) Sites Defined: Business “Sites,” as part of the definitions of Business in **Ordinance 1-1-104(8)**, mean any location where business is conducted and may include areas that are absent a building/structure, including but not limited to fields, canopies, industrial settings, and other areas where essential business operations occur.
- 7) Drilling Time Limits: Upon OE authorization to construct a domestic allowance (authorization to drill the Well), the applicant will have **one year** to have the Well drilled. Failure to meet the deadline may result in termination of the application. An applicant may request a deadline extension using Form 607F before, or after this deadline provided that the applicant has made progress on their development; the extension form filing fee increases after missing the deadline.
- 8) Beneficial Use Time Limits: Upon OE authorization to construct a domestic allowance (authorization to drill the Well), the applicant will have one year after the Drilling Time Limit to put the water to beneficial use (hook it up to the home/business and put the water to use). The applicant must file 60DF-Part B within 120 days of completing the project and putting water to beneficial use, as is specified in the Ordinance. An applicant may request a deadline extension using Form 607F before, or after, this

deadline provided that the applicant has made progress on their development; the extension form filing fee increases after missing the deadline.

- 9) Putting Water to Beneficial Use: Putting water to beneficial use as per Ordinance 2-2-117(13) and **WP&P 22-117(7)** above means the Well is physically connected to the Home(s) and/or Business(s) authorized by the OE in an authorization to develop a Domestic Allowance and the water is being used for one or more of the purposes designated on said authorization. A Domestic Allowance completion form may be filed if the Connection is made to a Home or Business that is temporary, so long as the Connection is at the same location and connected to the same Well.

This sub section was reviewed by the board on 3/12/24

- 10) Municipal Water Supply Connections: Any applicant requesting a Domestic Allowance that is within 500 feet of the exterior boundary of a Municipal Water Supply or Tribal equivalent must provide a letter from that Municipal Water Supply System or the Tribes that they are refused a connection to the Municipal Water Supply as the primary alternative to obtaining a new Domestic Allowance—this requirement is waived when using a Well that was drilled before June 01, 2022. The Water Engineer can consider exceptions on a case-by-case basis.

**Board consensus 4/23**

- 11) Use of FIIP Delivery Water associated with Domestic Allowances: Any Domestic Allowance plan that includes the use of FIIP delivery water to irrigate lawn and garden, landscaping features, or for stock water, must provide a letter from the FIIP Manager authorizing the use of FIIP delivery water as long as the applicant remains in good standing with FIIP and the letter of approval is dated within six months prior to the Domestic Allowance application. The use of FIIP water may allow an applicant to apply for additional domestic usage on an Individual, Shared, or Development Domestic Allowance not to exceed flow and volume standards.

- 12) Use of other water rights associated with Domestic Allowances: Any Domestic Allowance plan that includes the use of existing water rights to irrigate lawn and garden, landscaping features, or stock water, must provide a copy of the water right abstract and a statement as to how this use will be incorporated into their Domestic Allowance plan.

- 13) Number of Connections & Standards:

- a) Individual Domestic Allowances may only be connected to one Home or Business (Ordinance, § 1-1-104(8 &31).
- b) Shared Domestic Allowances may only be connected two or three Homes or Businesses.
- c) Development Domestic Allowances as per Ordinance, § 2-2-117(6) may be connected to more than one, but not more than five, Homes and/or Businesses. The maximum number of RV hookups is 40 for those without sewer and 20 with sewer associated with each hookup.
- i) Adherence to these standards does not alleviate an applicant's requirement to measure and report annual water volume and keep the total annual volume diverted



below the 10 AF/year maximum and the flow rate from any individual Well below 35 GPM as set forth in the Ordinance 2-2-117(6)(b).

- ii) Annual water measurements exceeding 10 AF may result in revocation of the water right and/or fines by the Board.

Any deviation from these standards requires the applicant to provide a Water Use Plan pursuant to section WP&P 22-117(23) below.

- d) Adding additional Domestic Allowances and/or making additional connections to existing Wells for new uses may cause a project to be reclassified as Shared or Development Domestic Allowance or a New Appropriation if volume and/or flow rate standards are exceeded. This excludes Stock Allowances set forth in Ordinance § 2-2-116.

This sub-section was reworked by the board on 3/12/24

#### 14) Inclusion of Existing Permit Exceptions for Annual Volume Maximums:

Within a Development, individual parcel, or among parcels sharing a Well, all water rights issued as Permit Exceptions (as defined below) will be considered as part of the total additive maximum annual diverted volume for all Permit Exceptions, existing or proposed, which may not exceed 10 AF. Ordinance § 2-2-116 through 2-2-117; WP&P Section 22-117(12).

Cumulative Permit exceptions with total additive maximum annual diverted volumes approaching 10 AF do not automatically necessitate mandatory water measurement.

An applicant may request that the OE consider reducing the volume of an existing Permit Exception, using a Request to Reduce or Correct a Water Right Record (OE Form 625F), to avoid exceeding the maximum annual volume limit.

“Permit Exceptions” for purposes of this section are limited to:

- a) Groundwater Certificates developed on or after May 17, 1991, at a volume and flow rate that would qualify as an exception to the permit requirements of 85-2-306, MCA, and for which a notice of completion of groundwater development (DNRC Form 602) was filed with the DNRC.
- b) State-based registrations of certain other previously unrecorded existing uses pursuant to Ordinance 2-1-106, excluding exceptions limited to stock purposes and water uses predating July 1, 1973.
- c) Individual, Shared, or Development Domestic Allowances as described in Ordinance 2-2-117.

d) Due to the complexities of Groundwater Certificates which predate May 17, 1991, and were issued by the Montana DNRC for up to 100 gallons/minute and without a volume, the OE will, on a case-by-case scenario, determine an appropriate method for incorporating these exceptions.

15) Phased Developments: Any parcels in existence as of September 17, 2021 (Effective Date) are considered stand-alone parcels. Any subdivision after this date will be considered a Development, using the September 17, 2021 boundary as the exterior boundary of the Development, regardless of phased subdivisions.

16) Maximum Number of Wells:

- a) Individual and Shared Domestic Allowances are restricted to one Well.
- b) Development Domestic Allowances are restricted to no more than one well per Home and/or Business (Ordinance § 2-2-117.6.e).
- c) If water supply is limited and requires an alternative to a) or b) above, the applicant must provide justification for the need and get OE approval in advance for the use of additional Wells for domestic allowances.

17) Clarification for Developments: For the definition of Development (Ordinance § 1-1-104(16), closely will mean those parcels with boundaries that are physically connected by edge to edge, corner to corner, or edge to corner. Separations of boundaries resulting from public land easements (such as road rights of way) are discounted as separations of those boundaries.

18) Additional Well Fee for Development Domestic Allowances: Each Well beyond one for a Development Domestic Allowance has an additional application filing fee, as set forth on Form 6DWF and in WP&P 10-102.

19) Measurement Devices:

- a) Each Development Domestic Allowance Well must have an OE approved measuring device that continually measures total volume diverted and time-period of the diversion that allows for monthly diverted volumes to be calculated for all Wells on the system.
- b) Well owners are required to report their usage on Form 622F each year and failure to do so may incur a fine or risk revocation of the water right.
- c) For the OE to approve a measuring device, the applicant must provide the OE with complete information about the measuring device(s), plans for installation(s), identification of installers, identification of recording features, and identification of plans to operate the devices. This information must be included in the 60DD Part A application and must be preapproved before installation. Preapproval by the OE of any equipment does not provide the applicant an assurance that the proposed equipment will work as proposed. Upon preapproval, the OE will issue approval of the proposed measuring device plan along with the Part A application approval.

- d) Once operational, the OE will conduct an inspection of the installation to ensure the equipment and installation was conducted pursuant the preapproval. The OE may request a test to ensure the equipment is functioning properly.
- 20) **Maximum Number of Connections for Larger Parcels:** Large parcels of land that are under the same or affiliated ownership, including, but not limited to, housing subdivisions or any combination of business and residential units, are entitled to up to 10 AF in Permit Exceptions for each **40-acre** apportionment of land within the Development. Applicants applying for multiple 10 AF amounts based on parcel size are responsible for providing a map that demarks each 40-acre apportionment. These developments, however, will encumber the property for future domestic allowances in perpetuity or until the developments are removed and the water rights withdrawn.
- 21) **Annual Volume:** Annual volume limits, 2.4 AF/year for Individual and Shared Domestic Allowances (Form 60DF) and 10 AF/year for Development Domestic Allowances (Form 6DDF) on parcels 40 acres or less, are diverted amounts, not to be confused with consumed volume.
- 22) **Combined Flow Rates:** No single well may exceed 35 GPM in flow.
- 23) **Stock Water Volumes for Domestic Allowances:** Stock volumes are additive to other domestic uses for volume calculations and thus may reduce maximum numbers of connections or the acreage of lawn and garden if included in a proposed water development.
- 24) **Association of Water Rights:** Water rights that share a point of diversion, conveyance, place of use, or are grouped for purposes of determining the maximum number of connections, will be associated through a remark on the water right issuance and abstracts. Associated information about the combined use may also be included.
- 25) **Domestic Water Storage:** Storage facilities associated with any domestic water system must be enclosed and documented in volume, location, system attachment, additional pump infrastructure, depth if buried, and other pertinent design criteria.
- 26) **Exceptions to Standards and Water Use Plans:** Any proposed exceptions to standards must include an engineer's, hydrologist's, or design specialist's assessment of need and function. For commercial, business, and other unique water uses, the OE may require the applicant to provide a Water Use Plan that specifies volumes, flow rate, and design parameters for each proposed purpose of uses or defines how water storage will be designed and used. If the OE chooses to assess proposed exceptions to standards, an extended timeline may be imposed on application review phases.

**WP&P 22-118. Process for development of new uses from Flathead System Compact Water.**

- 1) Monthly Time-steps
  - a. Diverted
  - b. Consumed
  - c. Flow Rate
- 2) Burden of Proof

- a. Demonstrate Conveyance from Source to Place of Use will not Deplete Other Sources:
- b. Adverse Effects to Water Quality of an Appropriator:
- c. Plan to Adhere to federal Clean Water Act, 33 USC Section 1251 et seq.
- d. Plan to Adhere to Water Quality Management Ordinance, Tribal Ordinance 89B:
- e. Plan to Adhere to Minimum Flow Requirements and Ramping Rates and Other Ecological Flow Requirements:
- f. Adequate Means of Diversion:
- g. Proof of written consent of the Tribal Council or its delegate to use a portion of the Flathead System Compact Water must be attached with this form.

3) Notice Requirements:

Discussed this section at the 4/10 meeting

WP&P 22-119. Appropriation Rights for Non-consumptive Geothermal Heating or Cooling Exchange Wells.

WP&P 22-120. Temporary Emergency Appropriations.

WP&P 22-121. Short-term use of a portion of the Tribal Water Right for road construction or dust abatement.

WP&P 22-122. Short-term use of an appropriation right that is not part of the Tribal Water Right for road construction or dust abatement.

WP&P 22-123. Wetland Protective Appropriation Rights.

WP&P 22-124. Wetland Quantified Appropriation Rights.

WP&P 22-125. Notice of Trust Status Conversion for Lands with Appurtenant Water Rights Arising Under State Law Acquired by the Tribes.

WP&P 22-126. Water Management Board Adjustment of Priority Date Pursuant to Compact.

WP&P 22-127. Tribal Utilization of Water Right with Adjusted Priority Date.

WP&P 22-128. Public Water Supply Reporting Requirements

### CHAPTER III – ENFORCEMENT

WP&P 31-101. Scope

WP&P 31-102. Complaint to the Engineer Regarding Actions or Inactions Between Appropriators.

- 1) Who May Bring a Formal Complaint. Any Appropriator aggrieved by the action or inaction of any other Appropriator, or by any person the Complainant believes is wasting water or illegally using water to the detriment of a right to use water the Complainant possesses, may file a Complaint with the Water Engineer using Form 610F. See Ordinance, § 3-1-102.

- 2) Who May Bring an Informal Complaint. A Person residing within the exterior boundaries of the Reservation may file an informal complaint with the OE, using Form 609F, pertaining to matters not covered under the formal complaint process in Ordinance, § 3-1-102.
- 3) Who May Bring a Temporary Use Complaint. An Appropriator, whether the water right is prior or subsequent in priority to the short-term lease [temporary use] acquired by a Person, who cannot satisfy in full the Appropriator's right during the time that the short-term lease is diverting water, may make a [temporary use] complaint to the Engineer and cause the short-term lessee's diversion to be discontinued. In this form of complaint, the diversion is discontinued until the Complainant's water right is satisfied or until the lessee establishes to the Engineer that the discontinuance has had no effect on the Complainant's water right. See Ordinance, § 2-2-122(5).
- 4) Complaint Requirements. A complaint must be submitted in writing to the OE and describe specifically the action or inaction being complained of and the justification for the complaint. The OE maintains complaint forms on the Board's website for a Complainant's use (Form 609F – Informal Complaint and Form 610F – Formal Complaint and Temporary Use Complaints).
- 5) Receiving an Informal Complaint. Upon receipt, the OE may investigate the informal complaint and resolve the matter utilizing its emergency enforcement powers or upon motion to the Board for further penalties and/or restrictions. The OE shall not charge a filing fee for the filing of an informal complaint and informal complaints are not subject to the timelines and requirements set forth in Ordinance, § 3-1-102, unless the OE, at its discretion, so chooses to impose those timelines and requirements.
- 6) Receiving and Notice of Formal Complaint. When the OE receives a formal complaint, with the accompanying fee set forth in WP&P 10-102 OE Forms & Fee Table, the OE shall date stamp the complaint. Within three (3) days of receiving a formal complaint, the OE shall serve, via regular mail, a copy of the complaint on the Complainant and the Respondent and shall post a notice of the complaint on the Board's website. See Ordinance, § 3-1-102(2) and (3). The notice shall include a written statement indicating that informal resolution of the dispute between the Complainant and the Respondent may provide a more timely and cost-effective remedy than having the petition adjudicated by the Engineer. See Ordinance, § 3-1-102(3). If a hearing is required, the notice shall specify the date, time, location, and manner in which the hearing shall take place. The notice may also specify if the Engineer or Designee requires additional time for

investigation of the complaint prior to a hearing. The notice format is set forth in **WP&P Attachment 31-A**. This section also applies to informal complaints that are determined by the Engineer or Designee to require a notice.

- 7) Extension of Time by Parties. The parties, upon mutual agreement, may extend the timeframes set forth in **Ordinance §§ 3-1-102 through 107. See Ordinance, § 3-1-101(3).**

#### WP&P 31-103. Resolution of Complaint.

- 1) Informal Resolution of Complaints. The parties may resolve the complaint informally, unless the complaint pertains to illegal use of water. If the parties resolve the complaint informally, they must notice the OE, in writing, that the complaint has been resolved informally and the OE will add the written notice to the file and consider the matter resolved. The Engineer need not issue a Findings of Fact, Conclusions of Law for complaints brought under this section, but rather an Order providing: (1) a background on the Complainants alleged harm, (2) any procedural steps taken, (3) a finding that discontinuance has not had an effect, and (4) anything else the Engineer deems appropriate for the resolution of this type of complaint.
- 2) Resolution of Temporary Use Complaints. Upon establishment that discontinuance of the short-term lessee's diversion has not had an effect, the Engineer shall enter an order allowing the diversion to continue. See Ordinance, § 2-2-122(5). The Engineer need not issue a Findings of Fact, Conclusions of Law for complaints brought under this section, but rather an Order providing: (1) a background on the Complainants alleged harm, (2) any procedural steps taken, (3) a finding that discontinuance has not had an effect, and (4) anything else the Engineer deems appropriate for the resolution of this type of complaint.
- 3) Timing of Formal Complaint Hearing. In the event informal resolution is unsuccessful, the Engineer or Designee shall hold a hearing on the formal complaint no later than fifteen (15) days after providing notice of the complaint to the Respondent. The Engineer or Designee may take an additional (10) days before holding the hearing to perform such independent investigation into the formal complaint as the Engineer or Designee deems appropriate. See Ordinance, § 3-1-103. The Engineer or Designee may extend timelines to accommodate weather and access conditions that limit field inspections necessary for resolution of complaints: extensions may be up to one month or until weather/travel restriction conditions permit, whichever is longer. This section also applies to informal complaints that are determined by the Engineer or Designee to require a hearing.

4) Investigation of Complaints. The Engineer or Designee may choose to perform an independent investigation of complaints prior to any scheduled hearing. The findings of the investigation shall be documented in an OE field report and become part of the official complaint record that is available to the public. The findings of the investigation may be used by the Engineer or Designee in writing its decision.

5) Formal Complaint Hearing.

- a. At the hearing before the Engineer or Designee, both the Complainant and the Respondent shall explain their positions concerning the complaint.
- b. The Engineer or Designee may set time limitations on the parties in the presentation of evidence to efficiently hear the evidence before him/her. Any hearing logistics should be detailed in the notice of complaint served upon the parties.
- c. The parties may call a lay or expert witness to present testimony at the hearing before the Engineer or Designee. The Engineer or Designee may order anticipated direct examination testimony by experts or other witnesses be prepared in advance and submitted as pre-filed testimony in either question-and-answer or narrative format. At the request of one of the parties, the Engineer may permit a lay or expert witness to appear and provide oral testimony by means of electronic participation and may only be granted if the participation will not substantially prejudice the rights of any party. Any testimony provided shall be under oath or affirmation.
- d. All evidence that, in the opinion of the Engineer or Designee, 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 normal business affairs. See Ordinance, § 3-1-103(1).
- e. Rules of privilege recognized by law shall be given effect. Evidence, which is irrelevant, immaterial, or unduly repetitious shall be excluded. See Ordinance, § 3-1-103.
- f. The hearing shall be electronically recorded and included as part of the administrative record.
- g. This section also applies to informal complaints that are determined by the Engineer or Designee to require a hearing.

6) Timing of Decision. A decision of the Engineer or Designee on a formal complaint shall be made in writing within seven (7) days after the completion of the hearing. See Ordinance, § 3-1-103(2). A decision of the Engineer or Designee on an informal complaint or a temporary use complaint shall be made in writing within twenty (20) days after the completion of a hearing, when determined by the Engineer or Designee.

7) Final Decision of the Engineer or Designee to a Formal Complaint.

- a. The final decision of the Engineer or Designee shall be in the format of a Findings of Fact, Conclusions of Law, and an Order.
- b. The final decision of the Engineer or Designee may include an award of declaratory relief, and/or the imposition of conditions on the use or exercise of a water right. Such conditions may include, but are not limited to: (i) Instructions regarding the proper delivery of water; (ii) the installation of measuring devices; (iii) the construction of suitable ditches to carry the return waters from any ditch or lands to the main stream or proper waste way; or (iv) the mandate of structural changes to diversion structures. See Ordinance, § 3-1-103(3).
- c. This section also applies to informal complaints that are determined by the Engineer or Designee to require a hearing.

8) Emergency Enforcement Powers of the Engineer. In an Emergency, the Engineer, or any Staff who is so directed by the Engineer, shall have the authority to lock, remove, render inoperative, shut down, close, seal, cap, modify, or otherwise control methods of diversions and withdrawals, and obstructions to the flow of the water, subject to expedited appeal to the Board by the affected person. See Ordinance, § 3-1-109.

9) Additional Enforcement Powers of the Engineer.

- a. The Engineer, or any Staff who is so directed by the Engineer, may enter upon lands on the Reservation with reasonable notice of the owner or occupant, to investigate and inspect methods of diversion, withdrawal, and other activities affecting water quantity, to install measuring devices at the expense of the water user on surface and groundwater diversions for the purpose of enforcing and administering this Ordinance, to monitor water use, water quality, and diversion structures. See Ordinance, § 3-1-110. The OE reserves the authority to collaborate with and utilize local law enforcement, jurisdiction dependent, in the event a landowner resists noticed and lawful entry.
- b. The Engineer, or any Staff who is so directed by the Engineer, may take action to prevent the illegal use of water, including, but not limited to the temporary decommissioning of head gates or other diversion works. See Ordinance, § 3-1-110.
- c. The Engineer may issue written notices of violation to Appropriators and to illegal users of water for violations of the Ordinance or of the terms and conditions of any Appropriation Right or Existing Use or of any lawful order of the Engineer or the Board. A notice shall specify the particular violation or violations, the step(s) to be taken to come into compliance, and identify a reasonable time frame within which such steps are to be taken. See Ordinance, § 3-1-110.



10) Recording and Notice of Final Decision. A final decision of the Engineer or Designee shall be entered into the administrative record and retained by the OE. The OE shall promptly issue to all parties a copy of the final decision and notice of the date of entry.

11) Appeal to the Board. Any Complainant or Respondent dissatisfied with the final decision of the Engineer or Designee may appeal to the Board and obtain review of the Engineer's or Designee's decision by filing a notice of appeal to the Board, which must be received within thirty (30) days of the issuance of the Engineer's or Designee's written decision. See Ordinance, § 3-1-104.

12) Stay of Decision. The decision of the Engineer or Designee shall not be stayed during the pendency of the appeal unless the Board expressly orders such a stay upon motion of the Complainant or Respondent. See Ordinance, § 3-1-103(4).

**Board Consensus to add this section, as is, to the WP&P 4/23**

WP&P 31-104. Appeal to the Board.

WP&P 31-105. Petition to the Engineer by Any Appropriator Aggrieved by Actions or Inactions of a Water Commissioner.

WP&P 31-106. Resolution of Petition.

WP&P 31-107. Appeal to the Board from a Decision on a Petition.

WP&P 31-108. Appeal from a Decision of the Board.

WP&P 31-109. Emergency Enforcement Powers of the Engineer.

**WP&P 31-110. Additional Enforcement Powers of the Engineer.**

- 1) Pursuant to Ordinance, §3-1-110, the Engineer may deny water right applications on parcel(s) where there are existing illegal uses of water until such time as the illegal uses of water cease and associated infrastructure is permanently removed or the water user finds a way to remedy the illegal use of water through lease, new water right application, or other legal means. This action may occur in the absence, or the presence, of additional enforcement actions imposed by the Engineer as authorized by the Ordinance and these Procedures.

WP&P 31-111. Expedited Appeal to the Board in the Event of Certain Actions by the Engineer.

WP&P 31-112. Additional Enforcement Powers of the Board.

WP&P 31-113. Fines.

WP&P 31-114. Appointment of Water Commissioners.

WP&P 31-115. Powers and Duties of Water Commissioners.

WP&P 31-116. Recourse from Water Commissioner Decisions.

WP&P 31-117. Removal of Water Commissioners.

## CHAPTER IV – OE HEARINGS AND APPEALS

### WP&P 41-101. General Provisions.

- 1) Purpose and Intent. The purpose of these procedures is to provide context and detail to the applicable and relevant sections of the Ordinance pertaining to hearings before the Office of the Engineer. These procedures are intended to assist individuals and persons involved in appeals and hearings proceedings before either the Engineer or Designee.
- 2) Representation. A party may appear on their own behalf, appearing pro se, or may be represented by an attorney licensed to practice law in the state of Montana or the CSKT Tribal Court in a proceeding before the Engineer or Designee. All legal entities, 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 or the CSKT Tribal Court throughout the entire proceeding. The Department of Natural Resources and Conservation and the Confederated Salish & Kootenai Tribes may appear in a proceeding before the Engineer or Designee for the limited purpose of representing the interests of the public.
- 3) Extension of Time. Upon a showing of good cause by the parties, the Engineer or Designee may extend the time limits specified within these procedures. The Engineer or Designee shall grant or reject the extension through an order and detail the reasons for the grant or rejection and issue the order to the parties.
- 4) Administrative Record. The OE shall maintain the official record in each proceeding until the issuance of the final decision. The record in a proceeding shall contain: a complete copy of the application file all pleadings, motions, intermediate rulings, and orders; all evidence received or considered, including a verbatim record of oral proceedings and pre-filed testimony; a statement of matters official noticed; questions and offer of proof, objections, and rulings; the OE file and all staff memoranda or data submitted to the Engineer or Designee as evidence in connection with the case; and the decision or final order by the Engineer or Designee.
- 5) Verbatim Record. If a hearing is held, the verbatim record consisting of audio recordings of the hearing shall be transcribed if requested by the Engineer or Designee. If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing to the Board, the requesting party must make arrangements with the OE for ordering and payment of

preparation cost of a written transcript. If any party appeals a final decision of the Engineer or Designee to the Board, the OE will transmit a copy of the recording(s) of the proceedings to the Board. Any party may request copies of the recordings and shall pay the charge set by the OE in WP&P [ ]. All monies received for copies of the recordings shall be payable to the Office of the Engineer.

#### WP&P 41-201. Office of the Engineer Hearings.

- 1) Appeal to Engineer/Designee from Recommended Decision. If a recommended decision is to deny an application or grant it with a requirement of Mitigation or other conditions, the applicant may appeal to the Engineer by filing a notice of appeal within 30 days of issuance of the recommended decision. An applicant may elect to have the appeal decided on the record, after submission of additional evidence and argument, or after hearing. If the applicant elects to have a hearing, that request must be made at the same time as the filing of the notice of appeal or the right to a hearing is waived. The notice of appeal must specify the parts of the recommended decision claimed to be in error.
- 2) Additional Evidence or Argument. Within 60 days from the filing of the notice of appeal, or any extended period of time, not to exceed 60 days, granted by the Engineer or Designee, the applicant may submit additional factual evidence and legal argument in support of the application. OE Staff who issued the recommended decision shall have 45 days from the applicant's submission to revise, amend, or affirm the recommended decision in a second recommended decision that explains in writing the rationale for the second recommended decision.
- 3) Application Deemed Denied. If the recommended decision or second recommended decision is to deny an application and no notice of appeal is filed, the application shall be deemed denied the day after expiration of the time for filing a notice of appeal. The OE shall issue a denial letter noticing the applicant of its decision. The denial letter shall constitute the final decision of the OE for purposes of the administrative record.
- 4) Burdens of Proof. Any party involved in a hearing before the Engineer or Designee shall adhere to the burdens of proof as described in the pertinent sections of the Ordinance.
- 5) Hearings Involving Objections. An objector or an applicant may elect to have any valid objection decided on the record or after hearing. If the objector elects to have a hearing, that request must be made at the same time as the filing of the objection or the objector's right to a hearing is waived. The applicant must invoke the right to a hearing within 10 days of receiving notice of the objection of the applicant's right to a hearing is waived. The applicant retains a burden to prove the applications' applicable criteria by a preponderance of evidence. The scope of a hearing involving an objection before the

Engineer or Designee shall involve the criteria to which the objector specifically objected to and which is determined valid by the Engineer or Designee.

- 6) Hearing Notice. A hearing notice for a hearing before the Engineer or Designee shall include: (a) a short and plain statement regarding the time; (b) place and nature of the hearing; (c) the legal authority and jurisdiction under which the hearing is to be held; (d) the particular sections of the statutes and rules involved; (e) the matters asserted, unless the OE is unable to state the matters in detail at the time the notice is served; (f) whether the formal proceeding may be waived; (g) name, address, and telephone number of the Engineer or Designee; (h) notification of the right of the parties to be represented by legal counsel; (i) notification that the failure of a party to appear at the hearing may result in default against a party; and (j) a citation to these procedural rules and to the relevant sections of the Ordinance. Service of a hearing notice constitutes the commencement of the hearing timeline before the Engineer or Designee; if a party is represented by an attorney, service upon the attorney shall constitute service upon the party.
- 7) Timing of Hearing. Timing of a hearing before the Engineer or Designee shall be determined by the applicable sections of the Ordinance. Upon request of a party to a hearing, if a hearing is continued, the Engineer or Designee shall make an oral statement providing that the hearing will be continued to a certain time and day or the hearing will be continued to a date to be determined later by written order.
- 8) Rules of Evidence. All evidence that, in the opinion of the Engineer or Designee, 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 normal business affairs. Rules of privilege recognized by law shall be given effect and evidence which is irrelevant, immaterial, or unduly repetitious shall be excluded. The Engineer or Designee may take judicial notice of cognizable facts and generally recognized technical or scientific facts within the OE's specialized knowledge. Parties shall be notified, either before or during the hearing or by reference in the proposal for decision of the material noticed. Each party shall be afforded an opportunity to context the materials so noticed.
- 9) Witnesses and Pre-filed Testimony. Any party may be a witness and may present witnesses at the hearing. The Engineer or Designee may order anticipated direct examination testimony by experts or other witnesses be prepared in advance and submitted as pre-filed testimony in either question-and-answer or narrative format.

Pre-filed testimony shall be served upon the Engineer or Designee and all parties as established by a schedule set by the Engineer or Designee. Any witness who submits pre-filed testimony must be available for cross-examination at the hearing. Evidentiary objections to such pre-filed testimony may be made by any party at any time during the

hearings conducted pursuant to these procedures. At the hearing, the party presenting the testimony may, if they deem it appropriate, briefly summarize the pre-filed testimony prior to the start of cross-examination. Nothing contained within pre-filed testimony shall be deemed to foreclose any party from presenting rebuttal testimony or from presenting testimony in response to reasonably unforeseen areas without the necessity of pre-filing.

At the request of the party or a witness, the Engineer or Designee may permit a witness to appear and provide oral testimony by means of telephonic or video participation. Such requests may only be granted if the Engineer or Designee determines that telephonic or video participation will not substantially prejudice the rights of any party. A party may call an adverse witness who may be a party's managing agent or employees, or an officer, director, managing agent, or employee of the state or any political subdivision thereof, or of a public or private corporation or of a partnership or association or body politic which is an adverse party, and interrogate the adverse witness by leading questions and contradict and impeach the adverse witness on material matters in all respects as if the adverse witness had been called by the adverse party. The adverse witness may be examined by counsel for the adverse witness upon the subject matter of the examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted, and impeached by any other party adversely affected by the adverse witness' testimony.

10) Subpoenas. Requests for subpoenas for the attendance of witnesses or the production of documents shall be made in writing to the Engineer or Designee and shall contain a brief statement demonstrating the potential relevance of the testimony or evidence sought and shall identify any documents sought with specificity, and shall name all persons to be subpoenaed. A subpoena shall be served in the manner provided by the Montana Rules of Civil Procedure. The cost of service, fees, and expenses of any witnesses subpoenas shall be paid at the rates determined by the OE by the party at whose request the witness appears. The person serving the subpoena shall make proof of service by filing the subpoena together with a certificate of service with the Engineer or Designee. Upon submitting a prompt motion, and in any event at or before the time specified in the subpoena for compliance therewith, the subpoena may be quashed or modified if the Engineer or Designee finds it is unreasonable or oppressive. The party seeking the subpoena may seek enforcement of the same by applying to a judge of a Court of Competent Jurisdiction for an order to show cause why the subpoena should not be enforced against any witness who fails to obey the subpoena.

11) Discovery. Written discovery may commence upon service of the hearing notice by the OE. Unless otherwise specified in these procedures or order of the Engineer or Designee, the methods, scope, and procedures of discovery available pursuant to the Montana Rules of Civil Procedure apply to written discovery in a proceeding before the Engineer or Designee.

A party may make a written demand upon another party requesting the disclosure of witnesses and written documents following the commencement of discovery. Within ten days of a service of a written demand, the responding party must: disclose the names and addresses of all witnesses known to the responding party to have knowledge of relevant facts along with a brief summary of the facts known by each witness, whether the responding party intends to call the witness as a witness at hearing, and the anticipated testimony of any witness the responding party intends to call as a witness at hearing.

All witnesses unknown at the time of the disclosure shall be disclosed, together with a brief summary of the expected testimony, as soon as they become known; identify all relevant documents, maps, photographs, correspondence, recorded statements, or other written materials; provide the name and address of the custodian of such information; and disclose whether the responding party intends to use the evidence at hearing. Within ten days of being served with written requests for production of documents, written interrogatories, and/or written requests for admission, the responding party shall serve written responses and/or objections upon the requesting party.

Any party unreasonably failing upon demand to make a disclosure, may be foreclosed from presenting any evidence at the hearing through witnesses not disclosed or through witnesses whose statements are not disclosed. Depositions of parties and witnesses by oral examination may be taken in accordance with the Montana Rules of Civil Procedure. Depositions of parties and witnesses by oral examination may be used at hearing for any purpose permitted by the Montana Rules of Civil Procedure.

12) Ex Parte Communications. No party or representative of a party shall communicate, in connection with any issue of law or fact in a pending proceeding, with the Engineer or Designee without notice and opportunity for all parties to participate in the communication. The prohibitions of this procedure shall apply beginning at the time at which a hearing is noticed and shall continue until a final order has been issued unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of that person's acquisition of such knowledge.

The Engineer or Designee may respond to questions of any party or representative of a party if it relates solely to procedures to be followed during the pendency of the hearing. A communication made for this purpose is not an ex parte communication. If the Engineer or Designee receives a prohibited communication, the Engineer or Designee shall decline to listen to such communication and shall explain that the matter is pending for determination, and that the Engineer or Designee may not listen to information or allegation when other parties are not present to respond.

If unsuccessful in preventing such communication, the Engineer or Designee shall notify the communicator that the Engineer or Designee will not consider the communication and that the other parties will be notified of it. The Engineer or Designee shall then place on the record of the pending matter any written communications received or a memorandum stating the substance of all oral communications received and all responses made and the identity of each person from whom the Engineer or Designee received an ex parte communication. The Engineer or Designee shall then notify all parties of the communication and its substance either orally on the record at the hearing or, if no hearing is held, in a written memorandum. The Engineer or Designee shall inform the parties that the substance of the communication is not part of the record in the pending matter, and will not be used as a basis for any part of the decision made therein. Upon receipt of a communication knowingly made in violation of this procedure the Engineer or Designee may require, to the extent consistent with the interests of justice and the policy of underlying statutes, the communicator to show cause why the communicator's claim, objection or interest in the hearing should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

- 13) Site Visits. Upon the request of the Engineer or Designee or upon the motion of any party, a site visit to the lands involved in the proceeding may be made at any time during the proceeding. The Engineer or Designee may enter upon lands to view proposed works, sources of water, location of proposed uses, construction of works, and such other views that are deemed relevant by the Engineer or Designee to gain a proper understanding of the issues involved in the proceeding. Before making any site visit, the Engineer or Designee shall give the parties at least five days written notice to participate, unless the motion is made during a hearing and then oral notice on the record shall be sufficient.
- 14) Staff Experts. An OE Staff expert may be appointed to issue a written report/opinion regarding: the subject matter and issues presented by technical aspects of the application; valid objections; and/or evidence in the proceeding. A copy of any OE Staff report/opinion shall be served on each party at least 14 days before commencement of the hearing. A party may take the deposition of any OE Staff expert witness who prepares a report/opinion. An OE Staff expert witness who prepares a report/opinion may be called as a witness at the hearing and examined or cross-examined by any party and/or the Engineer or Designee. Nothing in these procedures shall prevent any of the parties from producing other expert evidence on the same fact or matter to which the OE Staff expert witness appointed by the Engineer or Designee relates.
- 15) Settlement and Stipulations. The terms of a settlement, stipulation, or consent entered between private parties as a private contractual agreement are not binding on the OE. If the parties propose inclusion of the terms of a settlement, stipulation, or consent as a

condition to a permit or change authorization, the parties shall submit a copy of the written settlement, stipulation, or consent along with any proposed condition to the OE for consideration. At the OE's discretion, the terms may be included as a condition to a permit or change authorization upon determination that the terms are consistent with and necessary to satisfy the applicable statutory criteria. A complete copy of the settlement, stipulation, or consent considered by the OE must be included in the record. In an proceeding involving a hearing before the Engineer or Designee, if the parties sign and file with the OE a stipulation that the proceeding be dismissed, specifying the terms as to payment of costs, and whatever fees are due, the OE shall enter the proceeding dismissed, and shall give to each party a copy of the stipulation filed.

- 16) Engineer/Designee Hearing Duties. The Engineer or Designee shall perform the following duties associated with conducting a hearing: (a) regulate the course of the proceeding, including the scheduling, establishing deadlines, recessing, reconvening, and adjournment; (b) hear and rule on motions; (c) preside over the hearing; administer oaths and affirmations; (d) maintain a complete record of the proceeding; and (e) issue a decision or final order containing findings of fact and conclusions of law. The Engineer or Designee may perform the following duties: (a) enter preliminary, interlocutory and other orders deemed necessary; (b) limit the scope of discovery; (c) appoint a staff expert to issue a written report; (d) question witnesses; (e) issue subpoenas; (f) enter rulings regarding the admissibility of evidence; (g) request the submission of proposed findings of fact and conclusions of law; and (h) perform such other duties consistent with the Ordinance.
- 17) Prehearing Conference and Orders. Upon written request of a party or by order of the Engineer or Designee, a prehearing conference may be conducted to: (a) clarify the issues to be determined prior to or at the hearing; (b) establish deadlines for matters including but not limited to: (i) the submission of prehearing evidence; (ii) submission of post-hearing pleadings; and (iii) submission of proposed findings of fact and conclusions of law; (c) obtain stipulations regarding foundation for evidence including but not limited to expert witness testimony; (d) hear argument and rule on prehearing motions and evidentiary objections; (e) identify witnesses and exhibits; and (f) establish and review issues related to the hearing. Following a conference, the Engineer or Designee shall issue an order reciting the matters addressed and documenting any action taken at the prehearing conference. A party who fails to appear at a prehearing conference without good cause waives the right to object to any matters set forth in the prehearing order.
- 18) Consolidation. Two or more proceedings may be proposed for consolidation as a single proceeding upon motion of a party or upon notice by the Engineer or Designee. If consolidation is proposed by a party, the procedures regarding filing of motions to the Engineer or Designee shall be followed. If consolidation is proposed by the Engineer or Designee, the Engineer or Designee shall serve each party with written notification of the



proposal to consolidate. Any party opposing consolidation shall file and serve a written objection stating the reasons consolidation should not be ordered within 14 days of service of notice. The Engineer or Designee may order consolidation upon determining: (a) the proceedings present substantially the same issues of fact or law; (b) the final order in one proceeding would affect the rights of the parties in the other; and (c) the consolidation would not substantially prejudice any party. An order granting or denying a motion for consolidation shall be served upon all parties and shall contain a description of the cases being consolidation and shall explain the basis for the Engineer or Designee's determination.

19) Hearing Procedure. A hearing shall be conducted in the following manner: the Engineer or Designee shall open the hearing and provide a statement that explains or identifies: (a) the subject matter of the hearing and issues presented; (b) the procedures to be followed at hearing including the sequence for presenting evidence and argument; (c) any exhibits or evidence entered into the record by stipulation of the parties; (d) the burden of proof for each party; (e) the time and place for each party to present argument and evidence and cross-examine witnesses; (f) any relevant procedures or Ordinance provisions applicable to the hearing; (g) the Engineer or Designee's discretion to make determinations regarding admissibility of evidence; and (h) such other matters as the Engineer or Designee considers appropriate. Each party shall be provided the opportunity to make an opening statement. Each party shall be provided the opportunity to present evidence and examine witnesses in a sequence determined by the Engineer or Designee. Each party shall be provided the opportunity to cross-examine witnesses in a sequence determined by the Engineer or Designee. Each party shall be given the opportunity to present final argument in a sequence and form determined by the Engineer or Designee. Such final argument may be in the form of written memoranda or oral argument, or both. After final argument, the hearing shall be closed or continued. The hearing shall be electronically recorded and an official record maintained as part of the administrative record. The Engineer or Designee may require submission of proposed findings of facts and or post-hearing briefs at the close of testimony in the hearing. The proposed findings and briefs may be submitted simultaneously or sequentially and within such time periods as the Engineer or Designee may prescribe. The record of the proceeding shall be closed upon receipt of the final written memorandum, transcript, if any, or late filed exhibits that the parties and the Engineer or Designee have agreed should be received in the record, whichever occurs latest.

20) Disruption of Hearings. It is the duty of the Engineer or Designee to conduct a fair and impartial hearing and to maintain order. All parties to the hearing, their counsel and any other persons present shall conduct themselves in a respectful manner. Any disregard by parties or their attorneys of the rulings of the Engineer or Designee on matters of order and procedure may be noted on the record. If the applicant is responsible for disrespectful, disruptive, or disorderly conduct which interferes with the proper and

orderly holding of the hearing, the Engineer or Designee may recess or continue the hearing. If a party or person other than the applicant is disrespectful, disorderly or disruptive, the Engineer or Designee may bar that party or person from the proceeding and may strike all evidence presented by that party or person if the applicant's case is not prejudiced by the absence of the offending party or person. Before taking action under this rule, the Engineer or Designee shall first read this procedure to those parties or attorneys causing such interference or disruption.

- 21) Unavailability of Engineer/Designee. If the Engineer or Designee becomes unavailable to the OE, a decision may be prepared by an individual who has read the record only if the demeanor of witnesses is considered immaterial by all parties. If any party considers the demeanor of any witness to be material to the resolution of the appeal, a new hearing must be held.
- 22) Requests for New Hearings. A party must request a new hearing, in writing, within 30 days after the date of the notice of hearing before the Engineer or Designee. When a party requests a hearing, it shall be that party's burden to describe, with particularity, its reasons for requesting a new hearing.
- 23) Default. A default occurs when a party fails to appear at a hearing or fails to comply with an interlocutory orders of the Engineer or Designee. Upon default, the defaulting party's claim or interest in the proceeding may be dismissed (with or without prejudice), denied, disregarded or disposed of adverse to the defaulting party. An applicant is not relieved of the duty to present evidence to satisfy the applicant's substantive burden of proof when all objectors to a proceeding default.

#### WP&P 41-301. OE Hearing Decisions.

- 1) Decisions of the Engineer/Designee. A decision to reverse, modify, or affirm a recommended decision, or, if applicable, a second recommended decision, shall be made in writing, as prescribed by the applicable sections of the Ordinance, after the later of: (a) the filing of a notice of appeal; (b) the submission of additional evidence or legal argument; (c) issuance of OE Staff's second recommended decision; or (d) the completion of the hearing.

If the Engineer or Designee reverses a recommended decision, or, if applicable, a second recommended decision, and determines that the application should be granted, the application shall be publicly noticed to the public.

If the Engineer or Designee affirms a recommended decision, or, if applicable, a second recommended decision, resulting in a denial of an application, the applicant may either

accept that decision by withdrawing the application or taking no further action, or may appeal that decision to the Board. The application filing fee shall not be refunded upon withdrawal and if no timely notice of appeal is filed, the application shall be deemed denied on the day after the expiration of the time to file the notice of appeal.

If the Engineer or Designee affirms a recommended decision, or, if applicable, a second recommended decision, resulting in the granting of an application with a requirement of conditions other than Mitigation, the applicant may: (a) withdraw the application; (b) file with the OE written acceptance of the conditions within 30 days of the Engineer or Designee's decision, in which case the application will be noticed to the public; or (c) appeal the decision to the Board. The application filing fee shall not be refunded upon withdrawal and failure to withdraw the application, file written acceptance of the condition, or file an appeal within the applicable timeframes shall result in the application being deemed denied on the day after the expiration of the time to appeal.

If an applicant has appealed to the Engineer a determination that Mitigation is necessary and the Engineer or Designee affirms the recommended decision resulting in a determination that Mitigation is required before the application may be granted, the applicant may: (a) withdraw the application; (b) appeal the decision to the Board; or (c) prepare a Mitigation Plan. The application filing fee shall not be refunded upon withdrawal and failure to withdraw the application, file a Mitigation Plan, or file an appeal within the applicable timeframes shall result in the application being deemed denied on the day after the expiration of the time to file a Mitigation Plan.

If the Engineer or Designee affirms a recommended decision, or, if applicable, a second recommended decision, that found a Mitigation Plan inadequate to justify the issuance of the proposed right or change, the applicant may either accept that decision by withdrawing the application or taking no further action, or may appeal that decision to the Board. The application filing fee shall not be refunded upon withdrawal and if no timely notice of appeal is filed, the application shall be deemed denied on the day after the expiration of the time to file the notice of appeal.

- 2) Finality of Decision. The decision issued by the Engineer or Designee in a hearing proceeding shall be deemed the final decision of the Engineer or Designee and is binding upon all the parties as to all issues and claims that were raised or might have been raised at the hearing. Under the applicable sections of the Ordinance, an aggrieved party may obtain review of the final decision of the Engineer or Designee by filing an appeal with the Board within thirty (30) days of the issuance of the final decision.

## **WATER POLICY & PROCEDURES CERTIFICATIONS**

These policies and procedures are hereby adopted by the Flathead Reservation Water Management Board on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, for the operation of the Office of the Water Engineer.

\_\_\_\_\_ Date: \_\_\_\_\_  
Board Chair, Clayton Matt:

\_\_\_\_\_ Date: \_\_\_\_\_  
Board Vice Chair, Roger A. Noble: