

OFFICE OF THE WATER ENGINEER COMPLAINT PROCESS

The below section is intended to be added to the Board's Water Policy and Procedures (WP&P) Document and is formatted to integrate to Chapter III WP&P Enforcement Section. Due to priority need for complain policies and procedures, this section has been selected to receive Board consideration ahead of other pending WP&P items.

WP&P 31-102: Complaint to the Engineer Regarding Actions or Interactions Between Appropriators

- 1) **Who May Bring A 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.
- 2) **Complaint Requirements.** A Complaint must be submitted in writing to the Office of the Engineer and describe specifically the action or inaction being complained of and the justification for the Complaint. The Office maintains a Complaint form (Form 609F) on the Board's website for a Complainant's use.
- 3) **Receiving a Complaint.** When the Office of the Engineer receives a Complaint, with the accompanying fee set forth in WP&P 10-102 OE Forms & Fee Table [\$55.00], payable by check or money order as set forth in WP&P 22-104.4, the Office shall date stamp the Complaint and return a copy of it to the Appropriator or the Respondent.
- 4) **Notice of Complaint.** Within three (3) days of receiving the Complaint, the Office of the Engineer shall serve a copy of the Complaint on the Appropriator or the Respondent and shall post a notice of the Complaint on the Board's website.

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. 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 may be formatted as such:

FLATHEAD RESERVATION WATER MANAGEMENT BOARD
IN THE OFFICE OF THE WATER ENGINEER

_____) Case No. ____
Complainant)
)
) **Notice of Complaint**
)
)
_____)
Respondent

PARTIES TAKE NOTE: Informal resolution of the dispute between Complainant, _____, and Respondent, _____, may provide a timelier and cost-effective remedy than having the Complaint adjudicated by the Office of the Engineer.

A Complaint was filed with the Office of the Water Engineer (OE) on _____, complaining of: _____.

A hearing on this matter is required. Hearing logistics are set forth below.

Date:

Time:

Location:

Manner:

Additional logistics:

Dated, _____,

Engineer/Designee

- 5) Extension of Time.** The parties, upon mutual agreement, may extend the timeframes set forth in Ordinance sections 3-1-102 through -107.

WP&P 31-103: Resolution of Complaint

- 1) **Informal Resolution.** The parties, either on their own or at the request of the Engineer or Designee, may resolve the Complaint informally, unless the Complaint pertains to illegal use of water. If any resolution documents are generated and executed, the parties may submit a copy to the Office of the Engineer to be placed in the parties' records with the Office.
- 2) **Timing of Complaint Hearing.** In the event informal resolution is unsuccessful, the Engineer or Designee shall hold a hearing on the 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 Complaint as the Engineer or Designee deems appropriate.

- 3) **Representation.** A party may appear on their own behalf or may be represented by an attorney in a hearing 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.
- 4) **Investigation of Complaint.** The Engineer or Designee may choose to perform an independent investigation of the Complaint 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) **Complaint Hearing.**
 - a. At the hearing before the Engineer or Designee, both the Complainant and the Respondent shall explain their positions concerning the matter complained of.
 - b. The Engineer or Designee may or may not 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 expert witnesses 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 an 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.
 - e. Rules of privilege recognized by law shall be given effect. Evidence which is irrelevant, immaterial, or unduly repetitious shall be excluded.
 - f. The hearing shall be electronically recorded and included as part of the administrative record.
- 6) Timing of Decision.** A decision of the Engineer or Designee on the Complaint shall be made in writing within seven (7) days after the completion of the hearing.
- 7) Final Decision of the Engineer or Designee.**
- 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.
 - c. 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.Ordinance, § 3-1-103(3).
- 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. 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.
- 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.
- 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. Ordinance, § 3-1-110.

10) Entry and Notice of Final Decision. A final decision of the Engineer or Designee shall be entered into the administrative record, kept with the Office of the Engineer. The Office of the Engineer shall promptly issue to all parties a copy of the final decision and notice of the date of entry.

11) Effect of Final Decision. The final decision issued by the Engineer or Designee shall be deemed the final decision of the Office of the Engineer and is binding upon all the parties as to all issues and claims there were raised or might have been raised in the Complaint proceeding.

12) 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. Ordinance, § 3-1-104.

13) 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.