

**PENDING BOARD APPROVAL: NEW DRAFT SECTIONS**

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

**WATER POLICIES & PROCEDURES (WP&P)**



**[NEW] DRAFT/UPDATED SECTIONS & SUBSECTIONS THAT HAVE NOT BEEN APPROVED BY THE BOARD:**

- WP&P 21-107(4) UPDATED SUBSECTION: State-based Registrations, Pre-1973 Uses
- WP&P 22-101(2) REORG and ADDITION:
  - New Title: Exceptions to a Change Authorization.
  - New Subsection (b): Petition to Modify a Permit or Change Authorization

## 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.

# FRWMB Water Policies & Procedures

<b>CHAPTER I: WATER RESOURCES CONSERVATION, DEVELOPMENT AND ADMINISTRATION.....</b>	<b>5</b>
<b>PART 0: OPERATIONS. SECTION .....</b>	<b>5</b>
WP&P 10-102. OE Form Descriptions, Status, Fees, and Version Dates.....	5
WP&P 10-103. Water Right Application Submission. ....	5
WP&P 10-105. Issuance of Water Right – Illegal Uses.....	8
<b>PART 1 – GENERAL PROVISIONS .....</b>	<b>8</b>
WP&P 11-104. Definitions. ....	8
WP&P 11-108. Reservation Water Rights Database.....	9
WP&P 11-111. Groundwater Diversion Standards.....	9
WP&P 11-112. Mitigation. ....	9
WP&P 11,113. Codification, Severability and Defense.....	10
WP&P 11,114. Effective Date.....	10
<b>PART 2 – UNITARY ADMINISTRATION AND MANAGEMENT .....</b>	<b>10</b>
WP&P 12-112. Filing Fees. ....	10
<b>CHAPTER II – WATER USE.....</b>	<b>10</b>
<b>PART 1 – GENERAL PROVISIONS .....</b>	<b>10</b>
WP&P 21-106. Registration of Certain Other Previously Unrecorded Existing Uses.....	10
WP&P 21-107. Process for Registration of Certain Other Previously Unrecorded Existing Uses.....	10
WP&P 21-108. Failure to Register an Existing Use of Water. ....	13
WP&P 21-111. [New] Abandonment of Appropriation Right.....	13
WP&P 21-112. Procedure for Declaring Abandonment. ....	14
<b>PART 2 – PERMIT AND CHANGE APPLICATION PROCESS .....</b>	<b>14</b>
WP&P 22-101. Appropriation Rights and Change in Use authorizations on the Reservation.....	14
WP&P 22-115 Redundant and Substitute Wells.....	15
WP&P 22-116. Appropriation Rights for Stock Water Allowances.....	16
WP&P 22-117. Appropriation Rights for Domestic Allowances for Homes and Businesses; Process for Application, Review, and Issuance. ....	17
WP&P 22-118. Process for development of new uses from Flathead System Compact Water.....	22
WP&P 22-119. Appropriation Rights for Non-consumptive Geothermal Heating or Cooling Exchange Wells.....	24
<b>CHAPTER III – ENFORCEMENT .....</b>	<b>24</b>
WP&P 31-102. Complaint[s] to the Engineer Regarding Actions or Inactions Between Appropriators.....	24
WP&P 31-103. Resolution of Complaint[s]. ....	25
WP&P 31-113. Fines.....	29
<b>CHAPTER IV – OE HEARINGS AND APPEALS .....</b>	<b>30</b>

WP&P 41-101. General Provisions.....	30
WP&P 41-201. Office of the Engineer Hearings.....	31
WP&P 41-301. Office of the Engineer Decisions. ....	39
WP&P 41-401. Hearing Records and Public Inspection Requests. ....	40
<b>WATER POLICY &amp; PROCEDURES CERTIFICATIONS .....</b>	<b>42</b>

# CHAPTER I: WATER RESOURCES CONSERVATION, DEVELOPMENT AND ADMINISTRATION

## **PART 0: OPERATIONS. SECTION**

ADU	Accessory Dwelling Unit
AF	Acre-Feet
ARM	Administrative Rules of Montana
AU	Animal Units
CFS	Cubic Feet per Second
Compact	Water Compact between the Confederated Salish and Kootenai Tribes, Montana, and the United States
CSKT	Confederated Salish and Kootenai Tribes
DEQ	Montana Department of Environmental Quality
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
MCA	Montana Code Annotated
MT	Montana
OE	Office of the Water Engineer
TSR	Title Status Report
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 water development. See **WP&P 10-103(6)**. 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.
- 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 or money order only.
  - c) Refunds for applications where OE staff have commenced any work will not be allowed under normal circumstances. Refunds are only allowed in extenuating circumstances where either the OE, the Ordinance, or these WP&Ps 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. The criterion of this section does not apply to applicants pursuing the use of the Flathead System Compact Water, See WP&P, § 22-118 for more details.
- 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 one or more owners, all owners of record must provide original signatures on the application, or the application must contain written permission pursuant to WP&P 10-103(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 & Deed of Trust.

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.

b) Deed of Trust: For applications with a parcel(s) that are under a deed of trust, the Grantor(s) must sign water right applications with original signatures. Water rights approved by the OE will be issued to the Grantor(s). If the property is foreclosed before the OE issues a water right, the new owners must provide the OE with an updated deed and file an Application Owner Update Form (620F) with the OE to convert the active water right application to their name. The OE may terminate the application if these steps are not taken before application deadlines pass.

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 applicant must provide written authorization from the Tribes.

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(s) 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) Not Adequate to Process Determination. A water right or water use application that is determined to be “not adequate to process” may be terminated/revoked by the OE. The OE may 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 determined to be adequate to process is not the same as a determination that the application meets the statutory criteria for application approval.
- 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 individuals 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 10-105. 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.

### **PART 1 – GENERAL PROVISIONS**

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

- 1) Connected (Wells). 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. Diverted flow which is not consumptively used and which 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



- 4) Substantial Credible Information. 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) Ditch Tailwater or Tailwater. 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 *tailwater* ditch is *tailwater*.
- 6) Water Use Plan. Organized description with supporting information and calculations from an engineer, hydrologist, or technical professional with expertise in water use planning 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 11-108. Reservation Water Rights Database.*

- 1) Access to WRIS Database: An OE employee approved to work within WRIS will receive a State-registered CN#, which shall be unique and individual to that OE employee.
- 2) Corrections to Water Rights with a Priority Date of July 1, 1973, or Later: The Water Engineer or Staff in consultation with the Engineer may correct errors or provide additional information for existing State-based water rights recorded in the WRIS. Corrections shall occur on the original version of the water right.
  - a. Corrections to the record – informational remark: Water Rights being corrected shall receive an informational remark that explains exactly what was corrected, when it was corrected, and that the correction was performed by the OE.
  - b. Corrections to the record – memo to the file: Water Rights being corrected shall be generally described in a memo to be added to the water right record that explicitly describes the reason(s) for any correction. For each corrected water right element, the memo will define what was modified, provide the date of the correction, justify the need for the correction, document who made the correction, document who authorized the correction, and when needed, include a fully implemented Correction form (Form 625F).
- 3) Correction to Water Rights with a Priority Date Prior to July 1, 1973 (Statements of Claim): Corrections to Statements of Claim shall be limited to the: owner names, owner addresses, geocodes, and title status report tract number.

#### *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 and/or annulus around the well, to avoid Waste or Wasting of water as defined by Ordinance, § 1-1-104(65).

#### *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.*

- 4) Filing Fees. See 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.

## **CHAPTER II – WATER USE**

### **PART 1 – GENERAL PROVISIONS**

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

- 1) Certain Unrecorded Existing Uses: The Existing Uses, as described in Ordinance § 2-1-106 and WP&P 21-106(1)(a)-(c), are termed, “State-based Registrations.
- 2) Determination of State-based Registrations that have a Duplicative Claim Filing: The OE may compare State-based Registrations with claims filed in the Montana General Stream Adjudication. If the OE determines a claim has been filed for the same (duplicative) water use, the OE will suspend the duplicative State-based Registration until the claim is resolved by the Montana Water Court.
- 3) Determination of State-based Registrations that have a Duplicative post-1973 Filing: The OE may compare State-based Registrations with certificates, permits, allowances, and/or other State-based Registrations filed with the Montana DNRC or the OE. If the OE determines that a certificate, permit, and/or other State-based Registration has been filed or issued for the same (duplicative) water use, the OE may require the Registration owner to resolve the issue.

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

- 1) Adequacy of State-based Registrations – Registration Processing:
  - a. Informal Resolution of Defects: The OE may choose to resolve State-based Registration defects informally through phone, email, or in-person communication.
  - b. Formal Resolution of State-based Registration Defects: Upon making an initial determination to reject a State-based Registration, the OE shall send notice, in the form of a Defect Letter, to the owner(s) of record that details the defects that caused the initial determination to reject the State-based Registration. The owner(s) of record has thirty (30) days from the receipt of the letter to provide the OE with corrected information that addresses all defects identified by the OE. The thirty (30) day deadline shall begin fifteen (15) days from the date the Defect Letter was mailed to ensure delivery, thereby resulting in a forty-five (45)-day

deadline for response. A response postmarked within the above timeframe is considered a timely response.

- c. Failure to Respond: Failure to respond within the required timeframe, in b. above, may result in the OE's rejection of the State-based Registration.
- d. State-based Registration Issuance: Upon determining that a State-based Registration is adequate, the OE shall issue the Certificate of Registration and send an official copy of the issuance to the owner(s) of record.
- e. State-based Registration Rejection: Upon determining that a State-based Registration is rejected, the OE shall send a notice of Registration Rejection to owner(s) of record.

2) Adequacy of State-based Registrations - Possessory Interest and All Owners: State-based Registrations must meet the requirements of WP&P 10-103 (6-12).

- a. The OE may reject State-based registrations that fail to demonstrate that the owner(s) have possessory interest and appropriate title or the written, notarized permission from all owners with a possessory interest for all points of diversion(s), places of use, and the entirety of the conveyance.
- b. State-based Registration owners must update and resolve ownership issues relating to all associated parcel(s) where the water use occurs. If a DNRC Ownership Update (Form 608) is needed, the Registration owner must complete this process as identified by the OE. The OE may choose to extend defect response deadlines if the applicant can demonstrate that delays in DRNC's processing of Form 608 caused missed deadlines.

3) Adequacy of State-based Registrations – Location: The OE may reject a Registration if the places of use and points of diversion locations are not clearly identified and the Registration owner fails to provide corrected or missing location information identified in a Defect Letter.

4) Adequacy of State-based Registrations - Pre-1973 filings under Ordinance 2-1-106(1): Registrations under this section are limited to uses whose first use predates July 1, 1973 and the use is one of the following:

- a. Surface Water, direct from source, purposed for stock;
- b. Groundwater purposed for single domestic (one (1) home) that may include lawn and garden not to exceed five (5) acres in total size; or
- c. Groundwater purposed for stock.

When the OE cannot confirm pre-197 use, it will issue a letter of defect and require substantial evidence of the pre-1973 use that may include, but is not limited to: affidavit from a pre-1973 water user corroborating the use, additional pre-1973 photographic information, and/or additional pre-1973 written documentation corroborating the use.

- 5) Adequacy of State-based Registrations - Volume: The OE may reject a State-based registration that fails to meet the following volume requirements:
  - a. Information needed to determine the maximum annual diverted volumes as identified in a Defect Letter.
  - b. The OE calculates that the volume exceeds the allowable amount for a State-based Registration, and the registrant fails to provide a Reduction or Correction (Form 625Fs) that adequately addresses the volume overage.
- 6) Adequacy of State-based Registrations – Flow Rate: The OE may reject a State-based registration that fails to meet the following flow rate requirements:
  - a. Information needed to determine the maximum flow rate as identified in a defect letter.
  - b. The OE calculates that the flow rate exceeds the allowable amount for a State-based Registration, and the registrant fails to provide a Reduction or Correction (Form 625Fs) that adequately addresses the flow rate overages.
- 7) Adequacy of State-based Registrations – Date Water Was Put to Use: The OE will reject any State-based Registration if the water was not put to use by the September 17, 2021, which is the Effective Date of the Compact.
- 8) Adequacy of State-based Registrations – Wrong Form Filed: If the OE determines that an applicant has filed the wrong form, or is trying to use an inappropriate application type, the OE will send the registrant a letter explaining the issue and require the applicant to resolve the issue or the Registration will be rejected.
- 9) Adequacy of State-based Registrations – Fee(s) Due: The OE will not review State-based Registrations that DNRC has identified as not having paid the appropriate registration application fee at the time of submittal to the State of Montana. The OE will send a letter to the owner(s) of record indicating that an application fee of \$150 is due. Notice of failure to pay the application fee is not the same as a defect letter that identifies inadequacies; defect letters shall not be generated until such time as the applicant owner of record pays the application fees. Failure to pay the fee will result in the rejection of the Registration.
- 10) Volume Standards: The OE shall apply water use standards as specified in the DNRC Water Calculation Guide (Appendix 21-1). The calculated volume and flow rates will appear on the water right, rather than the “up to” standards seen on allowance water rights issued by the OE.
- 11) Adequacy of State-based Registrations - Shared Wells: Shared wells should be identified, when possible, through information such as well logs, plats or subdivision records, maps, property records, or written testimony from applicants. The OE shall require a Shared Well agreement to be submitted prior to issuing a Certificate of

Registration for uses that include Shared Wells. The following Shared Well conditions apply:

- a. Registrations using a Shared Well will be associated with formal remarks on all water rights connected to the Shared Well as per WP&P 22-117 (28).
- b. If the OE identifies a Shared Well where one or more users have not filed or do not hold an active water right for a portion of the use, no Registration Certificates shall be issued for that well until all uses come into compliance.
- c. Registrations for Shared Wells require a signed and recorded shared well agreement to be added to the water right filing.

12) Adequacy of State-based Registrations - Ponds, Pits and Reservoirs: Consistent with the requirements under state law for the types of existing uses that are allowed to be registered, all State-based Registrations that include ponds, pits, and reservoirs must provide the following:

- a. Identification of any surface water source that is included in the use;
- b. The maximum depth; and
- c. The surface area.

The OE will use DNRC's 602 Pond Guidance Document to calculate total annual volume, which cumulatively includes surface water evaporation, reservoir volume, and any diverted uses (Appendix 21-2). These volumes contribute toward the applicant's maximum annual volume allowed by the registration.

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

- 1) Failure to Apply – Application for New Use: Applicants who failed to file for Existing Uses pursuant to Ordinance § 2-1-106(2)-(3) may file an application with the OE to establish a new water right under Ordinance § 2-2-101. The priority date of these water rights shall be the date that the application was received by the OE.

#### *WP&P 21-111. [New] Abandonment of Appropriation Right.*

- 1) Evidence of non-use: The OE may use historic aerial photographs or other evidence for purposes of demonstrating a period of ten (10) successive years of nonuse of an appropriation right.
- 2) Failure to Maintain Operable Diversion: Failure of an Appropriator to maintain a diversion may not equate with water not being available for use for the 10 successive year period set forth in Ordinance 2-1-111(3).
- 3) Proof of Agreement or Contract: An Appropriator who is part of an agreement or contract as set forth in Ordinance 2-1-111(4), must provide the OE with a copy of the executed agreement, that details the duration of the agreement, the area affected by the agreement or contract, and the parties involved.

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

- 1) Evidence of Injury: A Petitioner claiming injury under Ordinance 2-1-112 relating to an appropriator's water use will be considered prima facie evidence of injury. Form 612F.
- 2) Evidence of Water Supply: For purposes of Ordinance §§ 2-1-111 and 112, a Petitioner alleging a reduced water supply will be considered prima facie evidence a reduction has occurred. Form 612F.

## **PART 2 – PERMIT AND CHANGE APPLICATION PROCESS**

*WP&P 22-101. Appropriation Rights and Change in 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.

2) Exceptions to a Change in Use Authorization:

- d)a) Replacement Point of Diversion: Before replacing a surface water Point of Diversion, a water user must file a Request for a Replacement Point of Diversion form (Form 644F). All information requested by form 644F must be correct and complete before the OE may approve the request. Upon receipt, the OE has 45 days from receiving and date stamping to review the request but may extend the review period up to 60 days. If the request has deficiencies, the OE will send a defect letter that itemizes the defects the applicant must address. The applicant has thirty (30) calendar days from the date of the letter to respond. If the applicant requests additional time, the OE, may allow up to six (6) months in which to respond to defects. If the applicant is unable to attain OE approval for a request to move a point of diversion, the action is not permissible.

If the OE determines a 644F request to be outside the parameters of what is allowed under this section and Form 644F, the applicant may alternatively be required by the OE to submit and receive approval for a 606F Change Authorization Request before replacing the POD.



b. Petition to Modify a Permit or Change Authorization: The owner(s) of a water right may petition the OE (Form 651F) to modify a Permit or a Change in Use Authorization for the following categories:

- i. Modify or Correct information relating to water use;
- ii. Remove a Condition;
- iii. Reduce Volume or Flow Rate; and
- iv. Change Interim Compliance or Construction Date.

Petition to Modify a Permit or a Change is authorized at the discretion of the Water Engineer. All information requested by form 651F must be correct and complete before the Water Engineer may approve the request. Upon receipt, the OE has 45 days from receiving and date stamping to review the request but may extend the review period to 60 days. The OE may request additional information from the applicant, pursuant to the OE application defect letter policies at the direction of the Water Engineer. Additional information requested may be broad in scope and include the applicant providing historic use information, information that eliminates concerns of any adverse effect resulting from the petition, or information relating to any past or present litigation, objections, or complaints relating to the water right(s) included in the petition.

#### *WP&P 22-115 Redundant and Substitute Wells.*

- 1) Redundant Well - GPS Locations: Applicants filing a Redundant Well Notice of Completion Form (635F), are required to provide the OE with the GPS coordinates (Latitude, Longitude) of the location of the new well and the location of the old Well.
- 2) Redundant Well – Documentation Needed: Applicants filing a Redundant Well Notice of Completion Form (635F), are required to provide the OE with documentation or citation of the rule requiring the Redundant Well.
- 3) Substitute Well – GPS Locations: Applicants filing a Substitute Well Notice of Completion Form (634F), are required to provide the OE with the GPS coordinates (Latitude, Longitude) of the location of the new well and the location of the old well.
- 4) Substitute Well – Abandoning the Well Being Replaced: Wells being replaced due to lack of supply or other malfunction shall be abandoned according to Administrative Rules of Montana 36.21.670.
- 5) Substitute Well – Abandoned Well Log: Applicants filing a Substitute Well Notice of Completion Form (634F), for circumstances where the old well is to be abandoned, must abandon the old well and provide the OE with a copy of the Well Abandonment Log/Report. Any deviation from this documentation may be approved or denied at the discretion of the OE.
- 6) Substitute Well – Non-Abandonment of Well Being Replaced: Applicants filing a Substitute Well Notice of Completion Form (634F), for circumstances where the old Well is not being abandoned, must provide written rationale for the old Well to be retained and

may be required by the OE to adhere to certain restrictions/conditions placed on the well not being abandoned that may be required to protect groundwater quality or manage future changes to groundwater regulations that may include, but are not limited to:

- a) Installing a sanitary well seal and providing the OE evidence of its installation;
- b) Marking the Well location in a fashion that reduces the chance of damage from vehicles or machinery;
- c) Making improvements around the wellhead designed to reduce the chances of future aquifer contamination;
- d) Providing the OE written documentation that the well will not be used for any unauthorized purposes or in advance of attaining the appropriate water right; and
- e) Agreement that the OE may impose abandonment at a future date if future groundwater regulations or future deterioration of the well head occur.

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

- 1) Using Existing Wells for Unregistered and New Uses: Existing Wells that are not connected to a Home or Business may be used as a point of diversion for new Stock Water Allowances, so long as they were drilled before June 01, 2022<sup>1</sup> and the existing uses have not been registered under Ordinance, §§ 2-1-101 to -108. Existing wells that were approved by the OE may also be used as points of diversion for new uses. Existing Wells must meet all the same Stock Water allowance application, construction, and use standards as would be required for new Wells [Ordinance, § 1-1-111 & ARM 36 Chapter 21]. Existing Wells that are currently serving and will continue to serve other water rights may have additional conditions imposed to ensure the new Stock Water use does not exceed 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.
- 2) Wells drilled after June 01, 2022: An individual who drills a Well(s) 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.
- 3) Existing Wells – Retired Uses: An individual using an existing Well associated with an existing water right to be replaced or modified for a different use in a new application may be required by the OE to withdraw the existing water right as a condition of approval for the new application.
- 4) Existing Wells – Priority Date(s): The date of application constitutes the priority date for a new use assigned to an existing Well. Existing Wells to be used for a new use, in conjunction with other Existing use(s) 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

---

<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.



portion, and will retain the historic priority date for those Existing Use(s) approved to be used simultaneously on the same existing Well.

- 5) Automatic Stock Waterers Allowed: Automatic stock waterers equipped with overflow protection may be used in-place of Stock Tanks.
- 6) Stock Water Allowances - Maximum Number of Wells: There is no limit to the number of Stock Water Allowances so long as each allowance meets the terms set forth in Ordinance §2-2-116.
- 7) Stock Water Allowances - Permit Exceptions: Stock Water Allowances are not counted toward the total number of Domestic Allowances set forth in WP&P 22-117.
- 8) Animal Unit Calculations: Stock use volumes are to be calculated using the same method as the State of Montana: a consumptive use of 15 gallons per day or 0.017 acre-foot per year per AU. Animal unit (AU) equivalencies for water consumption are set out in ARM 36.12.101 and the water conversion table, MT DNRC Form No. 615.
- 9) Stock Water POD Fencing Requirement: If the Stock Water Allowance is sourced from a spring, the point of diversion should be fenced to exclude stock.
- 10) Use of Water Truck(s) as Means of Conveyance: Applicant must designate POD(s), include proof of possessory interest in, and designate all places of use. The OE may request additional information if the POD is publicly owned. An informational remark will be added to the water right designating that a water truck will be used as a means of conveyance.
- 11) Stock Water through Form 60DF: For stock purposed uses where the well is attached to a Home or Business, use Form 60DF and apply for a Domestic Allowance purposed solely for stock.

*WP&P 22-117. Appropriation Rights for Domestic Allowances for Homes and Businesses; Process for Application, Review, and Issuance.*

- 2) 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 and the existing uses have not been registered under Ordinance, §§ 2-1-101 to -108. Existing wells that have been approved by the OE may also be used as points of diversion for new uses. Existing Wells must meet all the same domestic allowance application, construction, and use standards as would be required for new Wells (Ordinance, § 1-1-111 & ARM 36 Chapter 21). 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 prior use.

---

<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.

- 3) 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 Redundant Wells, Substitute Wells, and Wells drilled solely for aquifer testing that will not be used for a Beneficial Use.
- 4) 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.
- 5) 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 Use(s) associated with a valid water right.
- 6) 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.
- 7) 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 business operations occur. This definition of "Sites" does not apply to Stock Water Allowances. Ordinance 2-2-116.5(e).
- 8) 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 submit a Deadline Extension Request (Form 607F) before, or after this deadline provided that the applicant has made progress on their Development; the Form 607F filing fee increases after missing the deadline.
- 9) 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 or Business and put the water to use). The applicant must file Form 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 submit a Deadline Extension Request (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.
- 10) Putting Water to Beneficial Use. Putting water to Beneficial Use as per Ordinance, § 2-2-117(13) and WP&P 22-117(8) 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 (Form 60DF – Part B) 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.

- 11) Municipal Water Supply Connections. Any applicant requesting a Domestic Allowance that is within 500 feet of the exterior boundary of a municipal water supply system 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.
- 12) 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.
- 13) 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.
- 14) Number of Connections and Standards.
  - a) Individual Domestic Allowances may only be connected to one Home or Business. Ordinance, § 1-1-104(8) and (31).
  - b) Shared Domestic Allowances may only be connected to two or three Homes or Businesses. Ordinance, § 2-2-117(5).
  - c) Development Domestic Allowances as per Ordinance, § 2-2-117(6) may be connected to more than one, but not more than five, Homes or Businesses.
    - i. The requirement to measure and report annual water volume use and maintain the total annual volume diverted below the annual maximum volume issued and the flow rate from any individual Well up to 35 GPM must be adhered to. Ordinance, § 2-2-117(6)(b).
    - ii. Annual water measurements of water use for a Development Domestic Allowance exceeding the annual maximum volume issued, may result in revocation of the water right and/or fines by the Board.
  - 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 water rights purposed exclusively for Stock use Ordinance, § 2-2-116-117.

- e) Any deviation from these standards requires the applicant to provide a Water Use Plan pursuant to section WP&P 22-117(29) below.

15) Permit Exceptions Defined. For purposes of this section, Permit Exceptions shall include:

- 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.
- 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 Permit Exceptions.

16) 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 will be considered as part of the total additive maximum annual diverted volume, not to exceed 10 AF. Existing and future water rights purposed solely for stock are not included as part of the 10 AF cumulative maximum annual volume that is allowed before a permit is required. Ordinance, §§ 2-2-116 to -117; WP&P 22-117(12). New Individual or Shared Domestic Allowances retain the maximum annual volume limit of 2.4 AF. Ordinance, § 2-2-117.

17) Water Measurement for Permit Exceptions. Mandatory water measurement is not necessarily required for cumulative Permit Exceptions with total additive maximum annual diverted volumes that are 10 AF or less.

18) Reduction or Correction of a Water Right. 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 of 10 AF.

19) Phased Developments. For purposes of determining an area as defined as a Development or for defining what adjacent parcels as being affiliated, the date of September 17, 2021 (Effective Date) will be used. Any subdivision approved after this date will be considered a Development, regardless of phased subdivisions. The parcel boundary as of September 17, 2021, will serve as the controlling parcel boundary of a Development for purposes of determining cumulative total annual volume limitation for Permit Exceptions. Sale of individual parcels after this date does not alter the contiguous or closely grouped nature, or the same or affiliated ownership, of a Development.

20) Maximum Number of Wells.

- a) Individual and Shared Domestic Allowances are restricted to one Well.
  - b) Development Domestic Allowances are restricted to one Well per Home and/or Business and therefore may not exceed 5 wells. Ordinance, § 2-2-117(6)(e).
  - c) If one Well is inadequate, the applicant must provide justification for the need and receive OE approval to drill additional Well(s).
- 21) Clarification for Developments. For the definition of Development, Ordinance, § 1-1-104(16), the term “closely grouped” 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 rights of way will be considered on a case-by-case basis by the OE.
- 22) Additional Well Fee for Development Domestic Allowances. Each Well beyond one for a Development Domestic Allowance has an additional application filing fee.
- 23) 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 Form 6DDF Part A application and must be preapproved before installation. Preapproval by the OE of any equipment does not provide the applicant 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.
- 24) 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(es) 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.
- 25) Annual Volume. Annual volume limits, 2.4 AF for Individual and Shared Domestic Allowances (Form 60DF) and 10 AF for Development Domestic Allowances (Form 6DDF) on parcels 40 acres or less, are diverted amounts, not to be confused with consumed volume.
- 26) Combined Flow Rates. No single Well may exceed 35 GPM in flow.



- 27) Stock Water Volumes for Domestic Allowances. Stock volumes are additive to other Domestic Use(s) for volume calculations and thus may reduce maximum numbers of connections or the acreage of lawn and garden if included in a proposed Development.
- 28) 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.
- 29) 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.
- 30) Exceptions to Standards and Water Use Plans. Any proposed exceptions to standards must include an engineer's, hydrologist's, or technical professional'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) An application for new uses of the Flathead System Compact Water must consider water use information, including:
  - a. Diverted volume(s) for each month of the year for each proposed use;
  - b. Consumed volume(s) for each month of the year for each proposed use; and
  - c. Flow Rate maximum(s) for each month of the year for each proposed diversion.
  - d. If any of the amounts from a-c above, when added to all cumulative prior issuances, exceed the total water right volume described in the Flathead System Compact Water right, the application may be denied.
- 2) Burden of Proof
  - a. An applicant is not required to provide information demonstrating physical and legal availability of the Flathead System Compact Water;
  - b. An applicant must demonstrate the proposed use will have an adequate means of diversion;
  - c. An applicant must provide a plan to adhere to minimum flow requirements, ramping rates, and other ecological flow requirements set forth in the abstract of the Flathead System Compact Water Right;
    - i. The plan must include monitoring to track minimum flow and ramping rates; and
    - ii. The plan must include consideration for cessation of use when applicable.
  - d. An applicant must provide proof of written consent of the Tribal Council or its delegate to use a portion of the Flathead System Compact Water. The written consent must be attached to the application form.
  - e. Water Quality Provisions

- i. An applicant must demonstrate by a preponderance of the evidence that the proposed use will not adversely affect the water quality of another Appropriator pursuant Ordinance §, 2-2-102(1);
    1. The OE will not evaluate water quality considerations beyond the direct effects of the proposed water use and application of water.
    2. The OE should notify the Water Quality Program of the CSKT Natural Resources Department of all Flathead System Compact Water applications it receives.
  - ii. An applicant is required to comply with the Water Quality Management Ordinance, Tribal Ordinance 89B and the CSKT water quality standards, as amended.
    1. The OE may communicate with the Water Quality Program of the CSKT Natural Resources Department on a technical basis as it pertains to water quality standards of the CSKT as amended.
    2. The OE may request the applicant obtain a written verification from the Water Quality Program of the CSKT Natural Resources Department to confirm compliance.
- 3) Public notice of uses of the Flathead System Compact Water will be limited to:
  - a. Interested parties who have registered with the OE to be notified of all water right applications;
  - b. Water Quality Program of the CSKT Natural Resources Department;
  - c. Publication in at least one local newspaper of general circulation; and
  - d. Posted on the FRWMB website (FRWMB.GOV).
- 4) Process for application and completion:
  - a. An applicant may not commence construction of the diversion or use of Flathead System Compact Water without first obtaining approval of the application from the OE;
  - b. A granted application will receive a completion deadline(s) from the OE for construction of the point(s) of diversion and putting the Flathead System Compact Water to use;
  - c. An applicant must complete the point of diversion(s) and put the water to use by the deadline(s) set forth by the OE as per (b)(4). At the discretion of the OE, a timeline extension may be granted for completion.
  - d. Failure to meet the timeline for completion and failure to obtain an extension may result in revocation of the issuance for the use of the Flathead System Compact Water.
- 5) The OE may determine that uses of the Flathead System Compact Water require water measurement as set forth in Ordinance § 1-1-105. Any such water measurement requirements will be set forth in remarks on the issuance of a Use Authorization for Flathead System Compact Water and the associated abstract. OE water measurement requirements may be distinct from any water measurement requirements that may be imposed by the Tribes.

- 6) The OE may temporarily suspend or permanently revoke Flathead System Compact Water uses if the OE is informed by the Water Quality Program of the CSKT Natural Resources Department that a previously issued Flathead System Compact Water has fallen out of compliance with the CSKT water quality standards.
- 7) The Flathead System Compact Water Use Authorization will remain active until the Tribal Council or its delegate notifies the Office of the Water Engineer that the term of use has ended.

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

- 1) For purposes of this section, “extracted and returned without delay to the same source aquifer” shall encompass the following review criteria:
  - a. The entire system, from the extraction well to the injection well must be completely sealed and free from the risk of entrainment of additional water or contaminants;
  - b. An applicant must provide full design schematics, both proposed and as-built of all plumbing relating to the Geothermal Heating or Cooling Exchange Wells and conveyance between the two;
  - c. The extraction and injection maximum well depths must be no more than 50 feet in elevational difference; and
  - d. A Water Use Plan as set forth in **WP&P 11-104**.

### **CHAPTER III – ENFORCEMENT**

*WP&P 31-102. Complaint[s] 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 OE using Form 609F. **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 610F, pertaining to matters not covered under the formal complaint process in **Ordinance, § 3-1-102.**
- 3) Who May Bring a Temporary Use [Short-term Lease] 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 OE 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 OE that the discontinuance has had no effect on the Complainant’s water right. **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: Formal Complaints and Temporary Use [Short-term Lease] Complaints; Form 610F: Informal 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 Appendix 10-1 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. 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. 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 Appendix 31-1. 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. Ordinance, § 3-1-101(3).

#### *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 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.

- 4) Fines for Failing to Curtail Illegal Use(s). If a water user is found to be using water illegally after being notified by the Water Engineer, or any Staff who is so directed by the Engineer, to curtail the illegal use, the water user may be subject to fines.

## CHAPTER IV – OE HEARINGS AND APPEALS

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

- 1) Purpose and Intent. The purpose of these WP&Ps is to provide context and detail to the applicable and relevant sections of the Ordinance pertaining to hearings before the OE. These WP&Ps are intended to assist individuals and persons involved in 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 State of Montana and the Confederated Salish & Kootenai Tribes may intervene 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 either party to the action, the Engineer or Designee may extend the time limits specified within these WP&Ps. 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. For purposes of hearings before the OE, the OE shall maintain the official record in each proceeding until the issuance of the final decision. See also **OE Personnel Policies and Procedures, 12.04**.

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 OE.

- 6) Final Agency Action. For purposes of hearings before the OE, the recommended decision shall not constitute a final agency action appealable to the Board.

*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 at close of business 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 constitutes the final administrative decision of the OE.
- 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 ten 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 contest 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 be granted if the Engineer or Designee determines, based on information provided by the requesting party to the OE at the time the request is made, that telephonic or video participation will not substantially prejudice the rights of any party. Another party may voice an objection to electronic participation, however, the determination shall remain with the Engineer or Designee.

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 WP&P 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 consolidated 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. The Engineer or Designee shall first read this procedure to those parties or attorneys causing such interference or disruption prior to taking action under this rule.

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. Office of the Engineer 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) Form of Decision. The final decision of the Engineer or Designee shall be in the form of a final order.
- 3) 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.

#### *WP&P 41-401. Hearing Records and Public Inspection Requests.*

- 1) OE Docket. The OE shall maintain a docket for each hearing before it. The OE Docket shall include the name of the case, the parties, including any noticed attorneys, and a register of actions. The OE Docket may be made available to the public upon written request to the OE via the Contact email ([contact@frwmb.gov](mailto:contact@frwmb.gov)).
- 2) Hearing Transcript. All OE hearings shall be recorded. See WP&P 41-101(4) and (5). Upon written request, the parties will receive a link to the recording. The parties may also request a copy of the hearing transcript. Parties requesting a hearing transcript will be charged for reproduction costs and Staff time as clearly set forth in an OE invoice.
- 3) Record – Maintenance. The hearing record will be kept by the OE in both a secure electronic location and in hard copy format. The hearing record and the OE Docket shall be updated contemporaneously in the event of an appeal or public inspection request.
- 4) Record – Retention. The OE shall permanently retain all pending and closed case files within a secure electronic location. Documents not part of the official record but related to the case file does not require retention and will be destroyed.
- 5) Public Inspection – Generally. The public may inspect certain documents, pleadings, and transcripts from a specific case only after the case has a final decision or order. The public



may request a copy of the OE Docket at any time. To submit a public inspection request for documents listed in the OE Docket, the public make a written request to the OE via the Contact email (contact@frwmb.gov). The written request must specify which documents, pleadings, and/or transcripts he/she would like a copy of as described in the OE Docket. The requestor must pay the specific fee as determined by the fee schedule. Payments must be made in advance of receiving information and via check or money order made payable to the FRWMB.

- 6) Public Inspection – Final Orders and Decisions. The OE must maintain an index of all final orders and decisions in cases and declaratory rulings on the Board’s website. Digital copies of final decisions and orders must be given to the public upon written request.
  
- 7) Public Inspection – Personal Information. The OE shall, under no circumstances, produce to and/or allow the public to inspect documents that contain Personal Information. Any documents, pleadings, or transcripts created by the OE that contain such information and that are subject to a public inspection request shall be redacted prior to public inspection. See also Resolution FRWMB #5 (2024).
  
- 8) Communication with the Public. The OE shall not communicate with the public regarding an active and ongoing hearing or appeal. The OE may communicate with the public about a hearing or appeal after a final decision or order has been issued, but the communication will be limited to general issues, facts, and outcome(s). OE communication with the public during an active or ongoing hearing is limited to requests for public inspection of the record including documents requested, the fee schedule, and the request procedure itself.
  
- 9) Fee Schedule. The OE fee schedule is set forth below.

OE FEE SCHEDULE	
Reasonable public inspection fees are allowed and described in the following fee schedule for the following services.	
The current fees are:	
Digital copies of OE Docket	No charge
Photocopies, all sizes black and white	\$0.35/page
Photocopies, color	
8.5x11	\$0.75/page
8.5x14	\$0.80/page
11x17	\$1.00/page
Computer services	Based on type of service
Recording of hearing	\$2.00 + labor costs
Cost associated with contractor for hearings	Contractor dependent

The OE will issue an invoice for any fees owed. Any fees owed by a member of the public from an inspection request must be paid via check or money order to the FRWMB.

## 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: