

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

DRAFT WATER POLICIES & PROCEDURES



NOTICE

THE BOARD APPROVED THE SECTIONS OF THE WP&P BELOW FOR A 15-DAY PUBLIC COMMENT PERIOD ON 10/30/24. THESE SECTIONS INCLUDE:

- CHAPTER I: WATER RESOURCES CONSERVATION, DEVELOPMENT AND ADMINISTRATION

WP&P 10-105. Issuance of Water Right – Illegal Uses.

- CHAPTER II: WATER USE
 - PART 2 – PERMIT AND CHANGE APPLICATION PROCESS

WP&P 22-101. Appropriation Rights and Change of Use Authorizations on the Reservation

- CHAPTER III: ENFORCEMENT

WP&P 31-103. Resolution of Complaint[s].

WP&P 31-113. Fines

WP&P 10-105. Issuance of Water Right – Illegal Uses.

- 1) 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 Engineer or Staff designated by the Engineer should not issue an OE Water Right 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.
- 2) The Engineer or Staff designated by the Engineer may implement enforcement actions based on this discovery. Ordinance, §§ 3-1-109 and -110; WP&P Chapter III.

CHAPTER II: WATER USE

PART 2 – PERMIT AND CHANGE APPLICATION PROCESS

WP&P 22-101. Appropriation Rights and Change of Use Authorizations on the Reservation

- 1) Permit not Required for Testing and/or Monitoring.
 - a) Water testing or monitoring is not a beneficial use of water requiring the filing of a permit application.
 - b) A permit is not required if the intent of a person is to conduct aquifer tests, water quality tests, water level monitoring, or other testing or monitoring of a water source.
 - c) Any person conducting testing or monitoring must notify the OE in advance on Form 622F. The following information must be provided;
 - i. General description of the project in its entirety.
 - ii. Entity performing the test.
 - iii. Copies of other permits required for the work.
 - iv. Location including latitude and longitude of test wells/features.
 - v. Duration of the test including start and stop dates.
 - vi. Flow rate and volume estimates and destination of return flow.

WP&P 31-103. Resolution of Complaint[s].

- 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 [Short-term Lease] 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. 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. 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) Representation. A party may appear on their own behalf or may be represented by an attorney, licensed to practice law in the state of Montana or the CSKT Tribal Court, 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.
 - 5) 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.
 - 6) 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. 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. Ordinance, § 3-1-103.
- f. The hearing shall be electronically recorded and included as part of the administrative record.

This section also applies to informal complaints that are determined by the Engineer or Designee to require a hearing.

- 7) 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. 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.

- 8) 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.
- c. Such conditions may include, but are not limited to:
 - i. Instructions regarding the proper delivery of water;
 - ii. Installation of measuring devices;
 - iii. Construction of suitable ditches to carry the return waters from any ditch or lands to the main stream or proper waste way; or
 - iv. Mandating structural changes to diversion structures. Ordinance, § 3-1-103(3).

This section also applies to informal complaints that are determined by the Engineer or

v. Designee to require a hearing.

9) 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.

10) 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. Ordinance, § 3-1-110.
- b. 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.
- c. 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. Ordinance, § 3-1-110.
 - i. The Engineer, or any Staff who is so directed by the Engineer, may conduct an investigation to determine illegal uses of water using the following types of information including but not limited to: (1) well logs or well driller records; (2) remotely sensed data; (3) installation tags or plate information obtained through field visits.
 - ii. The Engineer, or any Staff who is so directed by the Engineer, may modify water measuring reporting requirements to address overages or additional water uses determined to be associated with a measured use. The following types of modifications include but are not limited to: (1) increasing frequency of reporting such as requiring monthly reporting when annual overages occur; (2) requiring water user to provide a more detailed schedule of water use for purposes of accommodating an increased frequency of reporting as set forth in (1) above; (3) require adding a measuring device to an additional water use determined to be associated with a measured use.
- d. The Engineer, or any Staff who is so directed by 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.

- 11) 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.
- 12) Effect of Final Decision. The final decision issued by the Engineer or Designee shall be deemed the final decision of the OE and is binding upon all the parties as to all issues and claims that were raised or might have been raised in the complaint proceeding.
- 13) 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.
- 14) 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. Ordinance, § 3-1-103(4).

WP&P 31-113. Fines

- 1) Maximum Fines Imposed by the Board. Maximum fines are defined in Ordinance,
 - a. Not to exceed \$1000 per violation. Ordinance, § 3-1-113(1).
 - b. Each day of violation constitutes a separate violation. Ordinance § 3-1-113(4).
- 2) Fines for Constructing a Well or Developed Spring Prior to Authorization from the OE. If a well(s) or developed spring(s) is found by the Office of the Engineer to have been drilled and/or developed after June 1, 2022, without prior authorization by the Office of the Engineer, a one-time fine equal to the pertinent application fee may be imposed by the Engineer, or any Staff who is so directed by the Engineer, in addition to any filing fee(s) that may be due. The Engineer, or any Staff who is so directed by the Engineer, may also notify the Montana Water Well Drillers Association regarding the violation and the need for prior approval before drilling can occur.
- 3) Fines for Exceeding Maximum Volumes Allowed for Measured Uses. If a water user exceeds the maximum volume allowed for a use of water for which they are required to measure and report to the OE, the Engineer, or any Staff who is so directed by the Engineer, may impose a fine up to an amount equal to the pertinent application fee associated with the use for each period of overage that occurs. For annual volume

measurement requirements, the overage would be once per year. If annual volume measurement requirements are modified to be more frequently required by WP&P 31-303.10.c.ii, that new required water measurement frequency would set the schedule for recurring fines.

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